# CONSTITUTIONAL FEATURES & INDIAN DEMOCRACY

## PREAMBLE

India, Hindustan or Bharat are three names of one country, which in ancient times was also called `Arya Bhumi' or `Aryavrat' in the South East Asia with second largest population on this planet of 1.25 billion people and is second biggest democracy after USA, having achieved the independence from the British rule after a freedom struggle spanning for 150 years & is now for last about 68 years governed, ruled and guided by the biggest written Constitution enacted on 26/11/1949, known as `Law Day' in India and enforced on Republic Day 26/1/1950 with a beautiful & meaningful preamble, which encompasses broad policy guidelines by which `We the People of India', declared to be sovereign, decided to give to ourselves after taking birth as a Democracy on getting freedom on the Independence Day on 15/8/1947:

> *"We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens:*
> *Justice, social, economic and political;*
> *Liberty of thought, expression, belief, faith and worship;*
> *Equality of status and of opportunity;*
> *and to promote among them all*
> *Fraternity assuring the dignity of the individual and the unity and intergiry of the Nation;*
> *In our Constituent Assembly this twenty sixth day of November, 1949, to hereby adopt, enact and give to ourselves this Constitution."*

The Constitution of India with long parliamentary debates drafted by the committee of wise people headed by Dr.B.R.Ambedkar borrowed from various Constitutions of the world over and Government of India Act, 1935 enacted during British days and having undergone about 100 amendments, now comprises of 395 Articles divided in 12 Parts and 12 Schedules, which broadly imbibes and adopts democratic values, Fundamental Rights of citizens akin to United States of America, bicameral Parliament system from Westminster model in the unwritten Constitutional system of United Kingdom, Fundamental Duties of the citizens & the Directive Principles in Part IV and Indian Constitution though binds India in a Federal character, the Central Government being given the superior and supreme powers for maintaining borders, unity, integrity and external relationship of the country while the States, 28 in numbers constituted under the State Reorganization Act, 1956, enjoy independent legislative powers about health, law & order, primary education & Panchayati Raj Institutions etc. The amalgam of separate yet coordinated fields of Legislatures, Executives & Judiciary makes it a beautiful document with thriving life of law into it which has endured cohesion, unity and integrity of the country for last so many years and the experience of implementation of this document confirms the wisdom, intellect & vision of the forefathers of this most wonderful legislative piece ever enacted on this earth and, therefore, democracies all over the world. While the phenomenon, namely, Rule by Public, becomes the guiding force in all other kinds of governance, where people have revolted against other system of governance and have fallen back upon the democratic system, as recently the Arab Spring, Iraq and Afghanistan wars ending into setting up of democratic governments, no country in the known past has repelled and revolted against the democracy as a method of governance and has chosen to go for some other form of government like monarchy. The USA and Indian Constitutions have, therefore, become beckon lights for guiding other countries, India more so because with the kind of diversities in culture, religion and languages in various part of one country, still remaining united, shows how substantial this document is.

### Indian & USA Constitution & Democracy

India and the U.S.A. - one the most populous and the other the most powerful democracy in the world – have several features in common. To start with, in both the countries the revolt against colonial rule was the genesis of freedom.

In both the countries there is dual authority – the authority of the Union and the authority of the States – as part of the basic structure and framework of the Constitution. If this basic structure were ever dismantled, the Constitution would clearly suffer a loss of identity. There is a difference between the extent of jurisdiction reserved for the States in the U.S.A. and that reserved for the States in India, but the difference is one of degree and not of kind.

In both the countries, the Constitution was framed by a few hand-picked individuals who were not elected on the basis of adult franchise. As regards the criticism that such a Constituent Assembly had no right to impose a permanent Constitution on the people, Dr. B.R.Ambedkar said in debates in 1948:

> *"Sir, it may be true that this Assembly is not a representative assembly in the sense that Members of this Assembly have not been elected on the basis of adult suffrage. I am prepared to accept that argument. But the further inference which is being drawn that if the Assembly had been elected on the basis of adult suffrage, it was then bound to possess greater wisdom and greater political knowledge is an inference which I utterly repudiate."*

Sir Henry Sumner Maine in his book on Popular Government (1918) observed that "there is no word about which a denser mist of vague language and a larger heap of loose metaphors, has collected". The form of government is always regarded as an essential feature of a Constitution. Prof. K.C. Wheare in his oft-quoted work Modern Constitutions dealing with classification of Constitutions points out that most systems of government fall into one or other of the categories of the parliamentary or the non-parliamentary executive. By "non-parliamentary executive" he means the presidential form of government as in the USA. India has deliberately opted for a parliamentary federal Constitution as rightly pointed out by Prof. Granville Austin thus:

> *"The Constituent Assembly's decision to give India a parliamentary, federal Constitution was not made in a day. The process took two and a half years from the first meeting of the Congress Experts' Committee on the Constituent Assembly, held in July 1946, to the debate on the Draft Constitution in November 1948"*[1]

The democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchy organizations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1 ½ per cent of the population has an access to the print media which is not subject to pre-censorship.

