

EXPANSION AND PROTECTION OF FUNDAMENTAL RIGHTS BY JUDICIAL INTERPRETATION AND INTERVENTION*

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The chapter on Fundamental Rights, contained in Part III of the Indian Constitution, was not incorporated as a popular concession to international sentiment prevalent after the conclusion of the Second World War. It was the ardent desire and persistent demand of our freedom fighters and Founding Fathers that a future Constitution of India should contain a guarantee of fundamental entitlements for the people of India.

The demand was made as far back as in 1895, in the Constitution of India Bill, popularly known as the Swaraj Bill, which was inspired by Lokmanya Tilak.¹ The Indian National Congress at its special session held in Bombay in 1918, demanded that the new Government of India Act should contain a “declaration of the Rights of the People of India”.² Mrs. Annie Besant’s Commonwealth of India Bill, finalised by the National Convocation of Political Parties in 1925, also emphasised a specific declaration of fundamental rights for every person. The Indian National Congress in its Madras Session in 1927 declared that the basis of a future Constitution must contain a declaration of fundamental rights.³ Again in 1928, the Motilal Nehru Committee in its report strongly recommended the adoption of fundamental rights as a part of the future Constitution of India.⁴ It is remarkable that the report, in the chapter on Fundamental Rights, stated that,

“[E]very citizen shall have the right to a writ of *habeas corpus*. Such right may be suspended in case of war or rebellion by an Act of the central legislature or, if the legislature is not in session, by the Governor-General in Council, and in such case he shall report the suspension to the legislature at the

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¹ See generally, TERENCE C. HALLIDAY, LUCIEN KARPIK, MALCOLM M. FEELEY, FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX 115 (2012).

² T.S.N. SASTRY, INDIA AND HUMAN RIGHTS: REFLECTIONS 42 (2005).

³ *Id.*, 26.

⁴ *Id.*, 26, 52.

earliest possible opportunity for such action as it may deem fit.”⁵

Motilal Nehru would have been shocked that our Supreme Court in its judgment in *ADM, Jabalpur v. Shivakant Shukla*⁶ delivered on April 28, 1976 by a majority, ruled that *habeas corpus* was virtually not available even in respect of proven *mala fide* orders of detention. This judgment was rendered at a time when there was neither war nor rebellion.

In 1931, in its Karachi Session, the Indian National Congress reiterated its resolve that a written guarantee of fundamental rights was essential to any future constitutional set-up in India.⁷ The subject of fundamental rights figured prominently in the deliberations of the Sapru Committee (1944-45). The Sapru Committee was of the firm opinion that in the peculiar circumstances of India, fundamental rights were necessary not only as an assurance and guarantee to the minorities but also for prescribing a standard of conduct for the legislatures, governments and the courts.⁸

On January 26, 1950 India became a Sovereign Democratic Republic as contemplated by the Constitution of India, which was adopted by the Constituent Assembly on November 26, 1949. Part III of the Constitution of India – the most debated and castigated part – guaranteed a wide array of fundamental rights. Importantly, they were also made judicially enforceable against the State and its instrumentalities, as well as private parties in certain instances.

Fundamental Rights guaranteed by the Indian Constitution broadly fall into certain categories. Articles 14 to 16 confer the right to equality in its several manifestations and prohibit discrimination on the ground only of religion, race, caste, sex or place of birth. Article 19 guarantees basic freedoms such as freedom of speech and expression, freedom of peaceful assembly; freedom to form associations or unions; freedom to move freely and reside and settle in any part of India; and freedom to practice and profess one’s religion, or to carry on any occupation, trade or business. Articles 19(1)(f) and 31, which guaranteed property rights were deleted by the Constitution (Forty-fourth) Amendment Act, 1978, with effect from June 20, 1979. Article 20 provides constitutional guarantees against retrospective criminal laws, double jeopardy and self-incrimination. Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

⁵ La Trobe University, *All Parties Conference (India Report of the Committee)*, 1928, available at <http://arrow.latrobe.edu.au/store/3/4/2/9/3/public/B11598426pp89-back.pdf> (Last visited on May 5, 2015).

