THE INDIAN CONSTITUTION: THE CORE AND THE CORE ISSUES

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ABSTRACT

This article seeks to examine the core issues in the actual working of the Indian Constitution. It is organized in four parts. The first Part will identify the fundamental principles of the Indian Constitution by looking at the reasons for adopting the Constitution. The second Part will identify the core content of the Constitution from the overarching goals of the Constituent Assembly. In this Part, I will argue that the guarantees of "Fundamental Rights" in Part III of the Constitution, the "Directive Principles of State Policy" set out in Part IV and the amending formula contained in Part XX together determine the essence of the Constitution. The third Part will examine core constitutional issues in the working of the Constitution. In this part, I will argue that the constitutional deferral of the problem of reconciling the conflicting constitutional provisions to future generations, without providing for proper mechanisms to resolve it, is the major constitutional issue in India. The fourth Part will examine how problematic the deferral is and it will point toward a possible resolution.

Keywords: *Fundamental Rights, Directive Principles, Conflicts of Constitution, Deferral in Constitutional Design, Basic Structure Doctrine.*

I. INTRODUCTION: THE MAKING OF THE CONSTITUTION AND THE AUTHORITY OF ITS AUTHORS

With 395 articles and over 117,000 words, the Indian Constitution was not a hastily drafted one. The drafting of the longest constitution in the world was a historical episode that took almost three years. The

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idea of a Constituent Assembly was proposed by radical democrats, decades before formal independence.[1] Later, the Indian National Congress, that represented mainstream politics and led the National Movement for freedom, came to the conclusion that the only method of applying the principle of self-determination was "to convene a constituent assembly representative of all sections of the Indian people to frame an acceptable constitution."[2] It officially raised the demand for a Constituent Assembly in 1939 and the British accepted the demand in 1940 as an expression of India's popular will.[3]

Inclusiveness is imperative for the authority of a constitution.[4] Generally, a constitution drafting process can not include all the citizens interested in participating it. Particularly, at the time when the Indian Constitution was framed, there was no precedent, in the history of modern constitutions, to provide every citizen a right to decide the content of the constitution.[5] The accepted practice was to compose a drafting body to reflect the divergent interests of various segments of the nation and to ensure sufficient representation of them all in it.[6]

The Constituent Assembly was elected in 1946 by the members of British India's elected provincial legislatures. The 299-member Assembly represented all sections of Indian society, and it also served as independent India's first Parliament. Though the Constituent Assembly was indirectly elected by the Provincial Assemblies, which themselves were elected on the basis of a limited franchise,[7] it truly represented the various religious, linguistic, caste, and socio-economic groups in India.[8] It also represented

[1] One of the pioneer communists in India, M. N. Roy proposed in 1927 the idea of transforming the Indian National Congress to a Constituent Assembly, see SAMAREN ROY, M.N.ROY: A POLITICAL BIOGRAPHY 121 (1997).
[2] JAWAHARLAL NEHRU, AN AUTOBIOGRAPHY 574 (2014).
[3] The August Offer of 1940.
[4] Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEXAS L. REV. (1983) (Hereinafter "Tushnet")
[5] The recent Constitution making process in Iceland proves that there is a possibility for achieving inclusiveness in the process to the extent that every citizen should have the right to make individual suggestions to a body that makes or revises the constitution.
[6] Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, DUKE L. J. 364, 373–74 (1995)
[7] The Government of India Act of 1935 imposed qualification on the basis of tax property and education. This kept out more than 70% of the adult population from the voting.
[8] G. AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 17, 20 (2nd ed. 1999) (Hereinafter "AUSTIN"); Despite the fact that many linguistic and cultural communities were given minimal or no representation, the Assembly duly represented the best interests of all groups including linguistic and cultural minorities. Though many scholars have observed an inherent upper caste Hindu bias in the composition of the Assembly, there is a unity of opinion that it was the best attempt at reflecting the heterogeneous character of the people. The Assembly was conceived as a representation of the whole population of India rather than a conference of some or all groups of population. It was true, the Cabinet Mission plan of May 16 1946 did not offer smaller minorities like Indian Christians, Anglo-Indians, Parsis, Jains and other linguistic and cultural minorities a guaranteed representation under separate categories. The election to the constituent assembly was held on the basis of indirect election by the Electoral College consisting of the provincial assembly representatives. Inevitably, the considerations of ballot politics influenced the composition of the Assembly. This situation left the smaller minorities in the lurch because they had no substantial ballot power, due to small population, to bargain for representation. However, the nationalist spirit of inclusiveness

the whole political spectrum of India that included moderates, extremists, Hindu revivalists, conservative industrialists, feudalists, radical communists and so on. The formation of the Assembly proved the claim that the Indian National Congress "representing the majority of the people of India, elected by them and owing their allegiance" could legitimately be "transformed into the Constituent Assembly of the Indian people".[9]

The legitimacy of a constitution and the authority of its framers do not itself ensure it is working without problems. This article seeks to examine the core issues in the actual working of the Constitution. It is organized in four parts. The first Part will identify the fundamental principles of the Indian Constitution by looking at the reasons for adopting the Constitution. The second Part will identify the core content of the Constitution from the overarching goals of the Constituent Assembly. In this Part, I will argue that the guarantees of "Fundamental Rights" in Part III of the Constitution, the "Directive Principles of State Policy" set out in Part IV and the amending formula contained in Part XX together determine the essence of the Constitution. The third Part will examine core constitutional issues in the working of the Constitution. In this part, I will argue that the constitutional deferral of the problem of reconciling the conflicting constitutional provisions to future generations, without providing for proper mechanisms to resolve it, is the major constitutional issue in India. The fourth Part will examine how problematic the deferral is and it will point toward a possible resolution.

II. THE FUNDAMENTAL PRINCIPLES IMPLIED FROM THE REASONS FOR ADOPTING THE CONSTITUTION

The founding people of a nation discover the principles they are bound by and declare them in the Constitution by translating them, at the time of making the constitution, into fundamental and, in some circumstances, eternal provisions.[10] The fundamental character of the provisions, practically, is reflected in some cases in its immutability and in most cases in the extent of agreement required to alter or abrogate

expressed by the Congress Party helped these smaller minorities securing some representation in the Assembly in the general category. Whatever representation they had in the Assembly was due to nomination by the Congress Party to the general category.