**Indian & Korean Constitution**

The spirit of Preamble & life of Constitution of both democratic countries India and Korea is very similar. The Preamble of Korean Constitution enforced on 12/7/1948 read as under:

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[1]Prof.G. Austin: The Indian Constitution – Cornerstone of a Nation (1966), Reprint 1991 at page 32.

> *"We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial, upholding the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 and the democratic ideals of the April Nineteenth Uprising of 1960 against injustice, having assumed the mission of democratic reform and peaceful unification of our homeland and having determined to consolidate national unity with justice, humanitarianism and brotherly love, and To destroy all social vices and injustice, and To afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social and cultural life by further strengthening the basic free and democratic order conducive to private initiative and public harmony, and To help each discharge those duties and responsibilities concomitant to freedoms and rights, and To elevate the quality of life for all citizens and contribute to lasting world peace and the common prosperity of mankind and thereby to ensure security, liberty and happiness for ourselves and our posterity forever, Do hereby amend, through national referendum following a resolution by the National Assembly, the Constitution, ordained and established on the Twelfth Day of July anno Domini Nineteen hundred and forty-eight, and amended eight times subsequently*."

Like Korea, the broad division of Indian Constitution divides the State in main three parts; (i) Legislature (ii) Judiciary & (iii) Executive. The Media now unofficially recognized as a fourth pillar of democracy but it has no constitutional origin under the Indian Constitution. Korea has 300 members in its National Assembly, however, as per the Constitution, the National Assembly must have minimum of 200 members. India has 542 elected Parliamentarians in Lower House and 250 members in Upper House, Rajya Sabha. Korea has one Supreme Court and a Constitutional Court, 5 High Courts at Seoul, Busan, Daegu, Gwangju & Daejeon and various subordinate courts, which is quite impressive looking to its population and geographical size, whereas, India has one Supreme Court, no separate Constitutional Court, 21 High Courts and large number of District and subordinate Courts down upto Munsif level. The Korean Constitution makes certain provisions for Constitution unamendable, whereas, Indian Parliament gives plenary power to Parliament to amend even the Constitution under Article 368 but which has been held by Supreme Court of India to be restrictive so as not to enable even the Parliament to amend or alter the basic structure of the Constitution.

The credit goes to the Indian Supreme Court and 21 High Courts in various States, who by constant judicial interpretation process have permeated & developed the constitutional values with all other statutes and laws enacted by the Parliament at the Centre or by various States and unlike Korea, the Indian Superior courts namely; Supreme Court and High Courts have the power to even strike down the legislation as ultra vires the Constitution, if a law enacted by the Legislature is found to be offending or falls foul with the Constitutional provisions.

**Broad Areas covered by this Paper**

In this Paper, I intend to broadly throw light on the Constitutional frame work in India in following four sub divisions:-

(i) Basic structure of the Constitution and Fundamental Rights of the citizens;
(ii) Fundamental Duties & Directive Principles for governance;
(iii) Independent Judiciary.
(iv) Democratic institutions or hierarchy of Executives or Municipal Governance.

(i) **Basic Structure of the Constitution and Fundamental Rights of the Citizens:**

The basic structure or life of the Constitution is in Part III thereof which defines the fundamental rights of the citizens. Right to Equality (Article 14), Right to practice any religion (Article 25), Equality in Public Employment (Article 16), Prohibition against discrimination on the ground of religion, race, caste, sex or place of birth (Article 15), Right to freedom of speech, business and profession, freedom of movement within the territory of India (Article 19) and Right to Life and Liberty ( Article 21), Right to Education (Article 21A), Right against exploitation (Article 23) are some of the hallmark fundamental rights in the Indian Constitution. Coupled with reasonable restrictions and Directive Principles for State Policies & fundamental duties of citizens enumerated in Part IV and IV A of the Constitution, these fundamental rights largely borrowed from American Constitution & suitably modified & moderated is the golden thread of Indian Constitution.

(ii) **Fundamental Duties or Directive Principles for governance:**

The Directive Principles for the State Policies or fundamental duties of the citizens in Part IV of the Constitution guide the State Policy and the concept of social justice, free and easy access to Judiciary, living and fair wages to workers and provision of Uniform Code for its citizens, protection and improvement of Environment, separation of Judiciary from Executive and promotion of international peace and security are the guiding stars of Part IV. Part IV A prescribes certain fundamental duties for the citizens also, which reads as under:

*"FUNDAMENTAL DUTIES*

***51A. Fundamental duties.**—It shall be the duty of every citizen of India—*
*(a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;*
*(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;*
*(c) to uphold and protect the sovereignty, unity and integrity of India;*
*(d) to defend the country and render national service when called upon to do so;*
*(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;*
*(f) to value and preserve the rich heritage of our composite culture;*
*(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;*
*(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;*
*(i) to safeguard public property and to abjure violence;*
*(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;*
*(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."*

It should be stated here that though the Directive Principles for State Policies are not enforceable in Courts of law but the Supreme Court of India and its proactive approach giving meaning and life to the words embodied in the Constitution has read these Directive Principles with the Fundamental Rights to make them indirectly meaningful & enforced them through Court directives.

