Indian constitutional scheme posing more thorn than roses: an analysis of doctrine of institutional jus-ticiability under Indian Constitution

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ABSTRACT

Indian Constitution is a blend of normative principles resolved through textual and principled analysis of the constitutional provisions. However, over the years a strange and dangerous trend of concentration of power, amongst various institutions, particularly with the executive and judiciary has been felt. The obfuscate understanding of constitutional provisions have left voids in the effective administration of domestic Constitution. Arbitrary means promote concentration of power. Over the years much suspicion has been formed as to the usage of doctrine of political questions/justiciability in India—a doctrine having much of its relevance under US Constitution. Its suspicious use requires constitutional clarification. The paper discusses how it can be resolved by textual analysis of constitutional provisions and not by any formalistic decision making process causing narrowing down of concerns, having repercussions beyond repair.

Keywords:

I Introduction

The key principles and values within the framework of the Constitution establishes rules and principles necessary for the States functioning. It recognisescitizens right and State’s limit in exercise of its power and authority. The constitutional functionaries of the State have peculiar functions assigned specifically for the effective working of the State. Having said this the great socio and political question of our time is whether we should respect and obey the language of the Constitution or we should look for other paths—which no doubt will be in conflict with the principles laid down by our founding forebears.1 People of this country gave Constitution to themselves for a reason. It was presumed that a law abiding citizen will be solely governed by the language of the Constitution. Perhaps which is why the job of legislatures becomes although more important. The Constitution includes things that points the legislatures in the direction of making good judgement about how they will conduct themselves and this forms a moral duty well mentioned within the letters and spirits of the Indian Constitution. It was for this reason, forebears did allowed amendments, but within the realm of constitutional permissibility. Unconstitutionality of legislations poses some serious threats to the health of a nation.2 Such legislations annihilate constitutional rights guaranteed to its citizens. Over the years executive as well as judicial actions (including inactions/overactions/underactions) have evolved controversies, rather than reaching for some agreement.3 Such differences pose social and economic

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3 Instances such as striking down of NJAC Act, 2014, wherein court held reviving collegium system as ultravires and therefore strike down the entire 99th Amendment to the Constitution, see Supreme Court Advocates-on-Record Association v. Union of India AIR 2016 SC 117; The Bhopal tragedy exposed much flaws in the judicial discourse of adjudication, compensation and settlement, see UpendraBaxi and AmitaDhanda,
consequences, having future repercussions, so much so that they have now become much of a political question than legal. Further in modern times we are witnessing how inactions on part of one institution is compelling other to take completely over others domain of functioning. Such an approach is against the very constitutional mechanism of a State, which negates use of concentration of power, since it nullifies functioning ability of other authorities, thus weakening constitutional doctrines including separation of power (SoP). By undermining the rights of citizens, especially of vulnerable section of society, causes a democratic deficit which intern takes away constitutional faith. The role of judiciary is to ensure peoples confidence, but with its preferences to tread highways of justice rather than resorting to bye-lines of justified activism—coupled with confused understanding of constitutional scheme, often leads to unjust outcomes. Dictatorial mandates have always failed the test of time and trial which is why the forbearers wrote a Constitution—declaring accepted, assented and acceded letters as law of the land. The overall fruits of constitutional prescription will ensure stability; bring enlightenment; raise standards; and promote decent living for a commonman.

It would be interesting to note how the values prescribed in the Constitution have actually been tested with the Indian ethos. No doubt it has on numerous occasion held its grounds, but in some respect, lacked necessary audacity to preserve its constitutional scheme. This paper will therefore delve upon the passed-failed trend of judicial as well as executive decision making process which accomplishes nothing albeit possesses significant warnings to the constitutional ethos of the nation.