[9] M. N Roy's article in "Our Problems" entitled "The Constituent Assembly" as cited in WILLIAM F. KURACINA, TOWARD A CONGRESS RAJ: INDIAN NATIONALISM AND THE PURSUIT OF A POTENTIAL NATION-STATE 17 (2008)

[10] For example, Article 79 of the Basic Law for the Federal Republic of Germany.

them.[11] Though these principles may have political source outside the constitution, the constitution itself becomes the legal source of all these principles from the moment of such an act of constituting. A constitution can be seen as a structure that is built upon the foundation of these principles that fill the essence of the constitution.[12] These principles determine the nature of the constitutional order and the details of the government structures under it. The fundamental principles cannot be violated by the powers constituted under a constitution.[13] The basic foundation of the constitution can be changed only by establishing a new constitution or by revising it radically beyond the formal procedures for constitutional amendment.[14]

The fundamental principles of a Constitution can be implied from the historical origins of a nation or the context in which the political unity emerged. The reasons for adopting a constitution are many. As a nation- state that emerged from the yoke of two hundred years of colonial domination, India needed a constitution for several reasons. Primarily, constitutions are a way of formally declaring national unity and establishing or symbolizing the existence of the nation as a state.[15] As a nation with a heterogeneous population, India needed a constitution that could serve as an expression of national unity. Much more than a prerequisite to statehood in the international community, the Indian Constitution helped the People of India to establish their national unity and identity. Indeed, the commonly shared Bill of Rights under Part III of the Constitution was expected to help the people to dissolve their differences and to embrace homogeneity to form a national unity, particularly in the backdrop of the rights violations in the era of colonial abuses. The abuses perpetrated by the British colonial regime had convinced the Indian people of the necessity of entrenching a bill of rights. Sustenance and development of political unity is an important fundamental principle of Indian Constitution. Secondly, Constitutions define the limits of various mechanisms for exercising the public power generated in the formation of the State.[16] The political sovereign of the new nation, the people of India, needed a document that not only conveys legal authority

[11] See the distinction Rousseau draws between fundamental laws and other laws. J- J Rousseau, *Specific Causes of Anarchy, Considerations on the Government of Poland and on its Proposed Reformation* INTERNATIONAL RELATIONS AND SECURITY NETWORK: PRIMARY RESOURCES IN INTERNATIONAL AFFAIRS (PRIA) (Oct. 24, 2017, 2.21 PM), https://www.files.ethz.ch/isn/125482/5016_Rousseau_Considerations_on_the_Government_of_Poland.pdf

[12] See, generally S. P. Sathe, *India: From Positivism to Structuralism* in JEFFREY GOLDSWORTHY (ED), INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY (1st ed. 2007) (Hereinafter "Sathe"); See. also the *Quebec Secession Reference* 2 S.C.R. 217, 248-49 (1998) (Can.)

[13] Aharon Barak, *Unconstitutional Constitutional Amendments*, ISRAEL L. REV. 321, 336 (2011).

[14] *Id.* at 336.

[15] Tushnet, *supra* note 4 at 1984.

[16] RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 87-88 (1999).

to the three organs of a "Sovereign Democratic Republic" but limits and distributes it among them.[17] Limited government is a fundamental principle of the Indian Constitution.

Most importantly, the Constitution was expected to help "the Republic to be controlled and directed to proceed towards certain destinations and for certain purposes only."[18] The constitution makers were animated by those 'destinations' and 'purposes' conceived during the National Movement and they declared them in the Preamble of the Constitution and embodied them in Part IV of the Constitution that included an Instrument of Instruction styled 'Directive Principles of State Policy.' Apart from stating clearly the source from which the Constitution emanates, the Preamble also states the basic objectives and values of the Constitution upon which the State is expected to function.

The Indian Constitution was particularly aspirational in nature. The framers set some goals they hoped to achieve by pursuing certain policies adopted in the Constitution. For them, there were two revolutions running parallel in India. The political revolution ended with national independence. However, the social revolution required the formal constitution to be an instrument of social transformation that could bring about fundamental changes to the structure of society. The political revolution was to declare the independence of the nation and its political unity by laying down a formal constitution. On the other side, the social revolution was destined to continue its course post-independence, to minimize the inconsistency between the nation actually constituted and the one that was imagined in the formally adopted written constitution. The Directive Principles of State Policy are a clearer statement of the social revolution that aims to bring about fundamental changes to the structure of society.[19] The Directive Principles are a series of general injunctions to the legislature and the executive to give a clear indication of the policy the State ought to follow. They are directions to the State to complete the socio-economic and cultural revolution which the National Movement for Socio-economic and political freedom aimed at. The Indian Constitution presents a model of transformative constitutionalism[20] and this transformative mission is a fundamental principle.

[17] INDIA CONST. preamble.
[18] Indira Nehru Gandhi v. Raj Narain 2 SCR 347, 557 (1976) (India).
[19] Tushnet, *supra* note 4 at 51.
[20] Upendra Baxi, *Preliminary Notes on Transformative Constitutionalism* in OSCAR VILHENA ET AL., TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (2013)

The conception of the constitution as a means, not as an end itself, involves the idea of adaptability. Jawaharlal Nehru, Chairman of three important Committees of the Constituent Assembly[21] emphasized: "…. while we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in Constitutions. There should be a certain flexibility."[22] Similarly, Dr. Ambedkar, Chairman of the Drafting Committee, who had declared Article 32, which provides for remedies for enforcement of fundamental rights in Part III, to be the very soul and heart of the Constitution, admitted at a later stage that the article itself could be amended.[23] The architects of the Indian Constitution echoed the wise voice of Justice Marshall of the United States Supreme Court that a Constitution is "intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."[24] Though they "certainly had in mind some degree of permanence", they considered adaptability as "a necessary requirement of permanence"[25].The Constitution was designed to serve the ends of both the founding generation and the generations that followed them.[26] This intergenerational transfer of a substantively unrestrained constituent- amending power is very fundamental to the Constitution of India.