(iii) **Independent Judiciary**

Invoking and expanding the jurisdiction in the field of Public Interest Litigation and liberalising the concept of locus standi to espouse the cause in the court of law, the Supreme Court of India and 21 High Courts have greatly guided the path of State Policies for better environment and dignified life to the citizens. Though the implementation of Courts directives lies with the Executive and by constitutional provisions they are bound to implement these directives, somehow in Indian democracy, the Executive somewhat lags behind or can be said to be lethargic in implementing such court directives. Meticulous & proper compliance of the Court's directives is generally sought through invoking contempt jurisdiction of the Courts and some times it can also result in public agitations, but these are all the pitfalls or flip side of the democratic set up and no country is immune from this.

(iv) **Democratic Institutions**

Like the hierarchy of the Government in India coming down from Central Government at the top in New Delhi to the bottom at Panchayati Raj Institutions like Panchayat Samiti or Gram Sabha at Rural or village levels, the Court hierarchy also comes down from Supreme Court of India at New Delhi to various District and Subordinate Courts of Civil Judges upto rural/Tehsil levels. To maintain the Rule of Law and to provide easy access to justice under the policy of Justice at the doorsteps, the Indian Constitution and enacted laws by the Central and State Governments have made all endeavour to provide quick remedies to large populace of the country. India is second most populated country on the planet with around 1.25 billion people and to provide for various democratic institutions on the side of Executive and Judiciary is indeed a tough task but the monitoring by the Superior Institutions of their subordinates has really worked well in past 65 years of Independence of this Country. The checks and balances of powers with constitutionally defined separate fields for the Legislature, Executives and Judiciary, of course with unavoidable overlapping to some extent, which is indeed a reflection of wisdom of the Constitution's draftsmen of this biggest democracy.

Indian democracy has created various democratic institutions for proper governance in the country and while Judiciary has the supreme power to interpret the various Statutes and Laws including the Constitution of India itself, the Parliament, Central Legislative body comprising of its two houses; House of People or Lok Sabha (Lower House) (Comprises of 542 members directly elected by the people) and Council of States or Rajya Sabha (Upper House) comprising of nominated persons from various fields and experts elected members by various State Legislative Assemblies. The Parliament as one unit has vast legislative field to enact various laws and even power to amend the Constitution under Article 368 of the Constitution of India. The topics or legislative fields for Union & State Governments & even concurrent subjects are defined in Seventh Schedule List I, II & III of the Constitution. The only restriction on such amendment is that the Parliament cannot alter or change the basic structure of the Indian Constitution itself and this is what was laid down by Supreme Court of India in epoch making judgment in 1973 in the case of ***Keshavananda Bharti vs. Union of India***[2] which was argued by eminent jurists like N.A.Palkhiwala. Besides Parliament, States of India have State Legislative Assemblies and some of the States in India have bicameral system. The Panchayati Raj Institutions at rural or village level also look after the local needs of the citizens in rural areas which forms about 70% of the Indian population.

On power to amend the Constitution itself, the Court overruled *Golaknath*[3] and declared that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution in the case of ***Keshavananda Bharti***. The Judges made no attempt to define the basic structure of the Constitution in clear terms. S.M. Sikri, C.J. mentioned five basic features:

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[2](1973) 4 SCC 25
[3](1967) 2 SCR 762 : AIR 1967 SC 1643

*1*. Supremacy of the Constitution.
*2*. Republican and democratic form of Government.
*3*. Secular character of the Constitution.
*4*. Separation of powers between the legislature, the executive and the judiciary.
*5*. Federal character of the Constitution.

He observed that these basic features are easily discernible not only from the Preamble but also from the whole scheme of the Constitution. He added that the structure was built on the basic foundation of dignity and freedom of the individual which could not by any form of amendment be destroyed.

J.M. Shelat and A.N. Gover, JJ. added three more basic features to the above list:

*1*. Sovereignty of the country.
*2*. The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
*3*. The unity and the integrity of the nation.

The laws like Right to Free and Compulsory Education to children between 6 – 14 years of age, Right to Information, Right to Work with minimum and fair wages enacted in recent past played a vital role in shaping the future of the country and for achieving the constitutional goal of socialist, secular, democratic and republic India. The laws like Right to Information Act has also helped to unearth the various corrupt activities and practices in governance and the judicial eye has helped to take corrective measures with Institutions like Central Vigilance Commission (CVC), Comptroller and Auditor General (CAG) and Joint Parliamentary Committee (JPC). The Central Investigation Agency known as Central Bureau of Investigation (CBI) is independent police organization which is largely kept free from political and bureaucratic interference and investigates into such economic crimes.