⁶ (1976) 2 SCC 521.

⁷ ABBAS HOVEYDA, *INDIAN GOVERNMENT AND POLITICS* 133 (2010).

⁸ SAPRU COMMITTEE, *Report of the Committee on Chapter VII Minorities and Fundamental Rights*, 257 (1945).

Articles 23 and 24 provide for guarantee against exploitation such as traffic in human beings and forced labour. Articles 25 to 28 deal with freedom of conscience and freedom of religion. Articles 29 and 30 guarantee rights of the minorities to conserve their language, script and culture and to establish and administer educational institutions of their choice.

Freedom of the press has been judicially described as the 'Ark of the Covenant of Democracy'⁹, and as one of the most precious freedoms in a democratic state.¹⁰ Every Constitution of the world which has a Bill of Rights proudly proclaims freedom of the press.¹¹ Yet it is conspicuously absent in Part III of Fundamental Rights in our Constitution. What could be the explanation for the same? Proceedings of the Constituent Assembly debates reveal that the Founding Fathers considered that freedom of the press was contained in the guarantee of freedom of speech and expression and need not be specifically mentioned. Our Supreme Court in more than one decision has deduced freedom of the press from Article 19(1)(a) of the Constitution on the premise that it is implicit in the said guarantee. Thus, by creative judicial interpretation, freedom of the press has been given the constitutional status of a fundamental right in our Constitution.

After deducing freedom of the press from the guarantee of free speech and expression, the Supreme Court has accorded the press effective protection on the sound principle that restrictions on fundamental rights should be narrowly construed and not enlarged inferentially or by implication. Article 19(2) of the Constitution enumerates specific heads of restrictions which may be imposed on the exercise of freedom of expression and consequently on the freedom of the press. The head of "interests of the general public", which is specified in regard to other fundamental rights¹² is not mentioned in Article 19(2). The Supreme Court in its landmark decision in *Sakal Papers (P) Ltd. v. Union of India*¹³ ruled that freedom of the press cannot be curtailed, unlike the freedom to carry on business, in the interest of the general public. The only restrictions which may be imposed are those which clause (2) of Article 19 permits and no other.¹⁴

⁹ Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788.

¹⁰ See Romesh Thappar v. State of Madras, AIR 1950 SC 124 : 1950 SCR 594; Brij Bhushan v. State of Delhi, AIR 1950 SC 129 : 1950 SCR 605; Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305 : (1962) 3 SCR 842; Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788; Prabha Dutt v. Union of India, (1982) 1 SCC 1; Tata Press Ltd v. Mahanagar Telephone Nigam Ltd., (1995) 5 SCC 139.

¹¹ See, e.g., Canadian Charter of Rights and Freedoms § 2; Charter of Fundamental Rights of the European Union, Art.11.

¹² Such as Art. 19(5) in relation to Arts. 19(1)(d) and (e) and 19(6) in regard to Art. 19(1)(g).

¹³ AIR 1962 SC 305 : (1962) 3 SCR 842.

¹⁴ *Id.*, ¶ 46.

In another celebrated decision, *Bennett Coleman & Co. v. Union of India*¹⁵, the Supreme Court came to the rescue of the press. It held that the Freedom of the Press entitles newspapers to decide the volume of circulation, and freedom lies both in circulation and in content. The Court further ruled that a newsprint policy under the garb of distribution of newsprint cannot control the growth and circulation of newspapers. Additionally, a restraint on advertisements would infringe the fundamental right of the freedom of the press.