As Mark Tushnet observes, we find fundamental principles in Preambles and other provisions stating general principles in most modern constitutions.[27] These principles are made explicit, to a great extent, in its Preamble and the principles adopted in them are sometimes said to have legal force, particularly when they are embedded in constitutions that provide for constitutional review in the Courts.[28] The Supreme Court of India in *Kesavananda* made it clear that the Preamble was an operative part of the Constitution.[29] The Court highlighted the Preamble as a basis for articulating the doctrine of the basic structure of the Constitution.[30] Later, in *S. R. Bommai*,[31] the court reiterated that the Preamble was an integral part of the Constitution. This does not mean that all the fundamental principles are exclusively reflected in the Preamble. The possibility of amending the Preamble indicates otherwise. The words 'secularism' and

[21] Nehru chaired three important committees of the Assembly: States Committee, Union Powers Committee, and Union Constitution Committee.
[22] 7 CONSTITUTIONAL ASSEMBLY DEBATES, 322-323 (8 November 1948).
[23] 7 CONSTITUTIONAL ASSEMBLY DEBATES 43-44 (4 November 1948).
[24] McCulloch v. Maryland, 4 LF.ed. 579. (U.S.: 1819).
[25] OM PRAKASH AGGARWALA, THE CONSTITUTION OF INDIA 3 (1st ed. 1950).
[26] *Id.* at 3.
[27] Tushnet, *supra* note 4 at 2001.
[28] Tushnet, *supra* note 4 at 2013.
[29] Kesavananda Bharati v.State of Kerala (1973) 4 SCC 225 (India) (Hereinafter "Kesavananda Bharati"); The court overruled its earlier decision in *Berubari* case of 1960 that the Preamble didn't form part of the Constitution.
[30] *Id.* at 247.
[31] S. R. Bommai v. Union of India AIR 1994 SC 1918 (India).

'socialism' were not originally included in it. These were added to the Preamble by the Forty-second Amendment in 1976. A reasonable question raised at that time was whether such an addition to the Preamble could become a part of the Constitution's basic, unalterable, structure?[32] The Court clarified that although the principle of secularism was added to the Preamble only in 1976, it had existed in its essence in the original Constitution.[33] This clearly indicates the essentially declarative nature of the Preamble. The Preamble explicitly declares the fundamental principles implicit in the Constitution.

III. THE OVERARCHING GOALS OF THE ASSEMBLY: THE CORE CONTENT OF THE CONSTITUTION

Two overarching goals of framing the Constitution are explicit in the constitutional text: firstly, in Part III the Fundamental Rights and secondly, in Part IV the Directive Principles of State Policy. Regarding the protection of individual rights, the framers of the Indian Constitution followed the American model of guaranteeing individual rights in writing.[34] Article 32 provided a right to move the Supreme Court for the enforcement of fundamental rights under Part III of the Constitution. The core of Part III can be seen reduced to five important articles including Article 32 itself. Article 14 provided for equality before the law and the equal protection of the laws within the territory of India. These two articles "are the direct Indian analogues to the American Supremacy and Equal Protection Clauses, and they are phrased in quite similar terms."[35] Article 21 entitled 'Right to life' guaranteed that "no person shall be deprived of his life or personal liberty except according to procedure established by law." The Right to Freedom under Article 19 originally[36] guaranteed every citizen the right to seven basic freedoms of speech, assembly, association, movement and settlement anywhere in India, private property[37] and occupation, trade and business. Article 13 gave supremacy to the fundamental rights in Part III of the Constitution over the legislative power of

[32] H. M. SEERVAI, CONSTITUTIONAL LAW 3100–01. (4th ed. 1996)
[33] S. R. Bommai v. Union of India AIR 1994 SC 1918 (India).
[34] AUSTIN, *supra* note 8 at 58-61.
[35] Vivek Krishnamurthy, *Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles*, YALE J. INT'L L. 207,220 (2009).
[36] In the year 1977, the 44th amendment eliminated the right to acquire, hold and dispose of property as a fundamental right. However, in another part of the Constitution, Article 300 (A) was inserted to affirm that no person shall be deprived of his property save by authority of law. The result is that the right to property as a fundamental right is now substituted as a statutory right.
[37] Though the strong protection extended to right to property in the initial draft of Article 21 was withdrawn in the final draft, the right to property find a place in Part III entitled "Fundamental Rights" (Article 19(f)).

Parliament by declaring laws inconsistent with or derogative of those rights to be void. However, it is worth noting that such supremacy was not extended over Parliament's amending power. Article 368, on its plain reading, is plenary and no fundamental rights were entrenched against the power of amendment. Consequently, the First amendment to the Indian Constitution, unlike the US analogue, marks an era of 'reasonable restrictions' to fundamental rights of an individual, predominantly on the basis of the considerations of social justice.[38] While the First Amendment to the US Constitution sought to preserve fundamental rights on the basis of some ontological reasoning, the First Amendment to the Indian Constitution restricted them on the basis of its reasoning founded on its observation that there was wide bridge between the existing socio-economic and political order and the order the constitution proposed to rebuild.[39] At the bottom of everything, Indian Constitution reflected a transformative constitution that marks "a conceptual break with Western individualist approaches to human rights."[40]

Noticeably, the Indian counterpart of the American Due Process Clause, Article 21, was different in its language and import. This difference becomes important in evaluating how deeply the fundamental rights are protected in the constitution. The initial draft of Article 21 was formulated along the lines of the American due process clause. However, the Constituent Assembly deliberately dropped the initial draft that sought to strongly protect "life, liberty or property of a person",[41] by placing them beyond the legislative and amending capability of parliament, "through an appeal to the higher principles or sources of law as identified by the courts."[42] As observed by Justice Khanna, the framers of the constitution "were so keen to avoid" introducing "an element of vagueness and indefiniteness in our Constitution" by importing the American due process clause.[43] The Constitution makers deliberately attempted to avoid a situation where the content of the rights could be effectively determined by judicial concepts rather than by the express terms of the constitutional provisions. However, belying the expectations of the framers, the modern Indian constitutional history witnessed a myriad of such concepts. The core of fundamental rights has always been a matter of conjecture. Though the inclusion of right to property in Part III was contentious, the Basic Structure Doctrine did not give a clue to the essence of fundamental rights that becomes part of

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[38] Upendra Baxi, *Demosprudence versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies* 14 MACQUARIE L. J. 3 (2014) (Hereinafter "Baxi")

[39] See, Statements of Objects and Reasons, The Constitution (First Amendment) Act, 1951 (India).

[40] *Supra* note 20.

[41] The Draft Report of the Sub Committee on fundamental rights initially contained a clause numbered 11 according to which "no person shall be deprived of his life, liberty or property without due process of law".

[42] For a succinct differentiation of substantive and procedural entrenchment, See., I LOVELAND, CONSTITUTIONAL LAW, ADMINISTRATIVE LAW AND HUMAN RIGHTS: A CRITICAL INTRODUCTION 37-38 (4th ed. 2006).

