sections of the foundational text be treated as final and binding by both the legislature and the executive. Each walks a tightrope between rights as a transformative force capable of sheltering and assisting the weak, and rights as a preservative force deployed in defense of the status quo.

The editors have selected the Supreme Court of India to inaugurate the series. The Supreme Court of India has generated more than a half-century of constitutional jurisprudence in the world’s most populous democracy. It has wielded considerable formal power, including the exceptional power to strike down constitutional amendments. It serves an immensely complex society with an unequaled array of difficult problems and conflicts. We presently intend the next profile to focus on the Constitutional Court of South Africa. The editors will welcome readers’ comments on the project and on specific profiles.

The “basic structure” doctrine that invalidates any effort to amend the Constitution of India that would destroy its “basic structure” was initially enunciated by the Supreme Court of India in Kesavananda Bharathi v. State of Kerala, A.I.R. 1973 S.C. 1461.

The Supreme Court of India

Burt Neuborne*

The Supreme Court of India construes and enforces the world’s lengthiest, most complex Constitution, a mammoth document of more than 300 pages, with more than 370 articles, replete with multiple schedules (ten at last count), numerous lists, and more than eighty amendments. Perched at the...

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1 The classic study of the Indian Constitution is Granville Austin, The Indian Constitution: Cornerstone of a Nation (Oxford Univ. Press 1966) [hereinafter Austin, Cornerstone]. The length and complexity of the document is somewhat mitigated by the fact that approximately two-thirds of its provisions are technical, functioning more like organic statutes than constitutional provisions. For our purposes, the bulk of the Supreme Court’s work is devoted to construing the fundamental rights provisions of the Constitution, codified in articles 14–32, as amended by the first, fourth, sixteenth,
apex of a judicial system that serves the world’s most populous democracy, a nation of almost one billion persons residing in an area the size of the United States east of the Mississippi River, speaking eighteen major languages and displaying an astonishing religious, economic, and social heterogeneity, the Supreme Court of India has, over the past fifty-two years, played a central role in sustaining democratic institutions and the rule of law for almost a quarter of the world’s population. Against enormous odds, the Court has developed a coherent philosophy of textual interpretation, maintained, even enhanced, judicial independence in the areas of judicial appointments and transfers; preserved judicial review against sustained attack, even to the point of declaring several constitutional amendments unconstitutional; protected fundamental rights of speech, equality, religious freedom, and personal liberty, although it has sustained India’s repeated resort to preventive detention; and initiated a dramatic experiment, known as Public Interest Litigation (PIL), in an effort to make the rule of law a reality for the weak.

seventeenth, twenty-fourth, twenty-fifth, twenty-sixth, twenty-ninth, thirty-eighth, thirty-ninth; forty-second, and forty-fourth amendments; the judicial review provisions codified in article 13; the judicial appointment provisions codified in article 124; and the amendment procedure codified in article 368. See INDIA CONST. arts 13, 14–32, 124, 368.


4 Judicial independence is discussed infra at 480–85.

5 The preservation of judicial review is discussed infra at 485–95.

6 For a brief summary of aspects of the Indian Supreme Court’s fundamental rights jurisprudence, see infra at 495–509.

7 The effort, known as Public Interest Litigation, to transform the Supreme Court of India and the high courts of the states into engines for the enforcement of the rights of the poorest segments of Indian society is described infra at 500–4.
1. A brief overview of the constitutional text

The Constitution of India, promulgated on January 26, 1950, two years after the assassination of Mahatma Gandhi, establishes a bicameral parliamentary democracy modeled on Whitehall, a federal union that currently consists of twenty-five states, with a distinct tilt toward the center, and a unitary three-tiered judiciary made up of lower trial courts, a high court for each of the twenty-five states, and a Supreme Court. The values of an open society are carefully preserved in the fundamental rights articles of the Constitution. Born amid communal rioting and strife, and fearful of centrifugal forces that threatened to pull the nation apart, the Indian Constitution also sows the seeds of erosion of fundamental rights by explicitly authorizing preventive detention and increased executive power during an “emergency.”

The Supreme Court’s constitutionally mandated jurisdiction is remarkably wide and varied. In addition to appellate jurisdiction from the high courts, and advisory jurisdiction at the behest of the president, the Supreme Court of India is vested by article 32 with original jurisdiction to issue writs in defense of the fundamental rights listed in the Indian Constitution, including equality.
speech and assembly, personal liberty, and religious freedom.16 The judicially enforceable “fundamental rights” provisions of the Indian Constitution are set forth in part III in order to distinguish them from the nonjusticiable “directive principles” set forth in part IV, which establish the aspirational goals of economic justice and social transformation. The concept of nonjusticiable directive principles was drawn from the Constitution of Éire (1937).17 A similar distinction between a judicially enforceable Declaration of the Rights of Man and nonjusticiable economic goals is present in recent French constitutions, as well as the constitutions of several newly democratic nations in Eastern Europe.18 The Supreme Court’s jurisdiction is reinforced by an explicit grant of power under article 13 to invalidate any “law,” as defined in the article, that contravenes an enumerated fundamental right.19

The Court’s initial philosophy of interpretation was narrowly positivist, hewing closely to the literal text and reading each article of the Constitution as a self-contained unit. Thus, in A. K. Gopalan v. State of Madras,20 the Court’s first major test in 1950, a divided Court upheld widespread preventive detention of political dissidents under article 22 of the Constitution by a vote of four to two, rejecting pleas to test the political detentions against the guarantees of free speech, freedom of movement, and equality contained in articles 14 and 19. Moreover, the Gopalan Court declined to infuse the guarantee of due process of law, contained in article 21, with substantive content, holding that as long as the preventive detention statutes had been duly enacted in accordance with the procedures of article 22, the requirements of due process were satisfied.21

16 The right to property, once protected by articles 19 and 31, is no longer a fundamental right, having been removed in the late 1970s by a combination of the forty-second and forty-fourth amendments. Property rights remain protected as an ordinary right subject to parliamentary regulation. Ironically, the left’s victory in finally removing the fundamental right of property as a stumbling block to radical social reform coincided with the worldwide collapse of socialism. With the fall of the Soviet Union and the increasing reliance on markets as the dominant form of economic organization, little or no effort has been made by the Indian parliament to impose radical restrictions on private property. The struggle over the property clause, couched as a general struggle over judicial review, is described infra at 494–95.

17 Article 44, Bunreacht na hÉireann [Constitution of Ireland], 1937.


19 INDIA CONST. art. 13.


21 As a matter of strict originalism, the Gopalan Court was probably justified in declining to read substantive protections into article 21. The draftsmen of the Indian Constitution had apparently been warned by United States justice Felix Frankfurter to avoid the risk of a substantive due process clause and carefully drafted article 21 to limit the judiciary’s ability to apply it expansively. See AUSTIN, CORNERSTONE, supra note 1, at 103–5.
In *Maneka Gandhi v. Union of India*, however, reacting in 1978 to the trauma of the massive violations of human rights that had taken place during the 1975–77 emergency, the Supreme Court of India repudiated the narrow reading of the constitutional text espoused in *Gopalan* and embraced a broad, purposive approach to the enunciation and enforcement of fundamental constitutional rights that verges on natural law. Specifically, *Maneka Gandhi* recognized an implied substantive component to the term “liberty” in article 21 that provides broad protection of individual freedom against unreasonable or arbitrary curtailment. This paved the way for a dramatic increase in constitutional protection of human rights in India under the mantle of the Public Interest Litigation movement (PIL).

2. The establishment and preservation of judicial independence

The Supreme Court of India, as originally constituted in 1950, consisted of Chief Justice H. J. Kania, and six puisne justices. Since six of the seven original justices, including Chief Justice Kania, had served on the Federal Court established under British rule, the initial composition of the Supreme Court occasioned little comment. Over the years, the Court’s membership has been expanded five times by constitutional amendment to its current strength of twenty-six, made up of a chief justice and twenty-five puisne justices.

Although the Indian Constitution permits the appointment of any lawyer of high ability to serve on the Supreme Court, the justices are almost always selected from senior sitting judges of the high courts of the states, with some mild effort in recent years at geographical representation. Supreme Court justices serve until age sixty-five, with adequate pay and pension, and protection against financial retribution by an angry parliament. Justices are removable by a two-thirds vote of parliament. The Court sits in subject-matter benches appointed by the chief justice, with a constitutional bench of at least five justices. As many as thirteen justices have sat as a constitutional bench in a complex case calling into question the decision of an earlier court.

As of 2001, 136 judges had served as justices of the Supreme Court of India—115 Hindus (24 of whom identified themselves as Brahmin, with 2 from the Scheduled Castes), 13 Muslims, 4 Christians, 2 Sikhs, and 2 Parsi.

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23 The one formal effort to remove a justice, in 1993, failed to receive a two-thirds majority. See V. N. SHUKLA, CONSTITUTION OF INDIA 417 (Eastern Book Co. 9th ed. 1994).

24 A bench of thirteen justices decided *Kesavananda*, for example, which overturned an earlier decision in *Golak Nath* by a nine-justice bench.