II Doctrine of Institutional Justiciability

The doctrine of institutional justiciability is a blend of constitutional requirement and policy considerations, that allows court to exercise broad discretion in not to decide certain matters. These certain matters are those which becomes more political with judicial involvement. It flows out of prudence and not on


5 See H.M. Seervai, Constitutional Law of India (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2005). See also Adam Smith, An Inquiry into the Nature and Causes of Wealth of Nations (1776), available at: https://www.ibiblio.org/ml/libri/s/SmithA_WealthNations_p.pdf (last accessed on 4 November, 2016), Smith writes "The separation of the judicial from the executive power seems originally to have arisen from the increasing business of the society, in consequence of its increasing improvement. The administration of justice became so laborious and so complicated a duty as to require the undivided attention of the persons to whom it was entrusted... When the judicial is united to the executive power, it is scarce possible that justice should not frequently be sacrificed to, what is vulgarly called politics. The persons entrusted with the great interests of the state may, even without any corrupt views, sometimes imagine it necessary to sacrifice to those interests the rights of a private man".


7 Over the years India is witnessing witnessing certain scenarios where before any dispute reaches courts, a questions arises: whether it will be desirable to decide a dispute according to the legal standards in a court or not?. So as to tackle such situation Indian judiciary has evolved a doctrine of political question, see State of Rajasthan v. Union of India AIR 1977 SC 1361; Balco Employees Union (Regd.) v. Union of India AIR 2002 SC 382 and recently in Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission (2015) 12 SCC 611. In US it is termed as the political question/justiciability doctrine, which is a criticised rule in public law, see J. Research Paper


9 See for e.g. in *Pratap Kishore Panda v. Agni Charan Das*, 2015 (11) SCALE 609, wherein the court extended the principle of legitimate expectation and questioned governmental morality; *Sanjivrajendra Bhatt v. Union of India* 2015 (10) SCALE 651, court enforced constitutional boundaries on administrative actions in order to ease out any inevitable tension between executive and judiciary; *Union of India v. Purushottam AIR* 2015 SC 961, court held that power to do particular act must be located in some statute, and if rules framed under such statute ordain action not contemplated by statute, it suffers from vice of excessive delegation and it would be declared *ultra vires*. See also I.P. Massey, “Administrative Law”, XLV *ASIL* 2 (2009).

10 The political question doctrine which is a brain child of judges from UK, US and Israel is a technique used as threshold barrier for review. See NicoKrishch, *Beyond Constitutionalism: The Puristic Structure of Post-national Law* 63 (Oxford University Press, Oxford, 2010).


13 Over the years due to pending bills, disrupted sessions, and therefore no legislation, a shift for moot presidential form has gained significant say. Also our parliamentary system has created a unique breed of legislator, largely unqualified to legislate, who has sought election only in order to influence executive power, see ShashiTharoor, “Shall We Call President?”, available at: http://www.shashitharoor.in/article-by-me-details.php?id=294 (last accessed on 10 November, 2016). In 2000 the effort was made to review the Constitution and one of the suggestion sought after was moving towards presidential form of governance,
presidential form is concentration of power to a single authority. In India, the executive power is wielded amongst the councils of ministers, which over the years hijacked in one single authority i.e. prime minister. This is not just the case of one or other institution of the State its slowly transgressing into other institutions, so much so that it has its feet within the judicial functioning of the State. The recent controversy as to the appointment of judges is a prime example. Such instances will lead judiciary to the grinding halt. The object for an effective working constitutional order is to identify, thereby clarify and simply the law for its better adaptation to the needs of the society. It is in this regards the pronouncement of apex judiciary holds its great importance. They are required to held executive agencies to the standards by which it professes its actions to be judged. A sense of caution must be addressed through courts to the statutory authorities for not to act with any preconceived notions and this does not means to dominate or make improper intrusions into the domain of the Parliament.