[43] Kesavananda Bharati, *supra* note 29 at 1519

the Basic Structure. Justice Khanna, whose opinion effectively decided the *ratio decidendi* of *Keshavananada*, concluded that the right to property did not form part of the basic structure.[44] However, he left the question open in the matter of other fundamental rights. Which among the rights included in Part III are more fundamental is still a vexing question. In Coelho, the court reiterated that "at least some fundamental rights do form part of basic structure of the Constitution".[45] Though it introduced nebulous concepts like "the rights test" and "the essence of the rights test", the rights that form part of the basic structure of the constitution are still unclear. As rightly observed by Soli J Sorabjee, the *Coelho* judgment added greatly to the prevailing confusion over the unamendable core of fundamental rights.[46] The Court ruled that the basic structure is indicated in "article 21 read with article 14, article 19 and **the principles underlying thereunder**"[47](*emphasis added*). Very clearly, the *Coelho* judgment is an attempt at making substantive entrenchment by courts, through an appeal to the higher principles as identified by the courts, which the framers of the constitution were very keen to avoid.

Secondly, the "Directive Principles of State Policy" are set out in Part IV. These Directives, though not enforceable in a court of law, lay down the important principles that are fundamental in the governance of the country.[48] Article 37 makes it the duty of the State to apply these principles in making laws. Part IV clearly enunciates the philosophy of the welfare state, when it enjoins the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life"[49].Most importantly, the State is directed "to minimize inequalities in income, and eliminate inequalities in status, facilities, and opportunities, not only among individuals but also among groups of people residing in different areas or engaged in different vocations."[50]Article 39(b) and (c) contain principles of the socialist welfare state. They attempt to promote social justice by nationalization and state action for the better distribution of resources. Moreover, they require the State to direct its policy towards ensuring that the ownership and control of the material resources of the community are so distributed as best to serve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production

[44] *Id.* 1539
[45] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1 (India).
[46] A lecture delivered Soli J.Sorabjee at Oslo University, Norway on October 6, 2008.
[47] *Id.*
[48] INDIA CONST. art. 37.
[49] INDIA CONST. art. 38(1).
[50] INDIA CONST. art. 38(2).

to the common detriment. Article 43(A) requires the State to secure the participation of workers in the management of undertakings, establishments or other organization engaged in any industry. Undoubtedly, the Directive Principles reflected the socialist objectives of the National Movement for socio-economic and political freedom.[51] In short, "the Directive Principles set a constitutional agenda for the future, which envisions the social, economic and political transformation of Indian society."[52] The addition of the word "socialist" to the Preamble and the removal of the right to property[53] are the two glaring occasions on which the parliament has subsequently declared the socialist objectives embodied in Part IV.

The core content of the Constitution can be found in the overarching goals of the Constituent Assembly as stated in the Objectives Resolution and later in the Preamble. The Objectives Resolution adopted by the Constituent Assembly in 1946 mentioned that there would be guaranteed to all people of India, "justice, social economic and political, equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and morality".[54] Obviously, socio-economic and political justice and equality of status and opportunity were given precedence over other objectives. 'Socio economic political justice' took precedence over other objectives in the text of the Preamble. Socio-economic and political equality through prevention of concentration of economic power and dispersion of wealth was one of the avowed goals of National Movement for freedom. Thus, the constitution makers were animated by these noble ideas which they declared in the Preamble of the constitution and embodied in Directive Principles of State Policy. They gave them primacy over the fundamental rights under Part III of the Constitution as seen under Articles 15(3)[55], 16(4)[56] and 31(4)(5)(6)[57]. It has been rightly observed that Directive Principles are the path of the nation's collective progress towards the constitutional objectives stated in the Preamble and Fundamental Rights are the limits of the path that could be adjusted according to the aspirations of the generations.[58] How narrow or wide the path is a choice consciously left to the legislature and the executive. Individual fundamental rights can be amended according to the needs of the generation that wants to tread the path of Directive Principles towards the constitutional objectives. A good illustration of the practice of this constitutional mandate can be seen in the first constitutional amendment which was enacted by the same constituent assembly while

[51] Sathe, *supra* note 12 at 241.
[52] Sathe, *supra* note 12 at 221.
[53] Omission of art. 19(f) and art. 31 by the Constitution of India (44th Amendment) Act.
[54] 1 CONSTITUTIONAL ASSEMBLY DEBATES (13 December 1946).
[55] Protective Discrimination for women and children.
[56] Protective Discrimination in favor of any backward class of citizens in matters of public employment.
[57] Restrictions to Right to Property and Compulsory Acquisition of Property.
[58] S. N. JAIN, ISSUES IN COMPARATIVE POLITICAL THEORY 51 (1989). (Hereinafter "JAIN")

acting as the first Provisional Parliament. The original Constitution under Article 16(4) provided for positive discrimination in favor of backward classes in the matter of public employment. The Constituent Assembly, however, failed to include similar provisions in connection with more general equality guarantees under Article 15. As rightly observed by Rosalind Dixon and Tom Ginsburg, this does not appear intentional in the backdrop of the desire of the drafters to provide wide-ranging redress to the backward sections of the Indian society.[59] The very same Constituent Assembly which acted as Provisional Parliament until the First General Elections in 1952, extended the scope for positive discrimination in favor of backward classes to more general equality guarantees.[60] Hence, the guarantees of "Fundamental Rights" in Part III of the Constitution, the "Directive Principles of State Policy" set out in Part IV, and the amending formula contained in Part XX together determine the essence of the Constitution.

The Constitution of India clearly aims at bringing about synthesis between Fundamental Rights in Part III and Directive Principles in Part IV. This task of synthesizing the two integral parts of the Constitution requires a suitable amending formula. The framers of the Constitution, thus, adopted the combination of the 'theory of fundamental law', that underlies the written Constitution of the United States with the 'theory of parliamentary sovereignty' as existing in the United Kingdom.[61] According to Dr. B.R. Ambedkar, the provisions for amendment in the Constitution were comparably simpler than those in the American and Australian Constitutions.[62]Article 368 eliminated the elaborate and difficult procedures such as a decision by a convention or a referendum. Article 368 provides for two categories of amendment: firstly, amendments that can be enacted by Parliament by a prescribed 'special majority'; and secondly, amendments that require, in addition to such a 'special majority', ratification by at least one half of the State Legislatures. Ratification is required to amend the amending formula and a few specific provisions where the interests of various States are concerned.[63] All other provisions of the Constitution are left to be amended by Parliament. The only limitation is that it shall be done by a majority of not less than two-thirds of the members of each House present and voting and a majority of the total membership of each House.