**Rule of Law : Basic Tenet of Democracy**

Prof. A.V. Dicey confined its scope to three kindred conceptions. In the first place, the rule of law meant absence of arbitrary power on the part of the Government. Next it meant that no man is above the law and every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals, i.e. equality before the law or the equal subjection of all classes to the ordinary law of the land, administered by the ordinary law courts. The third meaning given by Dicey is that the law of the Constitution is not the source but the consequence of rights of individuals, as defined and enforced by the courts. This last meaning is out of place in India. Sir Ivor Jennings in his book *The Law and the Constitution*, critically examined the three meanings of the rule of law given by Prof. Dicey. He commented that Dicey was imagining a Constitution dominated by the doctrine of laissez-faire. According to Jennings, "the truth is that the rule of law is apt to be rather an unruly horse". It implies many notions which are imprecise: a State regulated by law, law and order, separation of powers, since the fusion of powers in one authority is dictatorship or absolutism. He adds:

> *"It contains also the notion of equality, a notion whose scope however is as imprecise as the notion of the rule of law itself. It assumes that among equals the laws should be equal and should be equally administered, that like should be treated alike."*[4]

[4]Sir Ivor Jennings : Law and the Constitution, 5th Edn. Pages 49-50

In ***Indira Nehru Gandhi* v. *Raj Narain***[5] K.K. Mathew, J. considered the concept or rule of law as part of the basic structure of the Constitution as evident from his observation:

> *"If rule of law is to be a basic structure of the Constitution, one must find specific provisions in the Constitution embodying the constituent elements of the concept. I cannot conceive of rule of law as a twinkling star up above the Constitution. To be a basic structure, it must be a terrestrial concept having its habitat within the four corners of the Constitution. The provisions of the Constitution were enacted with a view to ensure the rule of law. Even if I assume that rule of law is a basic structure, it seems to me that the meaning and the constituent elements of the concept must be gathered from the enacting provisions of the Constitution. The equality aspect of the rule of law and of democratic republicanism is provided in Article 14....."*

**Free & Fair Elections : *Sine Qua Non* for Democracy**

Free and fair elections, which is *sine qua non* for a democracy are conducted in India through Election Commission of India and it enjoys vast powers to ensure free and fair elections at various levels in this large geographical country. Though the debate between Presidential system like in America or Parliamentary form borrowed from Westminster model of U.K. Still sometimes goes on, but the Constitution has assigned the role of Head of the State on the President of India, who largely acts and is bound to act on the advice of Council of Ministers comprising of public representatives as per the Constitution of India and the President of India does not enjoy independent or wide discretion in the matters of State Policies & decision making & interpreting the role of advice of Council of Ministers and making judicial review of material to be placed before the President of India subject to judicial scrutiny, the nine Judges bench of Supreme Court in ***S.R.Bommai & ors. vs. Union of India & Ors.***[6] case upheld the judicial scrutiny of such decision making process at the level of Head of the State. Otherwise the governance is largely the responsibility of Executive headed by the Prime Minister of India with its selected Ministers in the Council of Ministers. The criteria of `Floor Test' for ascertaining majority wish was also propounded in this landmark judgment in following terms:-

> *"In all cases where the support to the Ministry is claimed to have been withdrawn by some legislators, the proper course for testing the strength of the Ministry is holding the test on the floor of the House. That alone is the constitutionally ordained forum for seeking openly and objectively the claims and counter-claims in that behalf. The assessment of the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President. It is capable of being demonstrated and ascertained publicly in the House. Hence when such demonstration is possible, it is not open to bypass it and instead depend upon the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle, apart from being open to serious objections of personal malafides. It is possible that one some rare occasions, the floor-test may be impossible, although it is difficult to envisage such situation. Even assuming that there arises one, it should be obligatory on the Governor in such circumstances, to state in writing , the reasons for not holding the floor-test."*

Debating the issue of Presidential form of Government in USA & Westminster Model of UK, with Indian context, the eminent jurist P.P.Rao[7] in his Article has stated:

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[5]1975 Supp SCC 1
[6](1994) 3 SCC 1
[7]Article of Mr.P.P.Rao, Advocate, Supreme Court of India and Eminent Jurist, Published in

> "Assuming the changeover to the presidential system is legally feasible, is it desirable? It is strongly felt that the well-considered decision of the framers that the American system is not suitable having regard to the constitutional history and needs of India is correct. The awesome concentration of powers in the hands of a single functionary and the frequent deadlocks witnessed with respect to legislation proposed by the US President on account of resistance by the American Congress should serve as a caution. Enlightened public opinion in the USA itself is exercised about the concentration of too much power in the hands of the President. The books and writings on the functioning of the American Presidential system give the general impression that the system is not functioning without difficulties and that the USA is moving towards the direction of becoming a parliamentary system. India cannot afford to trust any single person with vast discretionary powers without ensuring accountability. It is not known why some of our thinkers and leaders are advocating adoption of the American system. The British model is basically sound and best suited for us provided we realise even at this distance of time how to work it successfully making minimal changes in the provisions relating to elections and Ministers."