The Supreme Court's solicitude for press freedom reached its zenith in its decision in 1986, in the case of *Indian Express Newspapers v. Union of India*.¹⁶ In that case, a steep levy of customs duty on newsprint was challenged. The Court observed that whilst newspapers did not enjoy any immunity from payment of taxes and other fiscal burdens, the imposition of a tax such as customs duty on newsprint is an imposition on knowledge.¹⁷ The Court accepted the plea that a fiscal levy on newsprint would be subject to judicial review. It held that in the case of a tax on newsprint, it may be sufficient to show a distinct and noticeable burdensomeness which is directly attributable to the tax. The Supreme Court in its judgments has placed a generous construction on the ambit of freedom of the press and given it a capacious content.¹⁸

Right to travel abroad and return to one's country is regarded as an invaluable human right. Our Constitution does not expressly guarantee this right. The Supreme Court in its landmark judgment in *Satwant Singh Sawhney v. D. Ramarathnam*¹⁹ spelt out this right from the expression "personal liberty" ensconced in Article 21 of the Constitution. The Court accepted the view of the Bombay High Court that the expression 'personal liberty' occurring in Article 21 included the right to travel abroad and to return to India.

Although there is no specific provision in the Constitution prohibiting cruel, inhuman and degrading punishment or treatment, the Court has evolved this right by reference to the Preamble and by its expansive interpretation of Article 21 in conjunction with Article 14, which prohibits discrimination and arbitrary action. In another landmark judgment the Court has ruled that the right to education until the age of fourteen is a fundamental right emanating from the reservoir, Article 21.²⁰

¹⁵ (1972) 2 SCC 788.

¹⁶ (1985) 1 SCC 641.

¹⁷ *Id.*, ¶ 68.

¹⁸ *Id.*, ¶ 69.

¹⁹ AIR 1967 SC 1836 : (1967) 3 SCR 525.

²⁰ *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666 (The Right of Children to Free and Compulsory Education Act or Right to Education Act was enacted on August 4, 2009. It emphasises on the importance of free and compulsory education for children between 6 and 14 in India under Art. 21-A of the Indian Constitution).

Privacy, which embodies the concept of the right to be left alone, a right most cherished by civilized society, is not expressly mentioned in Part III of Fundamental Rights. A classic instance of the judicial technique of deducing fresh human rights was adopted by the US Supreme Court in *Griswold v. Connecticut*²¹, popularly known as the ‘Contraceptive case’. The General Statutes of Connecticut, 1958 through §§ 53-32²² and 54-196²³, in Connecticut made the use of contraceptives a criminal offence. Under the statute, the police was authorized to barge into a bed room to “search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives”.²⁴ It was contended that the statute breached the right of privacy. Privacy is not expressly mentioned in the US Bill of Rights. Nonetheless privacy was deduced in that decision by Justice Douglas on the reasoning that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy”.²⁵ Adopting a similar judicial technique, our Supreme Court has deduced privacy as a fundamental right from Article 21 of the Constitution in its decision in *R. Rajagopal v. State of Tamil Nadu*.²⁶ This is based on the premise that certain unarticulated rights are implicit in the express enumerated guarantees.

There is no central legislation in India providing for legal aid. The Supreme Court in its judgment in 1978 in the case of *M.H. Hoskot v. State of Maharashtra*²⁷ held that free legal services to the poor and needy is an essential element of any ‘reasonable, fair and just’ procedure in Article 21. The Court ruled that,

“(1) where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner’s defence, provided the party does not object to that lawyer, (2) the State which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the court may equitably fix”.²⁸

²¹ 14 L Ed 2d 510 : 381 US 479 (1965).

²² The General Statutes of Connecticut, 1958, § 53-32: Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

²³ The General Statutes of Connecticut, 1958, § 54-196: Any person who assists, abets, counsels, causes, hires or commands another to commit any offence may be prosecuted and punished as if he were the principal offender.

²⁴ *Griswold v. Connecticut*, 14 L Ed 2d 510 : 381 US 479, 486 (1965).

²⁵ *Id.*, at 487-88.

²⁶ (1994) 6 SCC 632.

²⁷ (1978) 3 SCC 544.

²⁸ *Id.*, ¶ 27.

I am afraid these beneficial directions in the Supreme Court judgment are not always observed and legal aid continues to remain a problem. Article 21 seems to be the inexhaustible reservoir from which other fundamental rights are deduced.