25 The term “Scheduled Caste” refers to untouchability. Castes that were classified as requiring affirmative action have been included in one of the schedules to the Constitution. *India Const.* sched. 2.
Two justices have been women. The current Court consists of twenty-one Hindus, two Muslims, one Christian, and one Parsi. One justice is a woman, and there is one vacancy. Until 2000, no member of a Scheduled Caste or Tribe sat on the Court. In addition to constituting the benches, India’s chief justice exercises significant power over the appointment of justices to the Supreme Court and the high courts, and plays a major role in any decision to transfer high court judges to another state. Thus, appointing a chief justice is a significant political event. When Chief Justice Kania, India’s first chief justice, retired at sixty-five, the six sitting justices insisted that the principle of seniority be used in selecting a successor. When the executive (that is, the prime minister and Council of Ministers) expressed reluctance, the entire Supreme Court threatened to resign. The executive relented, and with the appointment of Chief Justice M. Patanjali Sastri in November 1951, the principle of seniority in the appointment of the chief justice of India was established. Since then, thirty of the thirty-two persons chosen as chief justice of India—and all chief justices since 1978—have been appointed on the basis of seniority, effectively removing the process from politics.

Although the executive has sometimes grumbled at the seniority system, it has confronted it only twice, each time in an effort to punish a sitting Supreme Court justice for disagreeing with the government’s position. The first occasion arose during the vigorous struggle between parliament and the Supreme Court over the survival of judicial review. The government of Indira Gandhi had become increasingly frustrated over what it perceived as judicial blockage of needed social legislation, often under the guise of enforcing the property provisions of the Constitution. Retaliation took the form of seeking to amend the Constitution to eliminate the Court’s power to exercise judicial review. The Court responded in 1973 in Kesavananda Bharathi v. State of Kerala with an assertion, by a vote of seven to six, of the power to set aside constitutional amendments that altered the “basic structure” of the Indian Constitution.

26 In 1997, the president created a stir by urging that greater efforts be made to appoint members of Scheduled Castes and Tribes to the appellate courts. The chief justice responded by stressing the need for appointments based solely on merit. See M. P. Singh, Securing the Independence of the Judiciary—The Indian Experience, 10 IND. INT’L & COMP. L. REV. 245, 278 (2000). On August 8, 2000, Justice K. G. Balakrishnan was the first member of a Scheduled Caste to be appointed to the Supreme Court. See Palash Kumar, Objection, Your Honour, The Week, Aug. 13, 2000, available at http://www.the-week.com/20aug13/events8.htm.

27 In addition to the reluctance to appoint Justice Sastri to succeed Chief Justice Kania, in 1971, the executive initially balked at appointing Justice Jayantilal Chhotalal Shah to succeed Chief Justice Mohammed Hidayatullah. In 1997, the president was reluctant to appoint Justice Madan Mohan Punchhi to succeed Chief Justice Jagdish Sharan Verma. On each occasion, the principle of seniority was eventually respected. For details on these controversies regarding the appointment of chief justices, see Singh, supra note 26.

especially its commitment to judicial review of assaults on fundamental rights. The executive responded the very next day by passing over three senior justices who had been in the majority in *Kesavananda*—Justices J. M. Shelat, Kowdoor Sadananda Hegde, and Amnar Nath Grover—and appointing Justice A. N. Ray, who had consistently supported the government’s position, as the new chief justice to succeed retiring Chief Justice Sarv Mittra Sikri. Although the three superseded justices immediately resigned, the rest of the Court did not echo the threat of resignation en masse that had preserved the seniority system in 1951. Accordingly, Chief Justice Ray became the first politically appointed chief justice and served from 1973 to 1976.²⁹

The tension between the Court and the Indira Gandhi government reached its peak during the emergency declared by Gandhi between 1975 and 1977, during which democracy and civil liberties were suspended in India. In 1976, in *A. D. M. Jabalpur v. Shiv Kant Shukla*,³⁰ a four-to-one majority of the Court declined to challenge any aspect of the emergency, holding that all access to the courts by political detainees could be suspended during a presidentially declared emergency. Justice Hans Raj Khanna dissented, arguing that access to the courts could not be suspended, even during an emergency. When Chief Justice Ray retired in 1976, the Gandhi government superseded Justice Khanna, even though he was almost sixty-five, and appointed Chief Justice Mirza Hameedullah Beg, who had also supported the government’s positions throughout. Justice Khanna resigned in protest and became a symbolic figure of great importance, both as an advocate for judicial independence, and as an example of great moral courage.

With the end of the emergency in 1977, and the fall of the Gandhi government after the 1977 elections,³¹ the pendulum swung dramatically back in favor of the seniority principle. When the Law Commission reaffirmed the seniority principle in its 1978 report, it became an unassailable, although unwritten, part of the Indian Constitution.

²⁹ Some have speculated that the real reason for the supersession was to force the resignation of Justice Hegde to prevent him from reviewing the merits of the effort to prosecute Indira Gandhi for alleged election fraud in connection with her 1971 victory over Raj Narain. Justice Hegde had earlier ruled in favor of the prosecution on an evidentiary matter and was feared by the supporters of Gandhi. Narain’s suit was ultimately dismissed on the merits by the Supreme Court, but not before it became a landmark in the preservation of judicial review. See Austin, *Working a Democratic Constitution*, supra note 2, at 281.


³¹ For reasons that are still shrouded in mystery, Indira Gandhi, after successfully suppressing virtually all democratic activity and imposing massive press censorship for almost two years, abruptly terminated the emergency and called for general elections in 1977. Some have speculated that she was a victim of her own censorship, since she completely misread the electorate’s leanings. The Congress Party suffered a crushing defeat at the hands of an unstable political coalition—the Janata Party—that pledged to restore democracy. See Austin, *Working a Democratic Constitution*, supra note 2, at 393–95.
While adherence to the seniority principle minimizes the role of politics in selecting a chief justice, the practice has been criticized, first, because it is not necessarily congruent with merit, and, second, because it results in a revolving-door chief justiceship. Since Supreme Court justices have always been chosen from the ranks of the senior judges of the high courts (who must retire at age sixty-two), Supreme Court justices tend to be mature individuals by the time they are appointed. Seniority ages them further as they await the serial retirements of justices senior to them. The net result is that by the time a justice becomes chief justice, it is often almost time to retire. Terms of service of less than one year are not uncommon, with thirty-two chief justices serving in fifty-two years.32 Certainly, such short tenure in office prevents the accumulation of inappropriate personal power; it also makes it virtually impossible for a chief justice to initiate significant changes in a system that cries out for administrative reform, or to make a lasting substantive mark on the law.33

If the selection of the chief justice of India has been taken out of politics, the appointment of the justices themselves—one of whom will predictably become chief justice someday—has been a constant source of political tension. The controlling constitutional text, article 124(2), is ambiguous; it calls for consultation between the executive and the sitting chief justice of India but does not specify who would predominate in case of disagreement.34 We know

32 Chief Justice Yeshwant Vishnu Chandrachud served for almost seven years, the longest tenure. The shortest tenures belong to Chief Justice Shah, who served for thirty-four days, and Chief Justice Kamal Narain Singh, who served for only seventeen days. The last chief justice, G.B. Pattanaik, served only forty days in office. The current chief justice, Bupinder Nath Kirpal, who took office on December 20, 2002, will have a tenure of about one and a half years. See The Supreme Court of India website, at http://www.supremecourtofindia.nic.in/new_s/wl_p1.htm.

33 The importance of an energetic reforming chief justice is illustrated by Chief Justice Aziz Mushabber Ahmadi’s initiative in 1994 that led to increased computerization of the Court’s records, and a more uniform method of administration, resulting in a reduction of the Court’s backlog from 130,000 cases to a less staggering, but still troubling 30,000. See Hiram Chodosh et al., Indian Civil Justice Reform: Limitation and Preservation of the Adversarial Process, 30 N.Y.U. J. INT’L L. & POL. 1, 11 (1997). The backlog numbers may be inflated by the large number of public interest petitions lodged with the Court. It is probably not a coincidence that Justice Ahmadi’s term extended for the relatively long tenure of two and a half years.

34 Article 124(2) of the Indian Constitution states:

Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

(a) a Judge may, by writing under his hand addressed to the President, resign his office;
(b) a Judge may be removed from his office in the manner provided in clause (4).

INDIA CONST. art. 124(2).
only that the draftsmen rejected both the British model of executive appointment, and the United States model of senatorial confirmation. During the early years, the executive’s influence appears to have predominated despite the need for consultation with the chief justice as a representative of the judiciary, because, in part, the short tenure of chief justices made it difficult to build a personal base. Persistent criticisms emerged, arguing that the appointment process was unduly political and fraught with favoritism.