III Constitutional Ethos

Indian Constitution paves clear mandate for the functioning of the State. Meaning whereby, for courts to determine the constitutionality of any law or to question the conduct of functionaries of State it has to be within the provisions of Constitution. Enforcement of provisions of Constitution is the prime duty—the strict sense interpretation of law of land—which is the textual and principled analysis of the relevant constitutional provisions. With a detailed and comprehensive document, it was expected that efforts will be made towards reducing considerably the chances of getting the constitutional image distorted or becoming subject to abrupt changes—both in its essential features and in principles—either through parliamentary means or judicial interpretation. An issue having its source purely based on electoral decision, rather than constitutional, remains outside the purview of courts. The expedient considerations or institutional justiciability under Indian scenario asks for blatant illegality or manifestly unauthorised exercise of power posing threats to the constitutionally protected rights. S.H Kapadia in his work rightly highlights how portmanteau principle of non-justiciability on prudential concerns becomes irrelevant under the Indian Constitution.

It has to be understood that at the onset of constitutional framework it was made clear that the power of executives, judges and legislators are constitutional, and thus not only legitimate but also limited. Any development to reintroduce element of constitutional jurisprudence by overlooking forbearers view—which has been expressly abandoned—would deaden staunch exertion on their part. The concept of constitutionalism with its growth promoted constitutional democracy which furthers social transformation through democratic reforms and political equality. This presupposes the idea that any exercise of political power must be for the good—common to the totality of citizens. The absolutistic idea of State with its authority and power to be not subject to its people holds no justification considering the legitimate expectations enshrined within the Constitution. Any blatant illegality or unauthorised exercise of power infringes protected rights guaranteed under the common accepted mandate. The constitutional scheme lays its trust on its institutions who held their duty of ensuring a prepared system of law and order, which will be near be over emphasised.

Acknowledging Constitutional Values and Indian Ethos

With the formation of Indian Constitution one thing was made clear that it will bear aspiration of masses. The process of constitutionalism was reflected beyond expectation in the provisions, thereby reflecting nation commitments. The values and principles enabled an unexanguinated blend of different diversities into one single nation. Constitutional values were echoed even with the constant tussle of India with its immense uncertainties in social, economic and political arena. Idea was to imbibe Indian ethos. However, with the constant changes in its original document, instances of undermining classical values of constitutionalism gains potency. Much of this owes to the usage of principles and provisions, though reflecting Indian

however this has its own repercussions, see S. Murlidharan and V. Venkatesan, “A Presidential Intervention”, 17(3) Outlook (2000).


15 S.H. Kapadia (2012), supra note 8 at 156.

thoughts, were nevertheless of non-Indian origin, coming vastly from outside. Strangely, with such shortcomings, it succeeded, largely due the ends it proclaimed and the means it laid down. The logical connotation of text of Indian Constitution is the most important starting point for judicial decision making process. Any proper balancing with the institutional comity required justifiable limitations to remain consistent with the Constitution.\textsuperscript{17} Further, it warrants avoidance of any action that declares invalidity to an act which is an affront of some other institution. As Oliver Wendell Holmes, in his most memorable words writes, “life of law has not been logic, it has been experience”.\textsuperscript{18} For understanding constitutional jurisprudence we have moved too fast. Experience suggest how as a nation we have failed in implementing a particular constitutional order.\textsuperscript{19} The practical difficulties in imbibing constitutional scheme, which were acknowledged and accordingly dealt by the learned forbearers—never got materialised. How difficult was it for the nation to realise that in making effective decisions for the governance of its populace—logic becomes irrelevant. Much more important than the provisions in the Constitution were there usage and administration—to serve the interest of people; to deliver legitimate expectation and; to meet the ends of justice—all of this within the constitutional boundaries. As Dr. Rajendra Prasad rightly put forth, in the final session of Constituent Assembly:\textsuperscript{20}

Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the government it deserves.....

After all the Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them.... We can only hope that the country will throw up such men in abundance.

The constitutional values encourage development of new rules and principles that ensure hope of people in the democratic governance of country to remain alive. This way a delicate balancing of rights, principles and duties within the Indian Constitution justifies protection of individual liberty, social interest and constitutional ethos. Efforts therefore requires adoption of such measures that find a meaning consistent with the constitution—which in an express language—demands rule of law.