Apart from the US Supreme Court²⁹, courts in the Republic of Ireland have held that “the Constitution guarantees various other rights which are not expressly referred to but are obviously a part of the expressly referred to rights”.³⁰ These additional rights have been termed unspecified or unenumerated rights. The Supreme Court of Canada has also deduced fresh fundamental rights, which are not expressly mentioned in the Charter of Human Rights.³¹

The aforesaid judicial technique is controversial and provoked a scathing comment from US judge Robert H. Bork, the former solicitor general of the United States and President Reagan’s failed nominee for the Supreme Court. Bork thundered:

“The adoption of the Charter, however, emboldened judges and introduced the era of judicial activism. For the first time, the judiciary vigorously used its authority to strike down laws that infringed on what the judges themselves considered fundamental rights not mentioned in the Charter...”³²

What Bork overlooks is that there is nothing novel about judges creatively adapting the language of the Constitution so as to apply its values to new situations. Chief Justice Charles Evans Hughes of the US Supreme Court has aptly stated that:

“If by the statement that what the Constitution meant at the time of its adoption it means today it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the condition and outlook of their time, would have placed upon them, the statement carries its own refutation”.³³

²⁹ *Butchers’ Benevolent Assn. of New Orleans v. Crescent City Livestock Landing and Slaughterhouse Co.*, 21 L Ed 394 : 83 US (16 Wall) 36 (1873) (‘Slaughterhouse cases’).

³⁰ *Ryan v. Attorney General*, 1965 IR 294.

³¹ *See generally* R v. Beaulac, 38 ILM 1303 (1999) (Even though the judges/jury adjudicating are not required by law to know both languages held that both should know the two official languages and in this case a new trial was ordered); *Chaoulli v. Quebec (Attorney General)*, (2005) 1 SCR 791, ¶ 96, *Vancouver (City) v. Ward*, 2010 SCC 27 (The Court derived the right to water as a justiciable fundamental right).

³² ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2010).

³³ *Home Building & Loan Assn. v. Blaisdell*, 78 L Ed 413 : 290 US 398 (1934), at 442-44.

In my opinion it is a fallacy to describe this judicial technique as tantamount to amending the Constitution. In reality it is a creative interpretation of the Bill of Rights or Fundamental Rights in Part III of our Constitution. It must be remembered that a Bill of Rights is the conscience of the Constitution. An independent judiciary is its conscience keeper. Neither the Constitution nor the Bill of Rights is a self-executing instrument. It is what the judges say it is. And whether the judiciary is the protective sentinel of our rights under the Constitution, will depend upon its interpretation of the Constitution and, in particular, of the Bill of Rights. A most generous Bill of Rights can be reduced to arid parchment promises by narrow and insensitive judicial interpretation. It is well to remember the *dicta* of our Supreme Court that “a Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently has to be adapted to the various crises of human affairs.”³⁴ Therefore, according to our Supreme Court:

“a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges”.³⁵

Courts should place a “generous interpretation avoiding what has been called the austerity of tabulated legalism”³⁶ remembering that the letter killeth, but the spirit giveth life.

Part IV of the Constitution of India lays down Directive Principles of State policy. In substance they are in the nature of social and economic rights. Although Directive Principles are not on the text of the Constitution enforceable by any court, they are “nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws”.³⁷

The Supreme Court, by remarkable craftsmanship, has incorporated into fundamental rights some of the Directive Principles, such as those imposing an obligation on the state to provide a decent standard of living³⁸, a minimum wage³⁹, just and humane conditions of work⁴⁰, and to raise the level

³⁴ M. Nagaraj v. Union of India, (2006) 8 SCC 212.

³⁵ Francis Coralie Mullin v. Union Territory of Delhi, (1981) 1 SCC 608.

³⁶ Minister of Home Affairs v. Fisher, 1980 AC 319 : (1979) 2 WLR 889 : (1979) 3 All ER 21.