The appointment controversy was resolved, at least temporarily, in the three “Judges’ Cases,” as they were known, decided between 1982 and 1999, in which the Supreme Court forged a unique appointment procedure that minimizes political input while assuring broad “participatory consultations” concerning proposed appointments to both the Supreme Court and the high courts of the states. The First Judges’ Case, S. P. Gupta v. Union of India, involved the power to transfer high court judges from one state to another, rather than the power to appoint Supreme Court justices. When one wades through the massive separate opinions of the seven justices who made up the bench, a decided tilt toward the executive branch emerges, appearing to hold that when disagreements arise between the executive and the chief justice over an appointment or a transfer, priority should be given to the executive. General dissatisfaction with both the theory and practice under the First Judges’ Case led, in 1994, to the filing of the Second Judges’ Case, an article 32 petition designed to force the government to fill existing judicial vacancies. The Court referred the matter to a constitutional bench to reconsider the appointment issue. The Second Judges’ Case prescribed an elaborate process of “participatory consultation” among the chief justice, the executive, the senior justices of the Supreme Court, and the justices of an affected high court. When the smoke cleared, the Second Judges’ Case appeared to vest priority in the chief justice, speaking on behalf of the judiciary. Concern quickly emerged that too much power had been ceded to the chief justice, leading the president in 1999 to commence the Third Judges’ Case by invoking the advisory jurisdiction of the Supreme Court in an effort to rethink the appointment/transfer process.

The Third Judges’ Case imposes significant procedural constraints on the chief justice and vests significant power in a collegium consisting of the chief justice and the four Supreme Court justices next in seniority, one of whom will almost always be the next chief justice. The process aims at consensus. It also requires exhaustive consultation with the executive and vests each of the participants with significant input, while seeming to place the ultimate

18 In the unlikely event that the next chief justice is not among the four most senior justices, the opinion calls for expanding the collegium to the fifth most senior justice.
appointment power in the hands of a majority of the Supreme Court collegium. The process appears to assure a significant, perhaps excessive, judicial independence in the appointment of Supreme Court justices. Whether it is wise to vest so much self-perpetuating power in a culturally homogenous judicial elite with the power to trump majority will is a difficult question. The challenge is to preserve judicial independence, while simultaneously preventing the emergence of a hermetically sealed institution. Whether the judiciary will use its power wisely to expand the participation of Scheduled Castes and women in the judicial process remains to be seen.

The final challenge to judicial independence involved an effort by Indira Gandhi’s government to transfer eighteen high court judges, including four chief judges, from one state to another, in 1976, to punish them for having entertained habeas corpus petitions during the emergency prior to the Supreme Court’s unfortunate surrender in A. D. M. Jabalpur v. Shiv Kant Shukla.39 The first challenge to the punitive transfers, courageously filed by Justice Sankalchand Himatlal Sheth of the High Court of Gujarat, was not decided until the emergency had ended. The new Janata Party government agreed to rescind the transfers, thus mooting the case. Nevertheless, the Supreme Court ruled that, although punitive transfers were unlawful, the consent of a high court judge was not required as a condition of a transfer.40 The justices wished to preserve the ability to transfer high court judges to prevent corruption and local favoritism. Under the three Judges’ Cases, the power to transfer, without the consent of the judge, but with the consent of the collegium and the advice of the affected courts, was reaffirmed. It is now national policy that at least one-third of all high court judges be from a state other than the one in which they preside.

3. The preservation of judicial review

The relatively polite disputes over the judicial appointment process pale before the bare-knuckle brawl inspired by the issue of judicial review in India. In 1950, the emerging Indian nation faced crucial challenges: a threat to its very existence caused by widespread communal rioting and religious and social strife, and a threat to its moral integrity caused by the persistence of vast disparities in wealth traceable, in part, to injustices dating from British rule. Parliamentary attempts to address both challenges placed the Supreme Court, committed to the enforcement of fundamental constitutional rights, on a collision course with the political branches.

The first confrontation involved efforts to censor communist and other dissident voices in the years immediately after independence. In three celebrated

cases, the newly minted Supreme Court invalidated efforts at censorship by invoking the free speech rights protected by article 19(1). In *State of Bihar v. Shailabala Devi*, the Court rejected the contention of the government of Bihar that a pamphlet constituted an incitement to violence. In *Brij Bhushan v. State of Delhi*, the Court struck down a requirement of precensorship contained in the East Punjab Public Safety Act as a prior restraint. Most importantly, in *Romesh Thapar v. State of Madras*, the Court rejected an effort by the government of Madras to ban *The Crossroads*, a communist-leaning weekly, and invalidated the state’s seditious speech laws as unconstitutionally overbroad.

The government’s response was to invoke article 368, which provides for amendment of the Constitution by a two-thirds vote of parliament, in order to amend the unwelcome judicial free speech decisions out of existence. The first amendment to the Constitution of India was passed in 1951. It modifies article 19 to permit “reasonable restrictions” on speech “in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation, or incitement to an offence.” During the debate over the speech provisions of the first amendment, the All-India Civil Liberties Council, a successor to the Indian Civil Liberties Union whose first president was Rabindranath Tagore, sought the advice of Roger Baldwin, then chairman of the International League for the Rights of Man and a principal founder, in January 1920, of the American Civil Liberties Union.

Baldwin noted that the inclusion of the phrase “reasonable restrictions” in the proposed amendment provided the courts with the needed reviewing power to prevent undue censorship. He proved correct. The amendment to section 19 added little to the government’s power to censor in an appropriate case, and the inclusion of the qualifier “reasonable restrictions” allowed the judiciary the needed scope to review government actions. But a dangerous precedent had been set. Henceforth, judicial protection of fundamental rights

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44 The invocation in *Romesh Thapar* of a doctrine of overbreadth in free speech cases predated the United States Supreme Court’s First Amendment overbreadth doctrine by twenty years. See *Gooding v. Wilson*, 405 U.S. 518 (1972).
45 Article 368 requires ratification by half the legislatures of the states when a constitutional amendment so alters certain structural aspects of the Constitution that it affects the states. *India Const.* art. 368. While later amendments aimed more broadly at judicial review were sent to the states for ratification, the first amendment was not deemed to require state ratification.
was to be subject to reversal by a two-thirds vote of parliament pursuant to the amending process.47

Unlike the relatively mild challenge posed by efforts to alter the language of the free speech protections of article 19, the issue of property proved quite tumultuous. The repeated collisions between the Supreme Court’s protection of fundamental rights of property, guaranteed by articles 31 and 19, and parliament’s early efforts to pass economic reform legislation, resulted in the first serious challenge to judicial protection of fundamental constitutional rights.

Land reform was at the top of the government’s agenda in 1950. And at the top of the land reform agenda was abolition of the zamindars, tax farmers dating from the Moghul period who were entitled to collect fees from small landholders. The British Cornwallis Code in 1793 had improperly turned zamindars into de facto landlords. Faced with abolition, the zamindars argued that pursuant to the Constitution their property rights could be abrogated only by the payment of just compensation. When high courts in several states struck down efforts to take over the management of the zamindars’ estates and to pay deferred compensation out of future profits, the government again resorted to the amendment process, establishing the ninth schedule in a new article 31A that lists certain land reform statutes, including the zamindari abolition laws, and places them beyond the review powers of the Supreme Court. The goal was to insulate the reallocation of the estates from fundamental rights review. When the zamindars challenged the use of the article 368 amendment process to abrogate fundamental property rights, the Supreme Court, in Shankari Prasad Singh v. Union of India,48 resoundingly upheld parliament’s plenary power to amend the Constitution by a two-thirds vote.

Despite the setback in Shankari Prasad, the zamindars continued to argue that their compensation was inadequate. In State of Bihar v. Kameshwar Singh,49 the Supreme Court struck down the Bihar Land Reform Act, despite the provisions of schedule nine removing it from judicial scrutiny, holding that a judicially enforceable just-compensation obligation survived the first amendment.50

47 The free speech guarantee of article 19 was amended once more in 1963 by the sixteenth amendment, which authorizes “reasonable restrictions” on speech in order to preserve “the sovereignty and integrity of India.” The sixteenth amendment, precipitated by the 1962 war with China, was designed to deter discussion of secession and separatism. See C.I.S. Part II-A (1963), Constitution (Sixteenth Amendment) Act of the Indian Parliament, Oct. 5, 1963.

48 A.I.R. 1951 S.C. 458. The amendment to article 31, insulating the zamindari land reform acts from judicial review, was included in the same first amendment bill that amended the free speech provisions of article 19. See supra note 46.


50 The Kameshwar Singh Court upheld the Uttar Pradesh and Madhya Pradesh zamindari acts, each of which contained more generous compensation than the Bihar act. See C.I.S. Part VII (1950), Bihar Land Reforms Act, State of Bihar.
The zamindars returned to the field in *Karimbil Kunhikoman v. State of Kerala*, when the Supreme Court struck down the State of Kerala’s zamindari act because of differential compensation patterns in violation of the equality provisions of article 14. The antireview provisions of article 31, which had been added by the first amendment, were avoided by narrowly construing the term “estate” to exclude zamindari holdings. In response to *Karimbil Kunhikoman*, the seventeenth amendment was promptly enacted expanding the definition of “estate” and placing additional agrarian reform acts into the nonreviewable ninth schedule. When the seventeenth amendment was initially upheld against attack by the zamindars in *Sajjan Singh v. State of Rajisthan*, the zamindars appeared to be checkmated, at least temporarily.