**Future of Democracy : Evolution & Political set up**

Democracy is bound to evolve; and it will shed, in course of time, the infirmities and shortcomings which often make it look so ludicrous sometimes. At present the main infirmity of democracy is that the only job for which you need no training or qualification whatsoever is the job of governing and legislating. You need years of training to attend to a boiler or to mind a machine, to supervise a shop floor or to build a bridge, to argue a case in a law court or to operate upon a human body. But to steer the lives and destinies of millions of your fellow-men, you are not required to have any education or equipment at all. Elections mostly throw either mediocrity or extremism into power. Talking of some speeches in Parliament, ***Gladstone*** described them as "sometimes rising to the level of mediocrity". ***Lord Balfour*** once said of an elected member of Parliament that "if he had a little more brains, he would have been half-witted". On another occasion, referring to a young politician, he quipped, "I thought he was a man of promise; but I soon discovered that he was a man of promises." The House of Lords has been called "proof of life after death:. In Major Barbara, the father observes about his son, "He knows nothing and he thinks that he knows everything. That clearly points to a political career."

"The second step in the evolutionary process will be reached when democracy will transcend national frontiers. What are today national frontiers will become not barriers but lines of demarcation only. This stage of evolutionary process is, I believe, almost inevitable. In some measure it has already come in Europe."

**Independent Judiciary**

The Constitution of India has given an absolute independent and insulated Judiciary, free from the interference of Executive, so much so that even appointment of Judges in the Supreme Court and High Courts requires least of interference by the Executive and Executive has hardly any interference in the decision making by the Judiciary. The Executive even cannot undo the judgment of Supreme Court of India or even High Courts without removing or curing the defects pointed out by the Constitutional Courts and the Courts have power to strike down the law enacted by the Parliament or State Legislatures ultra vires the Constitution, if such Statute is found to be repugnant or falls foul with the fundamental rights and other constitutional objectives, which is *suprema lex* in Indian democracy. The system of

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(2000) 2 SCC (Jour) 1.

democracy thus becomes synonymous with the idea of justice. In the words of ***Daniel Webster***:

> *"Justice is the greatest interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, there is a foundation of social security, general happiness and the improvement and progress of our race. And whoever labours on the edifice with usefulness and distinction, whoever clears its foundation, strengthens its pillars, adores its entablatures or contributes to raise its august dome still higher in the skies, connects himself in the name and fame and character with that which is and must be durable as the frame of human society"*[8]

Emphasising the need of independent Judiciary, ***Felix Frankfurter*** said:

> *"The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures."*

**Some leading Judgments by Supreme Court**

In ***Minerva Mills Ltd. and Ors v. Union of India and Ors.***[9] the Supreme Court of India mandated without ambiguity that it is the Constitution which is supreme in India and not the Parliament. The Parliament cannot damage the Constitution, to which it owes its existence, with unlimited amending power.

On Article 21 providing for Fundamental Right of Life, on a question, whether Right to Die i.e. Euthanasia is included therein, the Supreme Court in ***Aruna Ramchandra Shanbaug vs. Union of India & Ors***[10]**.** held that passive euthanasia (withdrawal of life support of a patient in permanent vegetative state) was permitted to a person who was being kept alive only mechanically, through life support systems and had been in that condition for many years. Decision regarding discontinuing life support system had to be taken either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision could be taken even by a person or a body of persons acting as a next friend including doctors attending the patient. However, injecting a lethal drug to a person who was being kept alive only mechanically, through life support system and had been in that condition for many years remains illegal.]

For such future petitions, it was held that when euthanasia petition is filed, the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit, preferably one of the three doctors should be a neurologist, one should be a psychiatrist, and the third a physician. The committee of three doctors nominated by the Bench should carefully examine the patient and

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[8] Article "The Judiciary in Democratic Governance : Some Insights from Indian Experience" By Ms. Justice M. Fathima Beevi, former Judge, Supreme Court of India, Published in "Democracy : Its Principles & Achievements" by Inter-Parliamentary Union, Geneva, 1998

[9] (1980) 3 SCC 625

[10] AIR 2011 SC 1290

also consult the record of the patient as well as taking the view of the hospital staff and submit its report to the High Court. Simultaneously with appointing the committee of doctors, the High Court should also issue notice to the State and close relatives e.g.parents, spouse, brothers/sisters etc.of the patient, and in their absence his/her next friend, and supply a copy of the report of the doctors' committee to them as soon as it was available. After hearing them, the High Court should give its verdict. The above procedure should be followed all over India until Parliament makes legislation on the subject of euthanasia.

On the question of Judicial Review even of laws so intended to be protected from Judicial Review, a 9 Judges Bench in ***I.R.Coelho (dead) by L.Rs. vs. State of Tamil Nadu & ors.***[11] held that if a Statute is held to be unconstitutional and such Statute is included in 9th Schedule after 24/4/1973 i.e.the date on which Judgment on Fundamental Rights case (Keshavananda Bharti) was pronounced, such violation can be challenged as violative of the basic structure as indicated in Article 21 read with Articles 14 and 19 but that actions finalised on the basis of these Statutes shall not be open to challenge. Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right by a Statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 211 read with Articles 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the Articles in Part III as held in Indira Gandhi's case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law (s) will not get the protection of the Ninth Schedule.