[59] Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, INT'L J. CONST. L. 636, 652 (2011). (Hereinafter "Dixon & Ginsburg").
[60] Constitution (First Amendment) Act, 1951 added a new clause to Article 15 which is similar to Article 16(4).
[61] VIRENDER SINGH, INDIAN POLITY WITH INDIAN CONSTITUTION & PARLIAMENTARY AFFAIRS 460 (2016)
[62] 7 CONSTITUTIONAL ASSEMBLY DEBATES, 322-323 (4 November 1948).
[63] For example article 54 (Election of President), article 55 (Manner of Election of President), article 73 (Extent of executive power of the Union), article 162 (Extent of executive power of State), article 241 (High Courts for Union territories), Chapter IV of Part V (The Union Judiciary); Chapter V of Part VI (The High Courts In the States); Chapter I of Part XI (Distribution of Legislative Powers).

Article 368 clearly vests plenary amending power upon the Parliament subject to the special procedure laid down in it. Unlike Article 139 of the Italian Constitution and Article 79 of the German Constitution, the Indian Constitution does not contain any provisions restricting its amendability.[64]

IV. THE CONFLICT OF GOALS: THE CORE CONSTITUTIONAL ISSUES

It appears that the unresolved constitutional issue in India is the contradiction between the dynamic Directive Principles and the Fundamental Rights. This contradiction surfaced within a few months after the Constitution came into effect. The First Amendment to the Constitution was adopted in 1951 and narrowed the scope of Fundamental Rights. Firstly, it amended the equality clause under Article 15 by positively authorizing the State to implement legislative policies based on protective discrimination for "any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."[65] Secondly, the amendment narrowed the meaning of the fundamental right to property under Article 19(1) (f)[66] and Article 31[67] by omitting Article 19(1) (f) and by inserting two articles to Part III. First, a notwithstanding clause in Article 31A validated laws providing for the abolition of the zamindari system that permitted aristocrats to control and own the material resources of the community contrary to the socialist mandates of the Directive principles embodied in Articles 39(b) and (c). Secondly, Article 31B validated certain laws in the new Ninth Schedule to the extent they were inconsistent with or in derogation of fundamental rights. Very clearly the First Amendment was to remove the difficulties created by judicial decisions that gave primacy to Fundamental Rights in Part III over the Directive Principles in Part IV.[68]The main object of this Bill was to ensure constitutional validity of land reforms based on the Directive Principles. In his speech supporting the First Amendment, then Prime Minister Nehru clearly acknowledged the inherent contradiction between the Directive Principles and Fundamental Rights. He emphasized the duty of Parliament to remove the contradiction and to make Fundamental Rights

[64] Vivek Krishnamurthy, *Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles*, YALE J. INT'L L. 207, 210 (2009).
[65] Constitution (First Amendment) Act, 1951, S. 2; INDIA CONST. art. 15(4)
[66] Right to acquire, hold and dispose of property.
[67]Compulsory Acquisition of Property - 31(1) No person shall be deprived of his property save by authority of law.
[68] Statement of Objects and Reasons appended to the Constitution (First Amendment) Bill, 1951 which was enacted as the Constitution (First Amendment) Act, 1951.

subservient to the Directive Principles. He said: "A constitution that is unchanging and static, it does not matter how good it is, is a constitution that has past its use".[69](sic)

It was this contradiction that led to the confrontation between the courts and Parliament over the right to property.[70] One of the stumbling blocks for the government in implementing land reforms to give effect to the Directive Principles was the doctrine of eminent domain under Art 31(2).[71] Though the Constitution excluded certain existing statutes and pending Bills relating to agricultural reform from the application of the doctrine at its commencement[72], it did not give any definitive indication excluding future land reforms from judicial review based on the doctrine of eminent domain. This led the courts to hold various land reform legislation ultra vires the Constitution's eminent domain and equality provisions.[73] Thus, Parliament, in the effort to carry on the agrarian reforms enacted the First Amendment and placed all classes of statutes dealing with agrarian reforms in the newly added Ninth Schedule that is exempt from the requirements of eminent domain.

The First Amendment Act was challenged in *Shankari Prasad,*[74] where the Court for the first time considered the question whether there was any limitation upon the amending power. The main argument advanced for the petitioners was that the amendments under Article368 were to be tested under Article 13 which declares laws that are inconsistent with or in derogation of the fundamental rights in Part III to be void. The Court rejected the contention on the basis of the clear demarcation between ordinary law made in the exercise of legislative power and constitutional law made in exercise of the amending power. The Court held that law, in the context of Article 13, must be taken to mean the rules and regulations made in the exercise of ordinary legislative power not amendments to the constitution made in exercise of the amending power under Article 368. Though the Court upheld the amendment, the Parliament adopted, for further clarification, the Fourth Amendment. It abridged the right to property under Article 31 by amending Article 31(2) to provide that no law to which Art 31(2) was applicable "shall be called in question

[69] Soli J Sorabjee, *Rights and Human Rights in the Modern World: The Experience of working the Bill of Rights in the Indian Constitution* in R.K. RAMAZANI AND ROBERT FATTON (ed.), THE FUTURE OF LIBERAL DEMOCRACY: THOMAS JEFFERSON AND THE CONTEMPORARY WORLD 120 ((1st ed. 2004)
[70] Sathe, *supra* note 13 at 242
[71] Right to Property- Compulsory Acquisition of Property.
[72] Articles 31 clauses (4) to (6) saved some statutes pending before the state legislatures from the application of this doctrine.
[73] Kameshwar Prasad v. State Of Bihar, AIR 1962 SC 1166 (India); State of Madras v. Champakam Dorairajan AIR 1951 SC 216 (India).
[74] Shankari Prasad v. Union of India, AIR 1951 SC 458 (India).

in any court on the ground that the compensation provided by that law is not adequate". It further amended Article 31A retrospectively with a non-obstante clause that "Notwithstanding anything contained in article 13, no law providing for matters mentioned in the newly added clauses (a) to (e) of Articleb31A (1) "shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14,[75] Article 19[76] or Article 31"[77].