The next major challenge to judicial review involved affirmative action. Next to land reform, efforts to advance the status of untouchables and members of the other backward classes were highest on the government’s social agenda. The reservation of places for members of these groups in government-funded educational institutions and government employment settings were quickly challenged by high-caste Brahmins, who argued that reservation of places based on caste violated the fundamental right of equality protected by articles 14 and 15(1). When the Supreme Court agreed in *State of Madras v. Dorairajan*, striking down the reserved slots in the medical school entering class, the government once more invoked the amendment process to add language to article 15 explicitly authorizing affirmative action in favor of untouchables and “other backward classes.”

Having challenged the government’s land reform and affirmative action policies in 1951 and 1952, the Supreme Court turned to nationalization projects in 1954, ruling, in *State of West Bengal v. Bela Banerjee*, that inadequate compensation had been paid for the seizure of land needed to house refugees from East Pakistan, and, in *Dwarkadas Srinvas v. Sholapur Spinning and Weaving Co.*, that

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55 The amendment to article 15 was also included in the first amendment. Strictly speaking, the addition of article 15(4) should not be viewed as a challenge to judicial protection of fundamental rights. Amending the equality clauses to achieve a substantive conception of equality, as opposed to the purely formal conception advanced in *Dorairajan*, is not a challenge to judicial review but a reasoned disagreement about the meaning of the right of equality.


57 A.I.R. 1954 S.C. 199. The government had argued that deferred compensation was payable from the company’s profits. See also Sughir Ahmad v. State of Uttar Pradesh, 1955 (1) S.C.R. 707 (invalidating effort to nationalize bus transportation).
the takeover of a plant’s management constituted a compensable taking, triggering an immediate right to compensation. Once again, the government turned to the amending process, persuading parliament to enact the fourth amendment, which added seven agrarian reform laws (including the statute involved in Bela Banerjee) to the list of nonreviewable statutes contained in the ninth schedule established by the first amendment. The new amendment also provided, in articles 31 and 31A, that a management takeover is not a compensable taking, which—the amendment stipulated—does not occur until the actual transfer of property.\footnote{The fourth amendment was, therefore, carefully tailored to reverse the precise holdings of Bela Banerjee and Sholapur Spinning and Weaving Co. C.I.S. Part II (1955), Constitution (Fourth Amendment) Act of the Indian Parliament, Apr. 27, 1955.}

The zamindars, frustrated by the first, fourth, and seventeenth amendments, returned to the offensive in \textit{Golak Nath v. State of Punjab},\footnote{A.I.R. 1967 S.C. 1643.} arguing that the Punjab Land Reform Act violated articles 31, 19, and 14, and that the provisions of the first, fourth, and seventeenth amendments, purporting to shield the act from judicial review, were themselves unconstitutional. The \textit{Golak Nath} Court divided six to five. The majority opinion, written by Chief Justice Subba Rao, held that a constitutional amendment could not render a fundamental right unenforceable, reasoning that the term “law” in article 13(2) includes an amendment to the Constitution enacted pursuant to article 368. Rather than invalidate the three amendments and the ninth schedule, however, the \textit{Golak Nath} majority resorted to prospective overruling, warning parliament to cease interfering with fundamental rights.\footnote{Shortly after delivering the bombshell in \textit{Golak Nath}, Chief Justice Subba Rao resigned to run for president with the support of the Swatantra Party, Congress’s principal non-Marxist opposition. He was soundly defeated, and he has been criticized for politicizing the Court. See Austin, Working a Democratic Constitution, supra note 2, at 202.}

In 1967, the ruling Congress Party lacked the two-thirds majority needed to overturn \textit{Golak Nath} by constitutional amendment, although the opinion gave Indira Gandhi the ability to cast the judiciary as the enemy of social progress, thus setting the stage for her overwhelming electoral victory in 1971. Emboldened by \textit{Golak Nath}, the Supreme Court in \textit{R. C. Cooper v. Union of India} ruled ten to one that an ordinance nationalizing the nation’s banks was unconstitutional because inadequate compensation was being offered for the banks.\footnote{A.I.R. 1970 S.C. 564. The Court used the test for adequacy of compensation initially set forth in Bela Banerjee.} In response to \textit{R. C. Cooper}, parliament enacted the Second Bank Nationalization Act, containing more generous compensation provisions. The new act escaped challenge.

\footnote{Justice A. N. Ray was the sole dissenter, arguing that the judiciary lacked competence to second-guess the adequacy of compensation unless the compensation was “illusory.”}
The Supreme Court then turned to the constitutionality of the effort to abolish “privy purses,” a fancy name for annual payments made to the former rulers of the “princely states” that had ceded sovereignty to India in return for a promise of yearly income. Indira Gandhi’s government first sought to amend the Constitution as a way to eliminate the annual payments. Although the amending bill narrowly passed the lower house by a two-thirds majority, it failed in the upper house by a margin of one third of the vote. Indira Gandhi reacted by withdrawing diplomatic recognition from the erstwhile princes, thereby cutting off their payments. The former princes responded with an article 32 proceeding in the Supreme Court challenging the government’s power to reneg on its promises.

The Supreme Court ruled in *Madhav Rao Scindia v. Union of India*, that under the foreign affairs provisions of the Constitution the government could not unilaterally “derecognize” the former princes. Accordingly, the Court ordered the payments restored.

Stung by the Supreme Court’s decisions regarding bank nationalization and privy purses and still smarting over the *Golak Nath* doctrine, Indira Gandhi called for new elections in 1971 and ran against the Court. She won an overwhelming victory. Armed with 350 seats in the lower house, the Gandhi government struck back at the Supreme Court by enacting four major constitutional amendments. The twenty-fourth amendment overturned the *Golak Nath* doctrine by explicitly excluding constitutional amendments from the reach of article 13, thus reestablishing parliament’s power to amend the constitution at will. The twenty-fifth amendment precluded review of the adequacy of compensation. It also expanded dramatically the principle of the ninth schedule, which had been limited to agrarian reform bills, by removing from judicial scrutiny all statutes designed to implement the Constitution’s “directive principles,” including statutes having nothing to do with property rights. The twenty-sixth amendment abolished the privy purses, and the twenty-ninth placed the Kerala Land Reforms (Amendment) Act of 1969 within the unreviewable ninth schedule.

On December 3, 1971, after Pakistan had attacked in the Punjab, Indira Gandhi declared India’s second presidential emergency and initiated a series of nationalizations under the aegis of the twenty-fourth and twenty-fifth

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64 Unlike earlier amendments designed to curb the judiciary, amendments twenty-four, twenty-five, twenty-six, and twenty-nine were ratified by the states, as well as being passed by a two-thirds vote of both houses of parliament. See C.I.S. Part II (1971), Constitution (Twenty-fifth Amendment) Act of the Indian Parliament, Apr. 20, 1972; C.I.S. Part II (1971), Constitution (Twenty-sixth Amendment) Act of the Indian Parliament, Dec. 28, 1971; C.I.S. Part II (1972), Constitution (Twenty-ninth Amendment) Act of the Indian Parliament, Jun. 9, 1972.

65 The first emergency had been declared in connection with the 1962 war with China. For details of events leading to emergencies in India, see Iyer, supra note 13.
amendments. The Supreme Court responded with *Kesavananda Bharathi v. State of Kerala*.

In *Kesavananda*, a religious leader challenged the application of the state of Kerala’s land reform act to the holdings of a religious community. Since the twenty-ninth amendment had placed the act within the purview of the ninth schedule, and since the twenty-fifth amendment had immunized those statutes designed to implement directive principles from judicial scrutiny, the Supreme Court was confronted squarely with the power of parliament to amend the Constitution so as to derogate from fundamental rights of property and religious freedom. Sitting in a thirteen-justice constitutional bench, the *Kesavananda* Court unanimously upheld the twenty-fourth amendment, overruling *Golak Nath* and holding that parliament possesses broad power under article 368 to amend the Constitution, even when the amendment affects fundamental rights. The majority also upheld the bulk of article 25, including the limits on judicial review of the adequacy of compensation, and all of article 29, including the use of the ninth schedule to immunize the Kerala agrarian reform law from judicial scrutiny.

On the other hand, the *Kesavananda* majority held, by a vote of seven to six, that the provision of the twenty-fifth amendment creating article 31C, which purported to place all statutes designed to implement the directive principles beyond the review power of the judiciary, was unconstitutional because it contravened the “basic structure” of the Indian Constitution by virtually eliminating the judiciary’s role as the guardian of fundamental rights.

Constitutional amendments, reasoned the majority, must respect the “basic structure” of the Constitution since it is doubtful that the founders wished to authorize the destruction of the Constitution by the process of internal amendment. A change in basic constitutional structure, reasoned the majority, should come only from a new constituent assembly.

The procedures surrounding the *Kesavananda* decision were hardly a model of judicial propriety. The constitutional bench contained thirteen justices, five of whom had been appointed shortly before the proceedings in an apparent effort to pack the Court. The hearings lasted for seventy days, with petitioners...