In ***Maneka Gandhi vs. Union of India***[12], the 7 Judges Bench of Supreme Court dealing with the case of Journalist Maneka Gandhi, daughter-in-law of Ex-Prime Minister Indira Gandhi when her passport was impounded `in public interest' and the Government refused to even supply the reasons for the same `in the interest of general public', upon a writ petition under Article 32 of the Constitution filed directly before the Supreme Court, the Court held that the fundamental rights in Part III of the Constitution are not distinct and mutually exclusive rights and each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom and such authority must be determined by the test of `direct and inevitable consequence' and invoking the doctrine of Pith and Substance and principles of natural justice, the Court quashed the impugned order holding that even the administrative decisions are subject to judicial review on the grounds of unconstitutionality, denial of natural justice, malafides and ultra vires. This is considered to be the landmark decision by the Supreme Court.

Recently, the Supreme Court in ***Centre for Public Interest Litigation & Ors. vs. Union of India & Ors***[13] canceled 122 licenses of 2G spectrum to the various telecom companies holding that such natural resources having been not put to public auction in a free and fair manner, resulted in a scam and while monitoring the criminal investigation in this matter, an Ex-Minister of Telecom of Union of India, Mr. A. Raja also was arrested and is being tried by the competent court. Upon a later Presidential Reference under Article 143 of the Constitution, the five Judges Bench of Supreme Court in said 2G Spectrum matter, however, held that there is no constitutional mandate for auction as being the sole method for distribution of natural resources of the country though the auctions are permissible method for disposal of natural resources across all sectors. The opinion dated 27th September, 2012 of the Constitution Bench under Article 143 of the Constitution reported in (2012) 9 SCALE 310

Way back in 1979 in ***Ramana Dayaram Shetty vs. International Airport Authority***

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[11] AIR 2007 SC 861 : (2007) 2 SCC 1.
[12] (1978) 1 SCC 248
[13] (2012) 3 SCC 117

***of India & ors.***[14] the Supreme Court held that Government in a welfare State is the regulator and dispenser of special services and provider of large number of benefits including jobs, contracts, licenses, quotas, mineral rights, etc. and such State largesses made available to private players through a decision making process is definitely subject to judicial review by the Courts of law on the touchstone of constitutionality. Thus, the Supreme Court of India even in the commercial ventures of the Executive or the Government has constantly acted as a watchdog and sentinel to avoid arbitrariness, favouritism and possible corruption in such matters. Thus, the Supreme Court & High Courts in India has constantly played a vital role in keeping the constitutional spirit alive by making judicial review over the Executive and Legislative functions, a fundamental right of citizens & basic structure of the Constitution.

**Indian Constitution & Women**[15]

Women folk, about half of the population of India, enjoys special status in Indian Constitution & Laws. Historically, the weaker sex & somehow not given its due position, the law makers have done commendable job in India to raise this class to its due level of respect and recognition. Though as a caveat, one would like to observe that gap between law & fact is the proverbial slip between cup & the lips. A former Judge of Supreme Court of India, Justice Dr. AR. Lakshmanan reminisces in his book "Voice of Justice"(2007) as under, to quote:

> *The Constitution opened a new horizon of hope for women in our developing nation, with the engrafting of non-discrimination and special clauses, intended to protect and promote the rights and legitimate aspirations of women as equal citizens of India. These special clauses are found in Articles 15, 39, 42 and 51A of our Constitution. These provisions hold out the promise of a new social order in what women would prefer to call a "male dominated society".*
> *In the Indian Constitution, the rights of women are traceable to the non-discrimination law contained in Article 15 and 15(3), besides Articles 39 and 42. Special attention to the legitimate interests of women has been paid by incorporating articles of far reaching benefits. The women are guaranteed equal political and civil rights such suffrage, employment, access to places of public resort, etc. They are also afforded extra special protection on account of their general health, responsibilities of mother hood, etc."*

Besides Constitution, several legislations also seek to protect, promote & enrich rights for women folk like Domestic Violence Act, Anti Dowry Law & even Supreme Court in ***Vishakha & Ors. vs. State of Rajasthan & Ors.***[16] laid down guidelines for providing them safe working environment & some of them are as under:

(i) It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

(ii) All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

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[14](1979) 3 SCC 489
[15] "Voice of Justice" (2007) by Dr.Justice AR. Lakshmanan, Former Judge, Supreme Court of India and Former Chairman, Law Commission of India.
[16](1997) 6 SCC 241 : (1997) Supp 3 SCR 404

(iii) Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.
(iv) These guidelines not prejudice any rights available under the Protection of Human Rights Act, 1993.

(v) Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field.

**Pitfalls & learning curves of Indian Constitution**

Thus, though this sound and viable *Suprema lex* for Indian democracy, the Indian Constitution also has raised some points, for pillars, which should make the Democracy more sound and firm form of governance & for better integrity of the country like India with vast geographic, cultural & religion variety, the following suggestions still require a good and healthy public debate for still more refined & meaningful Democracy:

(i) **Directive Principles to be made enforceable**

The part IV comprising of Directive Principles for guidance for State Polices & also Part IV A laying down Fundamental Duties for citizens should also have been made enforceable & binding on State & citizens respectively. Article 37, which makes such Directive Principles not enforceable but nevertheless fundamental in governance, requires a deeper debate. Though various Supreme Court decisions have dealt with this aspect & elevated these Directive Principles to the level of human rights, vide the case of ***Air India Statutory Corporation vs. United Labour Union***[17].