³⁷ The Constitution of India, Art. 37.

³⁸ *Id.*, Art. 47.

³⁹ *Id.*, Art. 43.

⁴⁰ *Id.*, Art. 42.

of nutrition and of public health.⁴¹ It is due to this judicial technique that some socio-economic rights have been made living realities for the indigent and downtrodden segments of Indian humanity.

The expression “life” in Article 21 of the Constitution has received an expansive interpretation. The Court has ruled that “life” does not connote merely physical existence but embraces something more, namely “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”.⁴² Based on this interpretation, the Supreme Court has ruled that the right to live with human dignity encompasses within its ambit, the protection and preservation of an environment free from pollution of air and water.⁴³ Court has issued numerous directions regarding polluting industries, vehicular traffic and related matters. Health and sanitation have been held to be an essential facet of the right to life. Consequently the Court has intervened and provided relief to inmates of asylums and so-called ‘care homes’ who were living in sub-human conditions.⁴⁴

Article 21 of the Constitution provides that “no person shall be deprived of his life or personal liberty except according to procedure established by law”. What is the reality about the content and effective enforcement of this right?

In the historically infamous judgment of *A.K. Gopalan v. State of Madras*⁴⁵ (‘Gopalan’), the Supreme Court placed an unduly narrow and restrictive interpretation upon Article 21. The majority held that “procedure established by law” means any procedure established by law made by the Union Parliament or the legislatures of the States.⁴⁶ It refused to infuse the procedure with principles of natural justice and concentrated solely upon the existence of enacted law. It was after three decades that the Supreme Court overturned its previous decision in *Gopalan* and held in *Maneka Gandhi v. Union of India*⁴⁷ that “procedure contemplated by Article 21 must answer the test of reasonableness. It must be ‘right just and fair’, and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirements of Article 21 would not be satisfied”.⁴⁸

In India, one witnesses the horrific spectacle of numerous under-trial prisoners languishing in jails for periods longer than the maximum term

⁴¹ *Id.*, Art. 47.

⁴² Francis Coralie Mullin v. Union Territory of Delhi, (1981) 1 SCC 608.

⁴³ Virender Gaur v. State of Haryana, (1995) 2 SCC 577.

⁴⁴ Sunil Batra v. Delhi Admn., (1978) 4 SCC 494; Sheela Barse v. State of Maharashtra, (1983) 2 SCC 96.

⁴⁵ AIR 1950 SC 27 : 1950 SCR (1) 88.

⁴⁶ *Id.*, ¶ 266.

⁴⁷ (1978) 1 SCC 248.

⁴⁸ *Id.*, ¶ 57.

for which they could be sentenced if convicted. This is because of the inordinate delays in criminal trials. Faced with this situation, the Supreme Court ruled that speedy trial is an integral and essential part of the fundamental right to life and liberty.⁴⁹ A procedure whereby under-trials remained in jail for such long periods was not a fair, just and reasonable procedure and therefore Article 21 was violated. As a consequence numerous under-trials have been released. This has provided much needed relief to undertrial prisoners.

Rights without remedies are useless. A mere declaration of invalidity of a detention order or seizure of the press or revocation of a licence to carry on a business would not provide a meaningful remedy to a person whose fundamental rights have been violated. To drive such a person to adopt separate proceedings for recovery of damages in tort would be onerous. The Court which has found violation of a fundamental right would be the most appropriate forum for giving compensatory relief.