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67 The Court noted that nearly all statutes could be linked to the implementation of a directive principle, placing the work of parliament beyond judicial review even when it had nothing to do with remedying economic injustices. Under the twenty-fifth amendment, statutes regulating speech, equality, and personal liberty would be immune from judicial scrutiny as long as they were linked to the implementation of a directive principle. See Constitution (Twenty-fifth Amendment) Act, supra note 64.

68 Although the Supreme Court has never attempted a comprehensive definition of the scope of “basic structure,” individual justices have included the following ideas in the concept: supremacy of the Constitution; the existence of a republic; the basics of democratic government; the secular nature of the state; separation of powers, federalism, and the existence of a welfare state; the unity and integrity of India; the sovereignty of India; parliamentary democracy; and judicial review.
arguing for thirty-three days. The chief justice’s imminent retirement almost scuttled the case, leading to charges that the government was engaging in conscious stalling tactics, and that at least one justice favoring the government was feigning illness to delay the matter. The thirteen justices eventually issued eleven opinions, making it close to impossible to distill a single holding, forcing nine justices, including two who were not in the majority, to join in an extraordinary “summary” of the Court’s rulings that eventually became authoritative. Despite the procedural foibles, however, and the exasperating vagueness of the idea of “basic structure,” Upendra Baxi was prescient when he described the Kesavananda opinion as “the constitution of the future.”

Indira Gandhi was not amused. The government viewed the case as a major defeat and sought to retaliate by superseding the three members of the majority who were next in line to become chief justice, in favor of Justice A. N. Ray, who had supported the government’s position.

On June 26, 1975, the atmosphere darkened. Claiming concerns for internal security, the executive declared a presidential emergency, the first to be triggered by domestic events. Mass arrests of opposition leaders occurred throughout the country. The government ordered the electricity shut off to prevent newspaper coverage. Fundamental rights were suspended throughout India, gatherings of more than five persons were forbidden, and the number of those in preventive detention swelled to more than 100,000. Access to the courts was suspended, whether it was to enforce article 19 or to seek review of preventive detention imposed on secret grounds. Speech and press rights were extinguished to the point where it was forbidden to report debates in parliament. For the next two years, democracy ceased to exist in India.

Although legitimate concerns existed over rioting in Gujarat and Bihar, many believe that the emergency was designed, at least in part, to protect Indira Gandhi from judicial proceedings designed to drive her from office. In March 1971, as part of her smashing nationwide victory, Gandhi had defeated Raj Narain, a flamboyant opposition leader, in a particular constituency in Uttar Pradesh. Narain argued that the election was tainted, claiming that Gandhi had exceeded her spending ceiling since certain third-person expenditures should have been allocated to her campaign, and that she had improperly used government officials to further her cause. But no serious charges of election fraud were made.

Narain commenced a criminal proceeding against Gandhi, who was serving as prime minister. He wanted the election results overturned and Gandhi


70 Seven thousand lawyers who practiced in the Bombay high court boycotted the Court on the day Chief Justice Ray took the oath of office; three thousand lawyers boycotted the Madras high court several days later in sympathetic protest. See Austin, Working a Democratic Constitution, supra note 2, at 286.
barred from holding parliamentary office as a convicted felon. When an Allahabad high court judge upheld the criminal charges, on June 12, 1975, Indira Gandhi’s political future was thrown into doubt because, if barred from parliament because of election fraud, she could no longer serve as prime minister. On June 24, 1975, Justice Krishna Ayer issued a partial stay of the lower court judgment, permitting Gandhi to remain in office as prime minister pending appeal, but denying her the right to speak or vote in parliament. In effect, Gandhi’s political future was now in the hands of the Supreme Court of India, hardly Gandhi’s favorite forum. Two days later, the emergency was declared, and democracy was suspended in India with appalling consequences.

The government moved quickly to protect Gandhi from judicial attack by the familiar route of constitutional amendment. The thirty-eighth amendment precluded judicial review of the proclamation of a presidential emergency, or of laws enacted during the emergency that conflicted with fundamental rights.71 The thirty-ninth amendment barred judicial inquiry into the election of the prime minister and speaker of the lower house.72 The fortieth amendment placed censorship laws into the ninth schedule in an effort to insulate them from judicial review.73

Raj Narain immediately challenged the thirty-ninth amendment in connection with the pending appeal from Gandhi’s conviction. In Smt. Indira Gandhi v. Raj Narain,74 a nine-justice bench unanimously reversed Gandhi’s criminal conviction on the merits. Five justices, however, including two staunch supporters of the government, Chief Justice Ray and Justice Beg, invalidated the thirty-ninth amendment under the “basic structure” doctrine. While the five justices each gave different reasons, the cumulative effect of the judgment was to reassert Kesavananda in the teeth of the emergency.75

Unfortunately, the Court was not willing to defy the emergency when it really counted. In A. D. M. Jabalpur v. Shiv Kant Shukla,76 a five-justice bench chosen strictly on the basis of seniority, containing three of the Court’s leading lights, Justices Yeshwant Vishnu Chandrachud, P. N. Bhagwati, and Hans Raj

75 Shortly after the decision in the Gandhi election case, Chief Justice Ray convened a thirteen-justice bench to reconsider Kesavananda, but nothing came of the project. For details about the aborted attempt, see AUSTIN, WORKING A DEMOCRATIC CONSTITUTION, supra note 2, at 328–33.
Khanna, failed to support a number of courageous high court judges who had continued to offer habeas corpus review to detainees despite the emergency laws suspending access to the courts. Instead, four members of the Court, including Justices Chandrachud and Bhagwati, ruled that all access to the Courts could be cut off during a presidential emergency. Only Justice Khanna dissented, and he was soon superseded as chief justice.

Many believe that Shiv Kant Shukla was the low point in Indian Supreme Court history. Indeed, many trace the remarkable explosion of energy and vigor that characterized the Court beginning in 1978, to a desire to restore the Court’s prestige as a protector of fundamental rights.

Frustrated by the inability to eliminate the “basic structure” doctrine, but emboldened by the Court’s weakness in Shiv Kant Shukla, the government once more resorted to the amendment process. The forty-second amendment, passed unanimously in both houses, virtually eliminated the judiciary from the Indian Constitution in a twenty-page bill that: (1) insulated the 1971 election from review; (2) strengthened the central government by authorizing the suspension of state governments under certain circumstances; (3) eliminated the judiciary’s power to review constitutional amendments, including amendments affecting fundamental rights; (4) required a two-thirds vote to invalidate a statute; (5) stripped the Supreme Court of jurisdiction to review state laws; (6) stripped the high courts of the states of the power to review central laws; (7) provided that implementation of the directive principles trumped enforcement of fundamental rights; (8) excluded courts from all election disputes; and (9) provided that certain antinational activities were no longer protected by the free speech protections of article 19. Then, mysteriously, in March 1977, at the height of her power, Indira Gandhi rescinded the emergency and called for new elections.

The 1977 elections dramatically rebuffed the Gandhi government. Indeed, Raj Narain defeated Gandhi in the Uttar Pradesh constituency by more than 55,000 votes. The new Janata government immediately sought to repeal the forty-second amendment. While adequate support existed in the lower house, the Congress Party retained sufficient power in the upper house to block any repeal with which it disagreed. The forty-third amendment quickly passed both houses, restoring concurrent jurisdiction, repealing the supermajority requirement in constitutional cases, and repealing the override of article 19 for antinational activities. It proved impossible, however, to marshal the

77 For a discussion of the punitive transfers of the eighteen high court judges who defied the emergency by offering habeas corpus review to detainees, see Austin, Working a Democratic Constitution, supra note 2, at 521–27.


votes needed for a complete repeal of the forty-second amendment. Instead, the forty-fourth amendment provides that access to the courts to protect life, liberty, or other rights in article 19 cannot be suspended, even in an emergency.\textsuperscript{80} In order to obtain the votes needed to pass the forty-fourth amendment, property was deleted as a fundamental right, and demoted to an ordinary right.

Since the upper house had successfully blocked the effort to repeal the provisions of the forty-second amendment that placed the directive principles above fundamental rights,\textsuperscript{81} it remained for the Supreme Court to deliver the coup de grâce to the remaining provisions of the forty-second amendment in \textit{Minerva Mills v. Union of India},\textsuperscript{82} where the Supreme Court held, first, that it was a violation of the basic-structure doctrine to insulate statutes designed to implement the directive principles from judicial review; and, second, that constitutional amendments affecting the basic structure of the Constitution may not be placed beyond judicial review.