IV Separation of Power in India: A debate

Concentration of power or tussle to avail maximum control on the functioning of State have caused much suspicion on the institutional sanction. This suspicious scenario resorts to doctrine of SoP. Although India does not follow SoP in strict sense, but with the blend of constitutional requirement and policy consideration a harmonious scheme for smooth functioning was carved out. How far such methods benefitted constitutional values is a matter of thorough analysis. However, with its many nuances, the contours of SoP in India, depends upon the textual interpretation of the Constitution.\textsuperscript{21} It would be interesting to contrast the expectations of forbearers with the actual working and interpretation of constitutional provisions. When every constitutional institution is required to abide by law, any deprivation of their discretion in situations where there is no law or a rule, strict adherence to law.....In this part we shall discuss certain contemporary issues which contradict forbearers choice, thereby demeaning constitutional

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\textsuperscript{18} S.H. Kapadia (2012), supra note 8 at 154.

\textsuperscript{19} For too many amendments with little attention to Indian views and feelings, there are bound to have crisis, see UpendraBaxi, The Crisis of Indian Legal System 41-51 (Vikas Publications, Delhi, 1982). See also V.S. Deshpande, “Nature of Indian Legal System”, in J. Minatur (ed.), The Indian Legal System (Indian Law Institute, New Delhi, 1978).

\textsuperscript{20} Speech by Dr. Rajendra Prasad, President, Constituent Assembly, delivered 26 Nov., 1949, Constituent Assembly of India, Volume XI, available at: http://parliamentofindia.nic.in/ls/debates/vol11p12.htm (last accessed on 4 November, 2016). Interestingly B.R. Ambedkar cautioned functionaries of Indian State by stating “By Independence we have lost the excuse of blaming the British for anything going wrong. If hereafter things go wrong, we will have nobody to blame except ourselves”, as quoted in the Conclusion, Granville S. Austin (1966), supra note 1 at 308.

\textsuperscript{21} It varies amongst nations, see J.W. F. Allison (ed.), Comparative Constitutionalism (Oxford University Press, New York, 2013).
ethos of the nation. These factors when analysed, will reveal a pattern that the efforts of forbearers, have not met with unanimous approval.

**Fundamental Rights and Directive Principles**

Since the formation of Constitution a constant efforts was made towards interpreting Part III and Part IV of the Constitution. The initial interpretation was centered around justiciable and non justiciable and later became harmonious and balanced approach.\(^\text{22}\) The present approach of reading directive principles into fundamental rights appears going too far, notably with Article 37 making it crystal clear that Part IV provisions are unenforceable through any court. Can such enthusiasm be justified? Judicial wisdom is something which needs to be discarded—although benefiting—especially when the same was not expressed in the provisions of the Constitution. There is reason in limiting wisdom on legislatures, besides enforcement of Part IV provisions are attached with constraints—social, political and economic *per se*. A duty was addressed on legislatures to ensure necessary resources for their enforcement. This duty, however high, has not received appropriate efforts.

**Delays in execution of death sentences**

Delays in the execution of the the death sentences have often acted as an extenuating factor, posing concerns for Indian judiciary in multiple occasion to come up with effective guiding principles. Undue delay in execution leads to inhuman suffering which holds unjust, unfair and unreasonable treatment therefore infringes the constitutional mandate. Finding solutions with the unguided, uncontrolled and uncertain principles leads this quest no where. Further, resorting to *rarest of rare doctrine* has revealed inconsistency and incoherency in the judicial as well as executive behaviour.\(^\text{23}\) Executive clemency coupled with delay in disposing mercy petitions have done no justice.

**Development vs displacement settlement**

With the ever formation of modern civility, development induced displacement has emerged as a major factor for human displacement particularly in India. The development paradigm persuaded ever since the formation of Constitution—does not resolved itself with constitutional goals—rather it has aggravated much discontent amongst the marginalised sections of the society.\(^\text{24}\) At present there is absence of uniform structured legal guidelines adjoined with one sided policy aiming ethically against the constitutional ethos of the State. Here judiciary while recognising rights on one hand has very much complexed the entire situation.\(^\text{25}\) Besides it is an admitted fact that due to the unethical political collusion between executive and corporate houses, the ultimate loss is of the marginalised section of society—for whom the constitutional provisions specifically aimed for.