In its landmark judgment in *Nilabati Behera v. State of Orissa*⁵⁰, the Court held that the compensation awarded by it was not to be equated with damages in a civil action for tort, but was grant of relief under public law “for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen”.⁵¹ It was clarified that the sum awarded would be adjusted if other proceedings are taken for recovery of compensation on the same ground so as to prevent payment twice over.⁵²

Mention must be made of the Supreme Court’s judgment delivered in 1997 in the case of *Vishaka v. State of Rajasthan* (‘Vishaka’).⁵³ The Court held that sexual harassment of women at the workplace violates Articles 14 and 21 of the Constitution. Thereafter it issued several directions defining what would constitute sexual harassment, the means to redress the same and the penalties that may be imposed for sexual harassment. The directions of the Court would be binding under Article 141 of the Constitution. In my opinion, this was a clear instance of ad-hoc judicial legislation. However it should be noted that the Supreme Court made it plain that its directions will hold the field till Parliament has enacted requisite legislation. The Sexual Harassment of Women at Workplace Bill was moved 13 years after the Supreme Court judgment in Vishaka.⁵⁴ The Supreme Court judgment in Vishaka has enabled women at work places to obtain relief and the evil of sexual harassment, though not eliminated, has been mitigated.

⁴⁹ *Hussainara Khatoon (I) v. Home Secretary, State of Bihar*, (1980) 1 SCC 81.

⁵⁰ (1993) 2 SCC 746.

⁵¹ *Id.*, ¶ 34.

⁵² *Id.*, ¶ 25.

⁵³ (1997) 6 SCC 241.

⁵⁴ The Bill was passed by the Parliament. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 came into force on 9th December, 2013 to provide protection against sexual harassment of women at workplace.

The most notable achievement in the protection and promotion of fundamental rights has been the development of Public Interest Litigation ('PIL') in India. PIL is a form of legal proceeding in which redress is sought in respect of injury to the public in general and for the enforcement of the rights of a determinate class or group of people injured by the act or omission complained of but who are unable to approach the court on account of indigence, illiteracy or social or economic disabilities. For example, these persons may be prisoners, landless labourers or inmates of care centres or mental homes. In view of these harsh realities, the Supreme Court has departed from the traditional requirement of *locus standi* and, in its landmark judgment in *S.P. Gupta v. Union of India*⁵⁵ declared that where judicial redress is sought for legal injury to disadvantaged persons, any member of the public acting *bona fide* and not for oblique considerations, can maintain an action on their behalf.⁵⁶ The Court has forged new tools, devised new methods and adopted new strategies. For example, in the case of *Bandhua Mukti Morcha v. Union of India*⁵⁷, it has appointed commissions for the purpose of gathering facts and data. It has sometimes appointed a district magistrate, or a district judge, sometimes a professor of law and at times a practicing advocate for the purpose of carrying out an inquiry and making a report to the court.

No doubt, there can be and have been problems with PIL. The three pitfalls or perils of PIL are that it may degenerate into private interest litigation; political interest litigation; and publicity interest litigation. Litigants, lawyers and even judges are not immune from these perils. It is at times forgotten that PIL is not a pill for every ill, such as trams not running on time or rise in the price of onions. Besides, PIL can be abused, it can add to the burden of arrears and in some cases lead to confrontation with the executive. Nonetheless, it can be confidently said that it is due to PIL, that the enjoyment of fundamental rights has become a living reality, to some extent, for at least some illiterate, indigent and exploited persons. Numerous prisoners languishing in prisons awaiting trial have been released; persons treated like serfs and held in bondage have secured freedom and have been rehabilitated; conditions of inmates in care homes and in asylums for the insane and condition of workers in stone quarries and brick kilns have been ameliorated. Juristic activism in the arena of environmental and ecological issues and accountability in the use of the hazardous technology has been made possible and has yielded salutary results.

It would not be appropriate to conclude the lecture without mentioning the unique doctrine propounded by the Supreme Court in *Kesavananda Bharati v. State of Kerala* ('Kesavananda Bharati').⁵⁸ It held that the power

⁵⁵ 1981 Supp SCC 87.

⁵⁶ *Id.*, ¶ 56.

⁵⁷ (1984) 3 SCC 161.

⁵⁸ (1973) 4 SCC 225.

of amendment of the Constitution, although plenary in terms of Article 368, is not absolute and cannot be exercised so as to destroy its essential features and thus damage the 'basic structure' of the Constitution. The consequence is that Parliament is not supreme even when it exercises its constituent power of amendment and the last word rests with the Supreme Court.