With \textit{Minerva Mills}, the struggle for the survival of judicial review in the Indian Constitution ended with a qualified victory for the judiciary. On the one hand, judicial review has been significantly narrowed since the days of \textit{Bela Banerjee} and \textit{Shalopur Spinning and Weaving Co}. Property is no longer a fundamental right,\textsuperscript{83} and review of the adequacy of compensation is barred in most settings. On the other hand, the rights of free speech, religious freedom, and personal liberty are safer than ever, immunized from parliamentary erosion by the basic-structure doctrine.\textsuperscript{84}

\section*{4. Selected aspects of human rights jurisprudence}

Constitutional texts, philosophies of interpretation, judicial independence, and decisional finality, all four of which the Supreme Court of India has

\textsuperscript{80}In \textit{S. R. Bommai v. Union of India}, A.I.R. 1994 S.C. 1918, the Supreme Court held that a presidential declaration of emergency was subject to judicial review, albeit pursuant to deferential standards. C.I.S. Part II-A (1979), Constitution (Forty-fourth Amendment) Act of the Indian Parliament, Apr. 30, 1979.

\textsuperscript{81}The Janata Party governed until 1980, when Indira Gandhi made a political comeback, aided by a bungled effort to have her arrested for her activities during the emergency. Her son and close adviser, Sanjay, was killed in the crash of a light plane on June 23, 1980. Gandhi was herself assassinated in 1984 by two members of her bodyguard who sought revenge for her decision to invade a Sikh holy place. One Sikh guard was killed during the assassination. The other was executed in a rare exercise of capital punishment. \textit{See Bachan Singh v. State of Punjab}, A.I.R. 1980 S.C. 898 (capital punishment may be invoked only in rarest of cases).

\textsuperscript{82}A.I.R. 1980 S.C. 1789.

\textsuperscript{83}The irony is that the demise of property as a fundamental right coincided with a renewed worldwide commitment to markets, making constitutional protection of property less necessary in India.

\textsuperscript{84}For example, faced with an effort by Hindu nationalists to impose Hindu values on the nation by law, the Supreme Court forcefully reminded the government that secularism is a nonamendable aspect of India’s Constitution. \textit{See S. R. Bommai v. Union of India}, A.I.R. 1994 S.C. 1918.
achieved through a mixture of good fortune, craft, political acumen, and a dollop of courage, are simply means to an end. After all, we care about constitutional courts not for the aesthetic value of their structures but because, when certain structural prerequisites are assembled, constitutional courts are capable of preserving the values of open, democratic governance. In short, the acid test of any constitutional court is whether it delivers on the promise to protect human rights. The Supreme Court of India, especially in its Public Interest Litigation decisions since 1978, construing article 21, has delivered on the promise.

4.1. Affirmative action and equality

Perhaps the most fully developed body of Indian human rights law is the Indian Supreme Court’s construction of the equality provisions of articles 14–17, and of the rights of vulnerable persons to be free from economic exploitation described in articles 23 and 24.

The equality cases started badly. In State of Madras v. Dorairajan, the Supreme Court of India adopted a purely formal reading of equality, and, acting at the behest of a member of the Brahmin caste, invalidated efforts to reserve places in the entering class of a medical school for members of Scheduled Castes. However, in State of Kerala v. Thomas and Vasanth Kumar v. State of Karnataka, the Court changed interpretive course, and, explicitly abandoning Dorairajan, construed the term “equality,” as used in articles 14, 15, and 16, substantively, permitting formally unequal treatment when it is needed to achieve genuine equality. The change in course was made easier because the first amendment had been adopted in response to Dorairajan, adding article 15(4) as an explicit authorization of affirmative action on behalf of disadvantaged groups.

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85 Article 14 provides a general protection of equality before the law. Article 15 provides for access to public accommodations and specifically forbids government discrimination on the grounds of religion, race, caste, sex, or place of birth; it does authorize special protection for women and children. Article 16 forbids discrimination in access to government employment but authorizes affirmative action in favor of any backward class of citizens. Article 17 abolishes untouchability. India Const. arts. 14–17.

86 Article 23 bars “traffic in human beings” and prohibits forced labor. Article 24 regulates the employment of children under fourteen years of age. India Const. arts. 23, 24.

87 For excellent summaries of India’s early efforts at affirmative action, see Galanter, Competing Equalities, supra note 2; Galanter, Law and Society, supra note 2. See also E. J. Prior, Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India. 28 Case W. Res. J. Int’l L. 63 (1996).

88 A.I.R. 1951 S.C. 226. Dorairajan was reversed by the first amendment. See Constitution (First Amendment) Act, supra note 46.


90 A.I.R. 1985 S.C. 1495. The precise precedential status of Vasanth Kumar is unclear, since it was an advisory opinion.
of backward classes and untouchables. But the Thomas Supreme Court explicitly disavowed reliance on a reading that treated affirmative action as an exception to the ideal of equality, opting instead for a reading of equality that embraced affirmative action as integral to the achievement of substantive equality. The provisions of articles 15(4) and 16(4), explicitly authorizing affirmative action, were read as mere examples of the affirmative action principle. The net effect of the interpretive change was to permit the development of programs that were not tethered to the literal language of articles 15(4) and 16(4).

The Indian Supreme Court, having firmly established affirmative action in education and government employment by both constitutional amendment and sympathetic interpretation, went on to grapple with the operational details of acceptable programs. Among the difficult issues to be confronted were the percentage of places subject to reservation, the identity of qualifying persons, the nature of permissible preferences, the treatment of economic status, and the problem of religious discrimination.

The Court’s first major affirmative action decision was *Balaji v. State of Mysore*. Confronted with a plan reserving 68 percent of the seats in engineering and medical colleges for lower caste entrants, the Court sought to impose two general restrictions. First, the Court placed a ceiling of 50 percent on the places subject to reservation. Second, the Court questioned whether caste alone could be a criterion for favored treatment, holding that other factors associated with unequal status should be factored into the definition of eligibility.

*Balaji* was followed by *Devadasan v. Union of India*, where the Court applied the 50 percent ceiling to government employment, holding that unfilled places could not be carried forward to future years if they pushed the reservations over the 50 percent ceiling. In *Chitralekha v. State of Mysore*, the Court ruled that the use of caste as a measure of eligibility was not mandatory.

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91 See *India Const.* arts. 15(4) and 16(4).

92 The Indian Constitution reserves 22.5 percent of seats in parliament for members of Scheduled Castes and Tribes (15 percent for castes; 7.5 percent for tribes), a proportionate share of their representation in the population. The existence of a permanent bloc of 22.5 percent of parliament elected from the Scheduled Castes and Tribes virtually ensures continued political support for affirmative action programs. See *India Const.* arts. 330 and 332.

93 Religious equality plays a role in affirmative action programs keyed exclusively to caste because caste is a Hindu religious concept. Exclusively caste-based systems of affirmative action necessarily exclude extremely poor Muslims. Critics of existing caste-based programs, which effectively exclude Muslims, argue that many poor Muslims who had been untouchables converted from Hinduism to avoid the caste system. See Prior, * supra* note 87; B. Sivaramayya, *Protective Discrimination and Ethnic Mobilization*, 22 J. INDIAN L. INST. 480, 439 (1980).

94 A.I.R. 1963 S.C. 649. The *Balaji* Court continued to accept the *Dorairajan* reading of equality, treating article 15(4) as an exception to the rule.


freeing the government to use more flexible definitions of backwardness and need. Unfortunately, the Chitralekha Court failed to articulate a set of alternative criteria. Four years later, in Rajendran v. State of Madras, the Court ruled that caste could be used as the exclusive eligibility criterion, but only if it could be shown that the entire caste was educationally and socially backward. Rajendran placed the burden of proof on the challenger, freeing the government from the need to justify its eligibility criteria in the absence of a credible challenge. In State of Kerala v. Thomas, the Court upheld a modest affirmative action program covering promotions as well as initial hires under which members of Scheduled Castes and Tribes were given a two-year extension to pass a promotion examination. The standard enunciated in Thomas merely required a rational nexus between the program and the goal of equal opportunity in government employment.

Finally, in 1993, in Indra Sawhney v. Union of India, the Court reconsidered the entire issue of affirmative action in the wake of the government’s decision to implement the recommendations of the Second Backwards Classes Commission (usually referred to as the Mandal Commission). The Mandal Commission had recommended that 22.5 percent of government jobs and educational places be reserved for members of the Scheduled Castes and Tribes (in rough approximation of their numbers in the population), and an additional 27 percent be reserved for members of the other backward classes, to be identified by sophisticated indicia of economic, social, and educational subordination. Unfilled places could be carried forward for three years, and the program was to be applied to promotions as well as initial hires. All private sector institutions receiving government funds were to be included.

The Indra Sawhney opinion begins by explicitly overruling Balaji and Devadasan insofar as they construed articles 15(4) and 16(4) as exceptions to the principle of equality. Instead, the Court adopted the reading of equality in Thomas, viewing affirmative action as an integral part of the achievement of equal opportunity in government employment.