The Supreme Court, in a series of cases, agreed that this amendment succeeded in preventing the courts from enquiring into the adequacy of compensation, but held that the court could nevertheless enquire into whether the compensation was illusory or it was not really compensation at all. On that basis, it struck down some agrarian reform statutes. This led to the 17th Amendment Act. Inter alia that amendment added 44 Acts to the Ninth Schedule. The validity of the 17th amendment was challenged in *Sajjan Singh,*[78] which raised, for the second time, the question of the power to amend fundamental rights. The court upheld the 17th amendment Act on the basis of the distinction between ordinary legislative power and the amending power. The Court confirmed the correctness of *Shankari Prasad* that the amendments under Article 368 could not be tested under Article 13 for inconsistency with or derogation of fundamental rights in Part III. The contradiction between Part III and Part IV was, thus, clearly translated to the contradiction between Part III and Article 368. This contradiction which was discussed in *Shankari Prasad*[79] and *Sajjan Singh,*[80] provided the basis for the long national debate beginning with *Golaknath*[81] to *Keshavannda.*[82] Justice Patanjali Sastri in the *Shankari Prasad* rightly observed that there was a conflict between Part III and Art.368.[83] This conflict has been a constitutional issue since the very First Amendment that reflected the dilemma in the mind of constitution makers regarding the issue of reconciling Fundamental Rights and the Directive Principles.

The important constitutional issue left open is that of adjusting Fundamental Rights according to the felt necessities of the times and the aspirations of the succeeding generations. The real question is about the true authority to resolve fundamental constitutional issues or conflicts. The Parliament took it as a matter

[75] Equality before law.
[76] Right to Freedom.
[77] Right to Property.
[78] Sajjan Singh v. State Of Rajasthan, AIR 1965 SC 845 (India).
[79] *Supra* note 74.
[80] *Supra* note 78.
[81] Golaknath v. State of Punjab, 1967 SCR (2) 762 (India).
[82] Kesavananda Bharati, *supra* note 29.
[83] *Supra* note 74..

within its competency to amend the Constitution and adopted a series of constitutional amendments tilting the balance towards giving prominence to the Directive Principles. On the other hand, the Court took the conflict as a matter of constitutional interpretation and used it as "a lever to prise open *Shankari Prasad* for harmonizing the conflicting articles."[84] In *Golaknath*, the Court overruled its earlier decisions in *Sajjan Singh* and *Shankari Prasad* and held that Parliament had no power under Art. 368 to take away or abridge fundamental rights in Part III. Later in *Keshavananda*, it modified its opinion, holding that any constitutional provision could be amended subject to the limitations implied in the basic structure of the Constitution which were to be determined by the Court from time to time and on a case by case basis. Thus, the Court placed the problem of resolving basic constitutional issues under its adjudicatory leadership.

It is important to note that the framers of the Indian Constitution did not declare what were the unalterable essentials of the Constitution. Though they adopted features from the German Constitution, which was drafted almost during the same period of time,[85]they refrained from borrowing the classic "eternity" clause of the German Basic Law.[86] The deliberate omission of an 'eternity clause' might lead to the conclusion that the makers of the Constitution consciously chose not to bind their successors in respect of the essentials of the Constitution. Some commentators have argued that despite the understanding of constitutions as attempts to regulate the future, constitution-makers may self-consciously choose not to bind their successors, by refraining from constitutionalizing some values or principles so that the future generations will be able to bind themselves based on contemporary preferences rather than on past preferences.[87]

The Indian constitutional history, however, shows that such deferral of fundamental constitutional issues could be problematic. The framing of the Indian Constitution shows that decisions as to fundamental constitutional issues belonged to the People of India, who exercised the power in constituent politics, through the device of a Constituent Assembly that ensured the maximum possible popular participation beyond the partisan tendencies of normal politics.[88] The very strong sense of political unity in the wake of the National Movement seems to have helped the people of India to compose their Constituent Assembly

[84] R. DHAVAN, THE SUPREME COURT OF INDIA AND PARLIAMENTARY SOVEREIGNTY 8 (1976).
[85] India borrowed 'Suspension of Fundamental Rights during the emergency' from Germany
[86] Article 79, says that amendments "affecting the division of the Federation into [States] . . . or the principles laid down in Articles 1 and 20 shall be inadmissible."
[87] Dixon & Ginsburg, *supra* note 59 at 637.
[88] 7 CONSTITUTIONAL ASSEMBLY DEBATES (4 November 1948) (Per Dr. B.R.Ambedkar).

meticulously to be a microcosm of the nation[89] and to decide most of the fundamental issues by consensus and accommodation.[90] It was the non-partisan character of the Constituent Assembly that distinguished it from an ordinary Parliament and kept its constitution-making politics aloof from the normal politics. The fundamental constitutional issues left open for future generations by such an Assembly cannot to be assumed to have been deferred to be decided in normal politics in Parliaments. Observations by Hutchinson and Colón-Ríos, are noteworthy in this context: "*When an important constitutional transformation is needed, strong democracy recommends that changes to the constitution be made through an exercise of popular participation similar to that present when the Constitution was adopted in the first place.*"[91]

The deferral of some of the fundamental constitutional issues to future generations was not accidental. The problem of reconciling the contradictory provisions was anticipated by the Assembly. On this aspect, some of the members were in favor of adopting an easier mode of amending procedure for the initial five to ten years.[92] They thought that the future Parliament elected under the Constitution would also act as a Constituent Assembly and that an elected Parliament would have better authority than the Constituent Assembly elected on limited franchise. However, Dr. Ambedkar brilliantly countered the argument and clearly explained the basic difference between a Constituent Assembly and a Parliament. According to him, the Constituent Assembly was essentially non-partisan reflecting the political unity of the nation. On the other hand, he anticipated that the future Parliament would be based on partisan politics and if Parliament met as a Constituent Assembly, its members would "be acting as partisans seeking to carry amendment to the Constitution to facilitate the passing of party measures."[93] Though the Assembly rejected the suggestion for adopting an easier mode of amending procedure for the initial five to ten years, it could not propose a solution to the problem of reconciling the contradictory provisions of the Constitution. It could not provide for the exercise of the power of the people to decide on the fundamental issues through the devices similar to or better than that utilized in the original constitution-making process.