At the same time, the Directive Principles have, according to later decision of the Supreme Court, a positive aspect. The Directives have been held to supplement fundamental rights in achieving a Welfare State. Parliament can amend fundamental rights for implementing the Directives, so long as the amendments does not touch the basic features. Legislation enacted to implement the Directive Principles should be upheld, as far as possible. In fact, when necessary, even constitutional provisions as to fundamental rights should be adjusted in their ambit so as to give effect to the Directive Principles. Even legislative entries may (within the limits of the total federal scheme) be given a wide interpretation for effecting Directive Principles. Constitutional provisions (apart from fundamental rights) may be construed in the light of Directive Principles. Undermentioned decisions are illustrative of the above propositions.[18]

Directive principles and fundamental rights are to be harmoniously construed.[19]

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[17] AIR 1997 SC 64 : (1997) 9 SCC 377
[18] (i)Chandra Bhavan v. State of Mysore, AIR 1970 SC 2042, Para 13 : (1969) 3 SCC 84
(ii) State of Kerala v. N.M.Thomas, AIR 1976 SC 496 : (1976) 2 SCC 310 : (1976) 1 LCJ 376.
(iii) Lingappa v.State of Maharashtra, AIR 1985 sc 389 : (1985) 1 SCC 479.
(iv) Manchegowda v. State of Karnataka, AIR 1984 SC 1151 : (1984) 3 SCC 301
(v) Chief Justice v. Dikshitulu, (1979) 2 SCC 34 : AIR 1979 SC 193
(vi) Jalan Trading Co. v. Aney, AIR 1979 SC 233
(vii) Mukesh v. State of Madhya Pradesh, AIR 1985 SC 537
(viii) Lami Kant v. Union of India, AIR 1987 SC 232: (1987) 1 SCC 66
(ix) A.B.K..Singh v. Union of India, AIR 1981 SC 298: (1981) 1 SCC 246
[19] (i)Grih Kalyan Kendra Workers' Union vs. Union of India,(1991) 1 SCC
(ii) Literate Association v. State of Karnataka, (1990) 2 SCC 396: AIR 1990 SC 883

The object of Directive Principles is to embody the concept of a welfare State: ***Keshavananda Bharati vs. State of Kerala, (1973) 4 SCC 25: AIR 1973 SC 1461: 1973 Supp SCR 1 Paragraphs 134, 139, 174.*** However, the Directives do not confer any enforceable rights and their alleged breach does not invalidate a law, nor does it entitle a citizen to complain of its violation by the State so as to seek mandatory relief against the State. Similarly, if a legislative power does not exist in a particular legislature, then the legislature cannot seek to rely on a Directive Principle for claiming that power. Undermentioned decisions support the above propositions.[20]

**Uniform Civil Code should be enacted**

(ii) The Uniform Civil Code promised and envisioned in Article 44 of the Constitution is yet a dream to come true notwithstanding freedom to practice different religions, a Uniform Civil Code can bind the large populace of the country in a perfect manner and that is why the visionaries, who drafted the Indian Constitution, provided in Article 44 and Indian Supreme Court in some judgments has re-emphasized the need to have Uniform Civil Code but this is still a far cry. If it was made mandatory and time bound objective to be achieved in 1950, by now it would have been achieved, but it has not been possible so far and thus, the fear of division along caste and religion lines & also sometimes regional and geographical issues loom large over the Indian Democracy.

In ***Sarla Mudgal vs. Union of India***[21], the Apex Court dealing with the case of bigamy, a punishable offence under Section 494 of Indian Penal Code, upon marriage by a Hindu, without dissolving his first marriage but converting himself into a Muslim, which personal law permits second marriage during the subsistence of first marriage, held that merely by converting himself into Muslim, the man could not escape from the rigor of offence of bigamy & Apex Court also urged the Parliament to "endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India". But in a later decision, the Court in ***Lily Thomas vs. Union of India***[22], observed that even under Muslim Law, plurality of marriages is not unconditionally conferred upon the husband & quoted Dr. B.R.Ambedkar's debate in the following terms:-

> *"....I should also like to point out that all that the State is claiming in this matter is a power to legislate. There is no obligation upon the State to do away with personal laws. It is only giving a power. Therefore, no one need be apprehensive of the fact that if the State has the power, the State will immediately proceed to execute or enforce that power in a manner that may be found to be objectionable by the Muslims or by the Christians or by any other community in India."*
>
> He further stated in his speech as under:-
>
> *"We must all remember – including Members of the Muslim community who have spoken on this subject, though one can appreciate their feelings very well – that sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignty in the exercise of that power must*