**Judges Appointments**

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22 Starting from *State of Madras v. Champokam Dorairajan* AIR 1951 SC 228, court held that Directive Principles (DP) cannot override Fundamental Rights (FR). This proposition was changed to not completely ignoring DP in *In Re Kerala Education Bill* AIR 1957 SC 956. In Keshavananda Bharti v. Union of India AIR 1978 SC 1461, court observed that FR AND DP are meant to supplement one another. Later, harmonious approach adopted in *Minerva Mills Ltd. v. Union of India* AIR 1980 SC 1789, wherein court held that "harmony and balance between FR and DP is an essential feature of the basic structure of the Constitution". Thereafter in *Olga Tellis v. Bombay Municipal Corporation* AIR 1986 SC 180, court ensured that DP were not lost and that the concept of a basic structure was not forgotten. Later also in *Unnikrishnan v. State of Andhra Pradesh* AIR 1993 SC 2086, court elevated the status of Article 45 (a DP) to FR under Article 21 and the executive was directed to ensure compliance. Similarly in *State of Gujarat v. Mirzapur Moti Qureshi Kassab* AIR 2006 SC 212, court held that reasonable restrictions can be imposed upon FR through DP and Fundamental Duties. See P. IshwaraBhat, *Fundamental Rights: A study of their Interrelationship* 523 (Eastern Law House, Lucknow, 2004).


24 Benefits of this paradigm shift have been availed disproportionately by the dominant sections, see *Report of an Expert Group to Planning Commission* (Government of India, New Delhi, 2008).

Perhaps the most controversial tussle between judiciary and executive can be explained best through this experience. The basic issue underlining ever since the formation of Constitution was: how ought a democracy select its judges?\textsuperscript{26} Democracies across the globe are in fix—nominated or independent? There is concern in having executive judicial control, since such a measure challenges constitutional justiciability. However, equally justified is how to invoke democratic values of transparency and accountability. India experienced some bitter conflicts between judiciary and executive concerning appointment of judges in higher judiciary.\textsuperscript{27} From declaring executive supremacy in S.P. Gupta v. Union of India\textsuperscript{8} to judicial discovery of collegium system in Supreme Court Advocates-on-Record Association v. Union of India\textsuperscript{29}—a unique beleaguered model, characterising Indian judiciary as one of the most powerful functioning amongst other constitutional functionaries was established. This led to a standpoint where legislature passed National Judicial Appointment Act, 2014 and it was struck down.\textsuperscript{30} The extended definition or scope of basic structure allows re-proclamation of such principles which already have its place in the constitutional scheme of governance. The thorny issue is selection between judicial independence and judicial superiority—the later is discarded whereas the former is encouraged under Indian constitutional framework.

**Reservation Policy**

India’s quest for equality posed serious concerns for the constitutional jurisprudence of the nation. At one place it ensured certain fundamental rights to be protected for its citizens where else on the other hand it declared war on the discriminatory practices prevailing in the society.\textsuperscript{31} Constitution guaranteed protection against unjust, unjustified and undeserved inequalities. But since first sitting of parliament the measures adopted for achieving constitutional equality were out of political necessity rather legal necessity. This moment led to usage of heavy politicisation of protective discriminatory policy. The political *cartelblanche* of preferential caste and class, goes much against the very observations of Dr. Bhimrao Ambedkar.\textsuperscript{32} The judicial discourse on reservational equality has been wayward too—even when they were duty bound to ensure usage of protective discriminatory policy to be justified, reasonable and rationale.\textsuperscript{33} Unwise state actions will not advance social justice, but *judicial gerrymandering* appears inapposite too. The present determination of backwardness solely on the ground of caste does nothing but revives casteism which our Constitution emphatically intended to squelch.


\textsuperscript{28} AIR 1982 SC 149.

\textsuperscript{29} AIR 1994 SC 268.