It was this deferral that encouraged both Parliament and the judiciary to claim the power of the people. On the one hand, the Court propounded the basic structure doctrine and started spelling out essentials of the Constitution that are unamendable. On the other, Parliament declared that there should be "no limitation

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[89] AUSTIN *supra* note 8 at 8
[90] AUSTIN *supra* note 8 at 310-11
[91] Allan Hutchinson and Joel I. Colón-Ríos, *Democracy and Constitutional Change*, THEORIA: A J. OF SOC. AND POL. THEORY 127 (2011).
[92] VIRENDRA SINGH, INDIAN POLITY WITH INDIAN CONSTITUTION & PARLIAMENTARY AFFAIRS 459 (Kindle ed. 2015)
[93] 7 CONSTITUTIONAL ASSEMBLY DEBATES 43-44 (4 November 1948).

whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution" under Article 368.[94] Deciding on the fundamental constitutional issues, which are left open by the framers of the Constitution to future generations, is a process that is akin to the original constitution-making. Such fundamental decisions as to the meaning of the Constitution, obviously, belong to the people. The core constitutional issue in India is that some fundamental decisions are deferred to the future generations without providing for mechanisms of decision-making similar to that in the original framing of the Constitution. The Constitution does not provide for a referendum or for reconstituting a Constituent Assembly. In answer to the problem, the leading majority view of five judges in *Golaknath* court suggested that the residuary power of Parliament could be relied upon to call for a Constituent Assembly for making the new constitution or radically changing it.[95] The concurring majority view (Hidayatullah J.), suggested an amendment to Article 368 for calling a Constituent Assembly after passing a law exercising the residuary powers of the Parliament.[96] However, it did not express a final opinion on this question. Similarly, the majority judges in *Keshavananda* held that such inquiry was unnecessary for the 'immediate purpose' of deciding the case.[97]

Another dilemma expressed in the Constituent Assembly was about the role of the judiciary as reflected in the wording of Article 21.[98]The Draft Report of the Sub Committee on Fundamental Rights initially contained a clause according to which "no person shall be deprived of his life, liberty or property without **due process of law**"[99](*emphasis added*). However, at that point, the Assembly discussed the problems of a substantive due process clause including judicialization of politics and policy matters. There was considerable support for the view that a due process clause might hamper social legislation, especially dealing with property and tenancy.[100] Meanwhile, the legal advisor of the Constituent Assembly visited Justice Frankfurter of the U.S. Supreme Court who expressed the opinion that the power of review implied in the due process clause was not only undemocratic but a burden on the judiciary. Regarding the role of the judiciary, the dilemma in the mind of the framers was profound. Jawaharlal Nehru, who was keen on implementing the socialist principles embodied in Part IV, upheld the doctrine of parliamentary supremacy

[94] The Constitution (Forty Second Amendment) Act, 1976, s .55.
[95] *Supra* note 81 (Subba Rao CJ and his four colleagues)
[96] *Supra* note 81.
[97] Kesavananda Bharati, *supra* note 29 at 1281-82.
[98] Right to Life.
[99] JAIN, *supra* note 58 at 186-187.
[100] *Id.* at187

and argued: "No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community."[101] On the other hand, the Assembly members representing minority groups supported the inclusion of 'due process clause'. Particularly, Dr. Ambedkar expressed his apprehensions about dropping the due process clause.[102] Ultimately, to facilitate social legislation dealing with property and tenancy, the word 'property' was omitted from the text of Article 21.The Draft Committee considered the powers of judicial review implied in the substantive due process to be undemocratic and replaced it with a new expression borrowed from the Japanese Constitution;[103] 'except according to procedure established by law'.[104] The framers of the Constitution steered clear of the due process language to avoid substantive due process implied in it. Dr. Ambedkar clearly expressed the dilemma of whether it was preferable to leave the question of fundamental rights to a majority in Parliament, which was often motivated by partisan political considerations, or to leave it to a few judges.[105]

CONCLUSION:
THE PROBLEMATIC DEFERRAL OF BASIC CONSTITUTIONAL ISSUES TO THE FUTURE

It is not possible for constitution makers to resolve all the basic issues in a constitution. In that sense, a finished constitution is unattainable. The framers of a constitution may defer some basic substantive issues to the future.[106] This is particularly inevitable when constitution making is for a nation with a heterogeneous population and in need of a constitution that can serve as an expression of national unity. It is worth noting that decision making in the Indian Constituent Assembly was largely based on consensus, and the decision cost of reaching a consensus on difficult constitutional issues was proportionately higher than the cost of a decision not to decide.

Constitution-making, particularly the adoption of eternity clauses, is an attempt on the part of a founding generation to control the contemporary preferences of future generations.[107] A deliberate omission of eternity clauses from the Indian Constitution is a typical case of constitution makers deliberately choosing

[101] 9 CONSTITUTIONAL ASSEMBLY DEBATES 1195.
[102] 7 CONSTITUTIONAL ASSEMBLY DEBATES 1000.
[103] JAPANESE CONSTI. art. 31.
[104] B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION - A STUDY, 232-235 (1966-68)
[105] *Supra* note 102.
[106] Dixon & Ginsburg, *supra* note 59 at 637.
[107] ANNE NORTON, REPUBLIC OF SIGNS: LIBERAL THEORY AND AMERICAN POPULAR CULTURE 124 (1st ed. 1993).

not to bind future generations over some constitutionally unalterable values.[108] When constitution makers defer constitutional issues to future generations without providing for the mechanisms of decision-making similar to that in the original constitution-making process, they are not properly understood to have deferred to subsequent constituent assemblies but to the two constituted powers, parliament, and constitutional court.[109] Indian Constitution is not an exemption.

The Indian Parliament has attempted to shoulder the burden of resolving the constitutional issues left to future generations. It has expressed its legislative leadership, for example, by adding two clauses[110] to the general equality guarantees under Article 15 tit giving primacy to Directive Principles over Fundamental Rights. These clauses rightly reflected the intention of the Constitution makers to provide protective discrimination to the socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.[111] On the other hand, role of the judiciary in resolving the issues is highlighted in the Constitution itself. While borrowing the idea of incorporating Directive Principles to the Constitution from the Irish Constitution, the framers slightly but significantly changed the wording of the relevant articles. The Irish constitution unambiguously stated that the principles of social policy outlined in Article 45 shall not be cognizable by any Court under any of the provisions of the Constitution. However, the Indian Constitution does not prohibit the courts from taking cognizance of the principles. According to Article 37, the provisions contained in Part IV shall not be enforceable by any court. However, it further says: "it shall be the duty of the State to apply these principles in making laws." Although Part IV primarily addresses the legislature, it seems that the judiciary as one of the three organs of the State is also bound by the mandates while performing its function of judicial law making.[112] The Supreme Court, for example, has read many socio-economic rights set out in the Directive Principles in Part IV into the judicially enforceable right to life under Article 21 in Part III.[113]

[108] Dixon & Ginsburg, *supra* note 59 at 637.
[109] Dixon & Ginsburg, *supra* note 59.
[110] Constitution (First Amendment) Act, 1951, s. 2; Constitution (Ninety-third Amendment) Act, 2005, s. 2.
[111] Dixon & Ginsburg, *supra* note 59 at 637.
[112] Balwani Rai v. Union of India, 1968 AIR All. 14 (India).
[113] Tushnet *supra* note 4 at 2204; A good illustration for this can be seen in the Pavement Dwellers Case (Olga Tellis v. Bombay Mun. Corp., S.C.R. 51, 55 (1985); A Directive principle laid out in Article 39(a) was read into the fundamental right under Article 21 Right to life. Art.39 (a) requires the State to direct its policy towards securing that the citizens have the right to an adequate means to livelihood.