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[20] (i) Kerala Education Bill (in re:), AIR 1958 SC 956: 1959 SCR 995: (1958) Ker 1167
(ii) Deep Chand v. State of Uttar Pradesh, AIR 1959 SC 648 : 1959 Supp (2) SCR 8.
(iii) State of Madras v. Champakam Dorairajan, AIR 1951 SC 525 : 1951 SCR 525
(iv) Fram Naserwanji v. State of Bombay, AIR 1951 Bom 216.
(v) U.P.S.E. Board v. Hari, AIR 1979 SC 65, Para 4A: (1978) 4 SCC 16: (1978) 2 LLJ 399.
[21] AIR 1995 SC 1531 : (1995) 3 SCC 635
[22] (2000) 6 SCC 224

*reconcile itself to the sentiments of different communities."*

**One common National Language : The Missing Link**

(iii) Having been ruled for 200 years by British, English naturally became the language of educated and upper middle class in India, besides Hindi, the National language and number of local dialects and languages. In ancient times, Sanskrit and Prakrat languages used to be the language of this Country but after Muslim rule for 500 years and English rule for 200 years, those old languages almost eloped and remained research topics for academicians in present era. Even now, Article 348 of the Constitution makes English as an official language of this largely Hindi speaking country, which in the absence of been given the status of sole official language of the country as one national language which could bind the people of various States in one common thread through education system. The same still remains a far fetched objective. The integrity, unity and sense of belongingness strongly depends upon the common language of any country. Take example of China, France and other European countries. But since English is undoubtedly a leading international language, it is required to be used largely as a business language, but for integrity and unity of the country, particularly for a country with vast and varied culture, one common language ought to have been propounded as one national language by the Constitution of India.

**Frequent Amendments in Constitution weakens its sanctity**

(iv) The Constitution of India in about 60 years of its existence has undergone about 100 amendments. So many amendments in fact cause damage to the basic fabric of the Constitution and makes it rather unstable document. Chief Justice K. Subba Rao in an Article on the two judgments *Golaknath* and *Kesavananda Bharati* expressed, "The stability of the Constitution stabilizes the State." The constant tug of war between Parliament and Judiciary over the amendments to the Constitution under Article 368 and some of the amendments declared unconstitutional by the Supreme Court as falling foul with the basic structure of the Constitution of India including its Preamble in various leading judgments, which are discussed elsewhere in this paper, ought to have been really avoided, if stability of the Constitution has to be kept as an objective in mind, essentially and primarily by the Parliament because the role of Judiciary to pronounce upon the validity of the same comes a while later.

(v) **Compensation Law for Rape victims**

With the increasing crime rate specially against women folk or weaker sex, particularly heinous crime like rape, if the victim woman is infected with deadly disease like HIV or AIDS, there is no specific constitutional provision or statutory provision in the Indian Democracy so far to provide for full compensation of entire medical expenses and compensation in case of death arising out of sexually transmitted disease upon commission of such crime upon woman. The provision in Section 357 in Code of Criminal Procedure, 1973 and 357A introduced in 2009 directing the State Governments in coordination with the Central Government to prepare a scheme for providing funds for the purpose of compensation to the victim or her dependents who have suffered loss or injury as a result of crime and who require rehabilitation is more recommendatory in nature rather than mandatory. This aspect of law requires debate and clear evolution and enactment of suitable legislative provisions for recovering such compensation from the property of the accused or in case it is found to be insufficient then by the State. Such provision would be in consonance with the guiding principles enacted in the Constitution for providing special protection and status to the women folk as narrated above and it is suggested that such provision may be enacted either in Criminal Procedure Code itself or any other special law for providing quick, compulsory and adequate compensation to such sufferers or victims or heinous crime. It would be in consonance with the spirit of Democracy, which envisages equality for both sexes and even unisex people.

The scheme drafted in this regard by National Commission for Women drafted in 1995 & revised in the year 2005 & Section 357A in the Cr.P.C. Introduced in 2009 in pursuance of the directions of Supreme Court in the case of ***Delhi Domestic Working Women Forum vs. Union of India***[23] are not adequate & comprehensive and its lack of mandatory nature, leave much to be desired still, though it is a welcome step. More vigorous, mandatory & enforceable law with quantified compensation for such rape victims, as interim measure of relief and final relief is still a target which alludes such unfortunate victims. The right of dignified life guaranteed under Article 21 of the Constitution would very much become more alive and meaningful for them if such compensation law is quickly put in place.

**Epilogue:**

The Indian Constitution is a landmark & wonderful Document or *Suprema lex* for guiding, surviving and carrying a Democracy as a successful method of governance of any Sovereign country. This 60 years old document has so far wonderfully well succeeded in running a large country like India with its 1.25 billion people, where by virtue of adult franchise, the people of country have active participation in the polity and have a say in selecting the people who would rule them for a fixed tenure, subject to periodical free and fair elections at various levels of Government from bottom level at villages and top level of Central Government. With remarkable flexibility in Federal binding of 28 States with one Union Government with vast differences in cultures, languages and religions, this Constitution makes space for everyone to express his views freely and the Rule of Majority prevails. Some weaknesses & pitfalls have not been able to weaken Indian Democracy as the sentinel in Supreme Court & 21 High Courts have vigorously upheld the constitutional values and spirits high and alive. Long Live Constitution of India & Long Live Indian Democracy.

JAI HIND !!

Dr. Justice Vineet Kothari

[23](1995) 1 SCC 14