This decision was much criticised when it was delivered. Critics vociferously urged that the Supreme Court had by this judgment assumed ascendancy over the amending power given in the Constitution and had vastly and unwarrantedly expanded its power. Another criticism was about the lack of unanimity among the judges as to what constitutes the 'essential or basic features' of the Constitution.⁵⁹

Historical facts and background must be kept in mind. Before the judgment in *Kesavananda Bharati*, the steam-rolling majority which the Congress Party enjoyed in Parliament facilitated constitutional amendments which were severely violative of fundamental rights. These amendments were passed in both the Houses without any serious debate or discussion and thereafter were placed in the 9th Schedule of the Constitution, thus making them immune from challenge on the ground of violation of fundamental rights. The enormity of the constitutional amendment sought to be made in order to validate the election of Mrs. Indira Gandhi, which was declared invalid by the Allahabad High Court⁶⁰, dispelled initial doubts to some extent about the wisdom and efficacy of the doctrine of basic structure.

A nine Judge Bench of the Supreme Court in the case of *I.R. Coelho v. State of T.N.*⁶¹ recently considered the doctrine of basic structure at length. The Court *inter alia* held that depending on the nature of the fundamental right and the extent of its invasion in a given case, it could be said that basic structure of the Constitution was damaged. The fundamental rights which the Court thought embodied the core values of the Constitution are Article 14, Article 15, Article 19 and Article 21. Thus, these fundamental rights have been accorded supremacy and the basic structure doctrine has been expanded.

The basic structure doctrine presents some problems, especially in identifying the essential or basic features of the Constitution. At present, judicial consensus seems to be that democracy, secularism, federalism, rule of law and an independent judiciary with power of judicial review can be regarded as basic features.⁶²

⁵⁹ SOLI J. SORABJEE & ARVIND P. DATAR, NANI PALKHIVALA - THE COURTROOM GENIUS (2012).

⁶⁰ *Raj Narain v. Indira Nehru Gandhi*, (1972) 3 SCC 850.

⁶¹ (2007) 2 SCC 1.

⁶² *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

There is some force in the argument that the Supreme Court in evolving this basic structure doctrine has exercised supra-legislative functions and in effect amended Article 368⁶³, which deals with power of amendment of the Constitution. On the other hand, this doctrine has ensured that no party enjoying an absolute majority in either House can effect a constitutional amendment which would make India a theocratic State, by providing that only members of certain communities alone can hold the office of President, Vice-President, Prime Minister and the Chief Justice of India. It is due to the basic structure doctrine that provisions for periodic free and fair elections cannot be repealed from the Constitution, nor can it be provided that elections would take place if and when Parliament determines instead of every five years, as the former would make a mockery of democracy. The basic structure doctrine has ensured that the judiciary cannot be deprived of the power of judicial review nor can the rule of law be abrogated. Again, it is due to this doctrine that federalism cannot be obliterated and States cannot be made vassals of the Centre. These, to my mind, are tangible and substantial benefits flowing from the basic structure doctrine which has above all, preserved the integrity of our Constitution. This is not a mean achievement, for which we are thankful to our Supreme Court.

I may now end the lecture with my concluding thoughts: In countries like India where fundamental rights are violated every day, whether in flouting of labour laws, illegal detentions, discriminatory actions, and other violations, one may wonder what response may be given to a cynic's taunt about the futility of fundamental rights. The answer is that guaranteed fundamental rights empower citizens and groups fighting for justice to approach the court. It also provides opportunities for vindicating the Rule of Law. It also establishes norms and standards which can be used to educate people to know, demand and enforce their basic rights. It has a salutary effect on administration which is made aware that it has to conform to the discipline of fundamental rights. Above all, a Bill of Rights, Part III enumerating Fundamental Rights, is a constant reminder that the powers of the State are not unlimited and that human personality is priceless.

⁶³ The Constitution of India, Art. 368: Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.