Both Parliament and the judiciary, however, seem to have failed in resolving the core constitutional issues the framers of the constitution deferred to each generation. On one side, parliament took advantage of the relatively flexible procedure for amendment and took away or abridged the fundamental rights provided in Part III. By enacting the Constitution (24th Amendment) Act, 1971, it claimed the unlimited constituent power of the people under the guise of limited amending power of Parliament[114] and tried to establish legislative leadership of the Parliament in constitutional politics over the fundamental meaning of the Constitution. This raised concerns that the Parliament "may reconstitute the constitutional idea of India from a 'republic' into a 'monarchy', from a 'federal' to a 'unitary' form of governance, and from a 'secular' form to a 'theocratic' one."[115] On the other hand, the Supreme Court of India, in *Keshavananda,* declared the limits on the power of amendment implied in the basic structure of the Constitution that could be deciphered by it from time to time.[116] The Court actually endowed itself "with a broader supervisory jurisdiction over the fundamental meaning of the document and strengthened its powers in anticipation of battles ahead."[117] This raised the concerns about the Constitution "being 'purloined' by lawyers and judges".[118] This situation shows neither institutions could escape the dilemma the framers had in their mind regarding how to make fundamental changes to the Constitution.

The long history of power struggle between the institutions clearly illustrates that they have failed to develop healthy constitutional practices to resolve the constitutional issues that are taken to have been left to them. Recently, in the Fourth Judges Case[119], the Supreme Court struck down the National Judicial Appointments Commission Act and the 99th Constitution (Amendment) Act as unconstitutional as violating the basic structure of the constitution. The amendment and the law sought to reform the process of judicial appointments by replacing the current the judges-appointing-judges ("**Collegium**") model with a six member National Judicial Appointments Commission ("**NJAC**"). Both the Executive-appointment

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[114] Parliament amended both Article 368 and Article 13. It added Clause 3 to Article 13 which provided; "Nothing in this article shall apply to any amendment of this Constitution made under article 368." A notwithstanding clause was added to Article 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."

[115] Upendra Baxi, *Demoprudence versus Jurisprudence: The Indian Judicial Experience in the Context Of Comparative Constitutional Studies,* [2014] MQ LAW J I. 13

[116] Kesavananda Bharati, *supra* note 29.

[117] Gary Jeffrey Jacobsohn , *An unconstitutional constitution? A comparative perspective,* INT'L J CON LAW 460, 474(2006).

[118] Upendra Baxi, *The Indian Constitution as an Act of Theft and the Theft of the Indian Constitution: A Retrospect on Indian Constitutionalism'* (Speech delivered at the Tenth Anniversary Talk, Centre for the Study of Culture and Society, Bangalore, 8 September 2008) (Oct. 27, 2014, 3:31 PM), http://cscs.res.in/events_folder/abevents.2007-03-17.5334271271/cscsevent.2008-08-30.3568599867; See also, Upendra Baxi, *Outline of a "Theory of Practice" of Indian Constitutionalism* in RAJEEV BHARGAVA (ed), POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 92 (2008).

[119] Supreme Court Advocates-on-Record Association and another v. Union of India Writ Petition (Civil) NO. 13 of 2015.

model, which prevailed until 1993 and the current judges-appointing-judges model, have been found unsatisfactory "to preserve the independence of the judiciary while promoting efficiency and accountability in the system."[120] Undoubtedly, the independence of judiciary is part of the basic structure of the constitution.[121] However, the court in the Fourth Judges Case, went to the extent of affirming that the primacy of the judiciary, in the matter of appointment of Judges to the higher judiciary, is the only, or the best, method of ensuring the independence of the judiciary.[122] As rightly observed by the dissenting judge Justice Chelameswar, the argument that the primacy of the judiciary in the appointments process is the only way of securing independence has no basis in constitutional history or political theory.[123] "'The concept of independence is a complex one which subsumes in it concepts like impartiality, accountability, efficiency and respect for other institutions of governance."[124] The idea of constitutionalism proposes that all the organs of government should be legally limited in its powers and that the authority or legitimacy of each organ depends on its observing these limitations.[125] When a particular organ claims primacy and its complete independence without accountability, it loses its legitimacy or authority.

The failure and the incapacity of the institutions to resolve the constitutional issues indicate their lack of legitimacy to resolve the basic issues that puzzled even the Constituent Assembly. The ever widening horizons of the basic structure doctrine have transformed our democracy into 'juristocracy'. The relevant question Prof. Baxi succinctly put is: "whether this daring articulation of the Basic Structure doctrine merely marks an affair of judicial will to power or serves a whole lot better a profound difference for the futures of Indian constitutionalism and human rights".[126] As rightly observed by Rajeev Dhavan, India never devised a peoples' based constitution.[127] Only when we recover the truth in the myth of popular sovereignty, we can make the constitution as a site of political struggle.[128] The people of India need to develop alternative ways of constitutional politics outside the notions of the legislative leadership of the

[120] N. R. Madhava Menon, *A way to judicial independence* (November 20 2015) The Hindu http://www.thehindu.com/opinion/lead/a-way-to-judicial-independence/article7896653.ece?homepage=true
[121] S.P. Gupta v Union of India & Another, 1981 Suppl. SCC 87 (Per Bhagwati J.); Shri Kumar Padma Prasad v Union of India & Others, (1992) 2 SCC 428 (Per Kuldip Singh J.)
[122] Supreme Court Advocates-on-Record Association and another v. Union of India Writ Petition (Civil) NO. 13 of 2015.
[123] *Id.*
[124] N. R. Madhava Menon, *supra* note 121
[125] Waluchow, Wil, *Constitutionalism*, EDWARD N. ZALTA (ed.), THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2018 ed), https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/
[126] Upendra Baxi, *supra* note 38
[127] Rajeev Dhavan, *Book Review: Sarbani Sen, Popular Sovereignty and Democratic Transformations: The Constitution of India*, 8(2) INDIAN J. CONT L 204, 219 (2008).
[128] *Id.*

Parliament and adjudicatory leadership of the Court.[129] This points towards the constitutional necessity of developing possible conceptions about constitutional revision based on the practices of referenda or reconstituting a constituent assembly.

[129] Baxi, s*upra* note 38 at 18.