99 The next chronological case was Vasanth Kumar v. State of Karnataka, A.I.R. 1985 S.C. 1495, an advisory opinion on eligibility criteria. The Court issued five opinions, four of which upheld caste, modified by economic factors, as an appropriate criterion. One justice argued that economic considerations should be the sole indicia of need.
101 The Mandal Commission was the second effort at systematic appraisal of the affirmative action issue. The first Backwards Classes Commission met from 1953–56 and issued a controversial report calling for the recognition of 2,399 backward groups, with the reservation of 70 percent of the seats in technical and medical colleges for qualified students from the backward classes, as well as from 25 percent to 40 percent of government jobs. The report was rejected by parliament. See Prior, supra note 87, at 80.
102 The 49.5 percent total was designed to comply with Balaji. Id. at 84–85.
substantive equality. Paradoxically, however, the Court reaffirmed the core holding of *Balaji*, which placed a 50 percent ceiling on reserved places, but cut back on *Thomas*, holding that affirmative action should not apply to promotions. Moreover, in compliance with the 50 percent ceiling, the Court invalidated the attempt to reserve an additional 10 percent for economically deprived members of upper classes not designated as backward.

In determining eligibility, the *Indra Sawhney* Court rejected the use of caste as the sole criterion for eligibility, holding that despite the literal language of article 16(4), social, and to a lesser degree, educational, backwardness (and not merely caste membership) must be considered. However, the Court approved the use of caste as a significant element in any plan, noting that caste internalizes a sense of inferiority. Caste, noted the Court, is merely a term for a socially and occupationally homogeneous class. Finally, to prevent wealthy members of backward classes from participating, each program must utilize a realistic means test to exclude persons whose economic status makes affirmative action unnecessary. The Court closed by urging consideration of less drastic forms of assistance than reservation of places.

The Court’s other equality jurisprudence includes efforts to force the government to enforce the ban on untouchability found in article 17; the judicial abolition of imprisonment for debt; upholding minimum wage laws; recognition of a right to appointed counsel in criminal cases for indigent defendants; modest efforts to protect women; and efforts to

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101 *Devadassan* was partially overruled. The Court held that unfilled places could be carried forward up to the 50 percent ceiling. *Id.* at 94.

104 The complexity of administering a caste-based system of reservation is exemplified by three cases. See *Uma Devi v. Kurnool Medical College*, A.I.R. 1993 A.P. 38 (marrying down in caste entitles wife to use husband’s lower caste); *Guntur Medical College v. Rao*, A.I.R. 1976 S.C. 1904 (a Hindu who converts to Christianity and reconverts to Hinduism is entitled to caste preference); *V. V. Giri v. D. Suri Dora*, A.I.R. 1959 S.C. 1318 (candidate for reserved tribal seat still member of Scheduled Tribe even though he had long embraced Kshatriya customs, since he was not accepted into the caste structure).


Professor Martha Nussbaum observes that the failure to have adopted a single Civil Code for India, leaving in place religious laws governing marriage and divorce, imposes dramatic hardships on poor women, especially Muslim women. See *Saroj Rani v. Sudarshan Kuman*, A.I.R. 1984
protect untouchables against continuing discrimination, even when the discrimination is at the hands of a Hindu temple. 110

4.2. The Public Interest Litigation movement

Beginning in 1978, 111 the Supreme Court of India embarked on a remarkable, sustained effort to enforce the rights of the weak, which has come to be known as the Public Interest Litigation movement (PIL). 112 Although PIL touches many areas of the law, its essence consists of two dramatic shifts in jurisprudence. First, in Maneka Gandhi, 113 a case challenging the arbitrary seizure of the passport of Indira Gandhi’s niece, the Supreme Court abandoned the narrow philosophy of interpretation first embraced in the Gopalan case. In its place, the Court infused the protection of liberty in article 21 with a broad, substantive component that required the government to justify as necessary virtually all limitations on an expanded conception of liberty consistent with personal dignity. For example, in Maneka Gandhi, the Court held that the right to travel abroad was a component of liberty, and that arbitrary and unreasonable limitations on the enjoyment of the right were subject to judicial invalidation.

The energized vision of constitutionally protected liberty espoused in Maneka Gandhi was soon extended to a host of traditionally powerless persons, such as prisoners, 114 bonded laborers, 115 pre-trial detainees, 116 rickshaw

S.C. 1562 (courts cannot interfere with religious law forcing return to conjugal home). Professor Nussbaum notes that the 40 percent literacy rate for Indian women continues to lag far behind the rate of 65 percent for men; that only 6.7 percent of the seats in parliament are held by women; that only one Supreme Court justice is a woman; that marital rape is not a crime; and that domestic violence laws are rarely enforced. See Nussbaum, supra note 2.


111 It is somewhat arbitrary to date the beginnings of PIL to 1978. Earlier hints that the Supreme Court was on the verge of a new era occurred as early as 1976. See Mumbai Kamgar Sabha v. Abdulbhia, A.I.R. 1976 S.C. 1455 (noting that forms of individualized justice should be replaced by broadened norms capable of rendering law relevant to the lives of ordinary people; permitting a union to raise rights of members). For convenience sake, however, I date the beginning of PIL to the Supreme Court’s 1978 decision in Maneka Gandhi.


115 See Bandhua Mukti Morcha v. Union of India, (1984) 3 S.C.C. 161 (enforcement of prohibition on bonded labor on behalf of workers in quarry near Delhi; broad relief ordered, including compensation and rehabilitative services).

116 See, e.g., Khatri v. State of Bihar, A.I.R. 1981 S.C. 928 (the Bhagalpur Blinding case) (relief granted to thirty-three pretrial detainees blinded while in custody in effort to extract
operators, children, migrant laborers, inmates of workhouses, pavement dwellers, rape victims, inmates of mental institutions, small farmers, workers facing plant closures, and victims of environmental degradation.

The legal rights that were enforced by the PIL cases did not break new ground. The cases usually involved a breakdown in the government’s duty to abide by or to enforce well-established legal norms. Thus, if we were to stop at the substance of the PIL movement, it would demonstrate energy and good intentions, but it would not be a groundbreaking event.
What made the PIL cases so extraordinary was the Indian Supreme Court’s radical departure from the usual rules of adversary judicial procedure and separation of powers. PIL cases depart from the judicial norm in four ways.

First, PIL completely abandons the traditional requirement, usually expressed as the doctrine of standing, that litigation be carried on by an aggrieved person. Since, reasoned the Court, many poor persons in India are highly unlikely to be in a position to seek justice from the courts because of poverty and ignorance, surrogates should be permitted to approach the courts on their behalf. Thus, for example, in the Bhagalpur Blinding case, the Court was initially approached by an attorney, Kapila Hingorani, who had read of the incident in a newspaper, and who filed a letter with the Court seeking relief on behalf of the victims. Well-regarded Supreme Court lawyers such as M. C. Mehta, Upendra Baxi, and Veena Sethi, as well as crusading journalists like Sheela Barse, to say nothing of a host of public interest organizations, were permitted to approach the Court on behalf of victims who could never have gained access on their own.

Second, the Court waived all formal pleading requirements in PIL cases. In what the Court came to call “epistolary jurisdiction,” the Court treated letters, even newspaper clippings, as article 32 petitions for the protection of fundamental rights. Although the initial burst of informal epistolary pleading diminished somewhat over time, in part because the Court has evolved somewhat more formal procedures to process PIL cases, the pleading rules remain extremely flexible.

Third, the Court virtually abandoned adversary fact-finding in PIL cases. Instead, it established fact-finding commissions, insisted on “cooperative” fact-finding behavior from the government defendants, and was content to rely on affidavits instead of live testimony subject to cross-examination.


128 M. C. Mehta has filed scores of petitions. In 1996 alone, there were at least forty landmark cases in his own name where he obtained major judgments. In 1996, he was awarded the Goldman Environmental Award for being “perhaps the most successful environmental litigator in the world.” See Dee Rossman, Goldman Awards Given to Risk-Takers on Six Continents, 22 EARTHLIGHT (1996), available at http://www.earthlight.org/goldman22.html.

129 Professor Baxi was the PIL movement’s leading theoretician and an active PIL litigator, often on behalf of persons confined to mental institutions. See Upendra Baxi, Law, Struggle and Change: An Addendum for Activists, in SOCIAL ACTIVISTS AND PEOPLE’S MOVEMENTS: SEARCH FOR POLITICAL AND ECONOMIC ALTERNATIVES 110–18 (Walter Fernandes ed., Indian Social Institute 1985).


131 Sheela Barse, a journalist, brought numerous PIL cases on behalf of women and children.

132 One of PIL’s great triumphs, Bandhua Mukti Morcha, was an action brought on behalf of bonded laborers by reformers who circulated questionnaires among the quarry laborers, and then approached the Court on their behalf.
Fourth, the Court dramatically expanded its remedial powers, often taking operational control of failing government institutions and requiring systematic efforts to mitigate the effects of past injustices. For example, when rickshaw licenses were made available only to owners, not lessees, of the vehicles, the Court entertained a PIL petition on behalf of lessees who were too poor to purchase the vehicle. Instead of passing on the difficult equality issues, however, the Court persuaded local banks to provide ready credit to rickshaw workers seeking to become owners in order to permit the worker to qualify for the license. Similarly, in Bandhua Mukti Morcha, the Court required that significant, virtually lifelong remedial assistance be given to the newly freed bonded laborers, and in Laxmi Kant Pandey, the Court actually drafted detailed rules governing the adoption of poor children by foreigners, down to the minimum daily caloric intake of the babies.