\textsuperscript{30} Supreme Court Advocates-on-Record Association v. Union of India AIR 2016 SC 117, wherein court held how framers of the Constitution intended free and independent judiciary with no executive interference. Article 50 of the Indian Constitution also demands separation of judiciary from executive.

\textsuperscript{31} See Article 17, 18 & 23 of the Indian Constitution. See also in detail regarding reservation as a policy adopted by legislature, Anirudh Prasad, Reservation Policy and Practise in India: A means to an End xvii (Deep and Deep Publications, New Delhi, 1991).

\textsuperscript{32} Id. at 123.

\textsuperscript{33} Amongst many of the apex courts judgement justifying reservations policy, court laid its own rule of capping, restricting and in some cases prescribing a method of its adaptation in the social structure, see in M.R. Balaji v. State of Mysore AIR 1963 SC 649 prescribed 50% upper limit. In StateofU.P. v. PradeepTandon AIR 1975 SC 563, where reservation of candidates from rural areas was held unconstitutional, whereas from hills it was justified. Soon after Indira Sawhney v. Union of India AIR 1993 SC 477, UpendraBaxi writes how “the poisonous weed of casteism has been replanted where it will trouble us a thousand years. Each age will have to consider it”. It laid different test for super speciality courses e.g.medical courses, see PreetiSrivastava v. StateofM.P. AIR 1999 SC 2894. The expansionist tendency of court is reflected in Pradeep Jain v. Union of India AIR 1984 SC 1420, which allowed extension of cap by more than 50% for people other than schedule caste, tribes and other backward section.
Right to property

Right to property in the initial draft of the Constitution and thereafter for few years remained a fundamental right. As a matter of fact had it remained a fundamental right (minus amendment) many acts of dispossession in various parts of the country could have been prevented. It is questionable how in its first place a right so dear for an individual (especially poor) was allowed to become a mere legal right. This transfer of right has allowed government of the day to turn their back against the people and grab their land under the garb of programmed industrialisation. In a society which is fast becoming a market oriented political economy — wrangling over property was bound to take place. The conflict between judiciary and legislature paved dead bed for property right. And at present, any violation of the right to property in India cannot be questioned as a constitutional issue.

Privatisation Policy

Forbearers of Constitution during its formation had little knowledge for market and its functioning. They held accountability as a measure to ensure proper governance, whereas the market-governance demands less restrictions. With the rise of corporate governance the distance between those who take decisions and those who suffer from such decisions have increased. The discomfiture of justice occupies a prominent role in the economic organisation of the society, especially when it effects them—directly or decisively. The power of corporates to deny justice by delaying tactics is not ignorant; notwithstanding with the need for speedy justice. There appears some formidable nexus between government and elites. Allowing privatisation of essential commodities strengthens this nexus further. Constitutional economics has paved its foot which has its concerns over efficiency. From constitutional values the affairs of State are moving

36 Seeds for accession of right to property were sown through a series of constitutional amendments—precisely First, Fourth, Seventh and Twenty-fifth amendment. This wrangling however received final affirmation in forty-fourth amendment.
39 Justifying privatisation court in Delhi Science Forum v. Union of India AIR 1996 SC 1356, Court held “Privatisation is a fundamental concept underlying the questions about the power to make economic decisions. What should be the role of the State in the economic development of the nation? How the resources of the country shall be used? How the goals fixed shall be attained? What are to be the safeguards to prevent the abuse of the economic power? What is the mechanism of accountability to ensure that the decision regarding privatisation is in public interest? All these questions have to be answered by a vigilant Parliament. Courts have their limitations because these issues rest with the policymakers for the nation. No direction can be given or is expected from the Courts unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provision.” Also in R.K. Singh v. Union of India (1981) 4 SCC 675 court held “The national policies in respect of economy, finance, communications, trade, telecommunications and others have to be decided by parliament and the representatives of the people on the floor of the parliament can challenge and question any such policy adopted by the ruling government.”
40 For better understanding as to constitutional economic, see J.M. Buchanan, Constitutional Economies (Basil Blackwell, Oxford, 1991). See also Prakash Sharma, Prison Privatisation: Exploring Possibilities in India (forthcoming).
towards market values. Regulatory processes of the government are targeted, leaving inefficient distribution of income as well as wealth in the society. The Preamble and the constitutional provisions postulates social welfare legislations (SWLs) on the lines democratic workable principles. The benefits of SWLs of the progressive governments have went to private players. There has to be some constitutional limits to privatisation process and for that Indian judiciary can take cue from Israeli Supreme Court’s decision in The Academic Centre for Law and Business v. Minister of Finance\textsuperscript{41}, wherein it struck down legislation to establish privately operated prison citing its conflict with the basic laws. Indeed with the above analysis of certain issues it can be settled that with such a confused formulations, there appears more thorns than roses for our constitutional scheme of governance. The confused paradigm shift from procedure established by law to due process of law and in the end none; the tussle for interpretation where on one place we are socialist (as expressed in Preamble of the Constitution) but our policies reflect a complete different scenario; the futile exercise of law making and its ultimate rejection by judiciary; the discriminatory State policy for reservation and its judicial backing; the piece-meal acceptance of resettlement schemes for poor’s—are all serious issues which needs immediate solution.\textsuperscript{42} One of the many hallmarks of our Constitution is that it has enough scope for correction. What is required is an earnest effort on part of functionaries to develop equity, principles of fairness, accountability, rule of law—all within the parameters of Constitution.

Conclusion
The author is not sure whether there has to be any concluding opinion on such a dynamic subject having no finality as such. The subject will continue to draw prolific growth. The contours are wide having much space between opportunities and contradictions. However, does it means that the fundamental philosophy of functioning of executive and judiciary will remain a cause of worry! Or there will be efforts on part of both to resolve any of those differences not by adjustments but with clear demarcation of constitutional powers and responsibilities. May be for such questions to be addressed to, specially within the constitutional framework, efforts should be to draw such solutions which will find a balance between avoidance of improper intrusions into the domain of constitutional institutions. Such an approach fulfills mandate of the Constitution. As Georges Bidault states “the good or bad fortune of a nation depends on three factors: its Constitution; the way the Constitution is made to work; and the respect it inspires”.\textsuperscript{43} Perhaps positive changes in the approach of governance would do some good. This however must address all possible mitigating factors, including that of masses and, must receive consideration that justifies constitutional mandate. Here a memorable statement by Abraham Lincoln made in 1858, needs its worth mentioning, which states:\textsuperscript{44}

If we could first know where we are and whither we are tending, we could far better judge what to do and how to do it.

\textsuperscript{41}2009 HCJ 2605/05.

\textsuperscript{42}A.K. Gopalan v. State of Madras AIR 1950 SC 27, where it was asked to test the correctness of the procedure established under the Preventive Detention AcL 1950 upon the touchstone of the principles of natural justice. This was precisely the issue that was so fiercely contested in the Constituent Assembly, however the Court refused to test the substantive correctness of the validly enacted Parliamentary law. Similarly in RustamCavasjee Cooper v. Union of India AIR 1970 SC 1318 executive actions were justified by the courts, since they justified procedure established by law criteria. However, in Maneka Gandhi v. Union of India AIR 1978 SC 591, court established that for a law to pass the test of Article 21, it must be reasonable, just and fair and not arbitrary, fanciful or oppressive. See Manoj Mate, "The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases", 28(1) Berkeley Journal of International Law 216-60 (2010). See also Rajeev Dhavan, The Supreme Court under Strain: The Challenge of Arrears 8-10 (N.M. Tripathi Pvt. Ltd., Bombay, 1979); Marc Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of legal Change", 9 Law and Society Review 95 (1974). Protection of rights vulnerable section of societies strengthens democracy, see Will Kymlicka, Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship (Oxford University Press, Oxford, 2001).


\textsuperscript{44}See Don E. Fehrenbacher, "The Origins and Purpose of Lincoln’s ‘House-Divided’ Speech,"46(4) The Mississippi Valley Historical Review, 615-43 (1960).