The abandonment of standing in PIL cases, coupled with the substantial relaxation of pleading rules, the willingness to launch independent fact-finding investigations, and the expansion of remedial power routinely undertaken by the Court in PIL cases resulted in the evolution of a new institution in the annals of constitutional courts. Instead of an adversarial organ operating on the model of an ordinary lawsuit, the Supreme Court in a PIL case appears to function as a combination of constitutional ombudsman and inquisitorial examining magistrate, vested with responsibility to do justice to the poor litigant before it by aggressively searching out the facts and the law, and by taking responsibility for fully implementing its decisions.

The PIL movement appears to have had a significant impact. In its first flush of success in reaching the public imagination, the Court registered more than 23,000 PIL letters over a fifteen-month period between 1987 and 1988. The Court established an internal “PIL Cell,” or administrative unit, devoted to processing PIL cases. The cell reviews PIL petitions, routes the purely local petitions to similar cells established by the high courts of the states, retains the petitions of national importance, appoints pro bono counsel, and supervises the initial fact-finding process. In appropriate cases, the matter is referred to the Court for interim relief. The movement spread to the high courts in the states, which established PIL cells in each court.

The movement appears to have had tangible successes in assisting many thousands of poor persons to invoke the rule of law to better their lives. Additionally, it was instrumental in rescuing the Indian Supreme Court from the disrepute into which it had fallen because of both its perceived supine posture in the preemergency era as a court for the rich and its failure to protect basic rights during the 1975–1977 emergency. PIL provides a model for courts struggling to balance the transformative aspect of law against the law’s natural tendency to favor those rich enough to invoke it.

But PIL has not been free from criticism. Members of the Court have complained that PIL shifts the Court from an organ of constitutional review, to an administrative mechanism responsible for enforcing the existing laws. Moreover, critics argue, in a judicial system already burdened by vast backlogs, the massive infusion of PIL petitions presents an insuperable logistical challenge. Critics also point out that, at best, PIL is cosmetic, covering a grim reality with a facade of occasional, highly publicized justice. For example, argue critics, for every 5,000 bonded laborers freed and assisted by a PIL case such as Bandhua Mukti Morcha, 100,000 new laborers are placed in bondage each year. Finally, serious questions have been raised about the collapse of separation of powers inherent in turning the constitutional court into an examining constitutional magistrate.

Despite the criticisms, PIL stands as a remarkable example of the capacity of a committed judiciary to transform law into a force for change. With the retirement of two justices—Bhagwati and Ayer—who led the movement from within the Court, and the inevitable disenchantment that followed the realization that PIL was not a panacea for India’s problems, PIL has lost some of its revolutionary fervor. But the movement continues to provide hope and continues to make the rule of law a reality in the lives of thousands of poor citizens of India.

4.3. Preventive detention
The human rights jurisprudence enunciated by the Supreme Court of India in the contexts of affirmative action, equality, and PIL stands in sharp contrast to the Court’s failure to grapple effectively with the widespread use of preventive detention. The Court’s difficulty in dealing with preventive detention stems, in part, from the fact that the Indian Constitution explicitly authorizes preventive detention in article 22(3)–(7). The failure of the Court to place significant limits on preventive detention appears, however, to flow more from a conscious choice than from textual constriction.

Acting under the grant of constitutional power, parliament enacted the Preventive Detention Act (PDA) in 1950. When the PDA expired in 1969, the president replaced it with the Maintenance of Internal Security Ordinance (MISO) in 1971, which remained in force until 1978, permitting the
government of Indira Gandhi to imprison more than 100,000 persons without trial or notice of the charges between 1975–1977. With the expiration of the MISO in 1978, parliament enacted the National Security Act (NSA)\(^\text{140}\) in 1980, which remains in force. Thus, during its fifty-two years of existence, India has lived under a regime of preventive detention for all but four years.

The two most unfortunate decisions of the Supreme Court, the *Gopalan* case in 1950 and *Shiv Kant Shukla* in 1976, were efforts to challenge preventive detention. In *Gopalan*, the Court enunciated a narrow approach to the constitutional text that refused to measure preventive detention laws against the guarantee of free speech in article 19. In *Shiv Kant Shukla*, the Court denied any form of judicial review to administrative detentions during the emergency. Neither decision was compelled by text. In fact, although the Court is long on rhetoric warning about the dangers of preventive detention, it has been conspicuously short in placing limits on its implementation.

For example, in defining the circumstances that justify preventive detention, the Court in *Ram Manohar Lohia v. State of Bihar*\(^\text{141}\) enunciated a careful distinction between concerns of law and order, which must be dealt with by the ordinary processes of criminal justice, and concerns of “public order” and “national security,” which may trigger preventive detention. But the Court has failed to give the distinctions real meaning, deferring completely to the executive’s judgment that certain activities threaten “public order.” Thus, preventive detention orders based on “creating anti-Indian feelings,”\(^\text{142}\) committing robbery,\(^\text{143}\) associating with a “notorious” gang,\(^\text{144}\) throwing stones at a political opponent,\(^\text{145}\) and threatening someone to get a job\(^\text{146}\) have all been sustained.

Moreover, the Supreme Court has declined to exercise judicial review over the necessity for preventive detention, leaving the matter to the “subjective” good faith of the police. Thus, in *Anil Dey v. State of West Bengal*,\(^\text{147}\) the Court declined to review a detention order for objective reasonableness, deferring to the subjective good faith of the authorities. While occasional orders are overturned because the police failed to consider the materials before them,\(^\text{148}\)


\(^{144}\) See Rajendra Kumar v. Superintendent, 1985 Cr. L.J. 999 (All.).


\(^{147}\) A.I.R. 1974 S.C. 832.

because the person was already in custody, or because the order was patently absurd, the Supreme Court has permitted the authorities virtually unrestricted latitude in carrying out administrative detentions. A hopeful decision in 1995, holding that government must make a showing that the situation is beyond the control of ordinary criminal law in order to justify preventive detention, appears to have been repudiated by an approach that deems any resort to preventive detention to be a showing that criminal law would not suffice.

Finally, the Court has declined to provide administrative detainees with basic procedural rights, other than the rights provided for in article 22 itself. Thus, in A. K. Roy v. Union of India, the Court declined to hold that detainees were entitled to counsel in efforts to persuade an administrative reviewing body that their detention was not necessary. While the Roy Court claimed to be bound by the language of article 22, its narrow, clause-bound reading of the constitutional text harked back to Gopalan.

If the PIL movement shows a constitutional court at its most actively protective, India’s preventive detention jurisprudence is a classic study in judicial passivity.

4.4. Protecting religious pluralism

Articles 25 and 26 of the Indian Constitution guarantee religious freedom in a country where religious identity and practice is central to the lives of many hundreds of millions of citizens. The difficulty is that Indian citizens do not all share the same religious beliefs and practices. In addition to almost 800 million Hindus, India includes almost 200 million Muslims, one of the largest Muslim populations in the world. Sizable Parsi, Sikh, and Christian communities are present as well. Religiously motivated communal violence remains one of India’s most difficult internal problems.

Despite or, perhaps, because of the intense preoccupation with religious identity among much of the population, part of the “basic structure” of the

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153 See India Const. art. 22.
155 The Roy Court did hold that counsel must be permitted if the government is represented by counsel. Of course, that merely assures that no lawyers will be present. In Wasi Uddin Ahmed v. District Magistrate, A.I.R. 1981 S.C. 2166, the Court ruled that detainees must be told of the right to an administrative review if they are held more than three months; they must also be told of the reasons for the preventive detention as quickly as possible.
Indian Constitution is secularism, defined not as a wall between church and state, but as a command to extend equal treatment to all religions. The complexity (or, possibly, incoherence) of the Indian Supreme Court’s effort to enforce religious freedom is illustrated by two early cases. In *M. H. Qureshi v. State of Bihar*, the Court rejected a challenge by Muslims to legislation that forbade the killing of cows sacred to the Hindu tradition by citing the directive principles as a guide to construing the Constitution. The opinion itself is far from convincing, but the principle that India is free to act to preserve the intense religious sensibilities of the bulk of its population seems correct.

Conversely, in *State of Bombay v. F. N. Balsara*, the Court rejected a challenge to the prohibition of liquor, a Muslim tenet, brought by a Hindu. The underlying principle in both cases was to permit the state to take reasonable steps to preserve the deeply felt religious sensibilities of major components of the community. The risk, of course, is that when the religious sensibilities of some are protected by law, it becomes oppressive to nonbelievers.

The effort by Hindu nationalist parties to invoke “secularism” in support of outlawing certain Muslim practices, or in support of imposing uniform “secular” laws that reflect majority (read Hindu) beliefs, constitutes a serious threat to the Court’s effort to walk the tightrope between toleration of plural religious practice and state-imposed religious belief. In *Manohar Joshi v. Nitin Bhavrao Patil*, the Court was asked to outlaw the overt religious nationalism of the Bharatiya Janata Party (BJP), and that of Rashtriya Swayam Sevak (RSS), Vishwa Hindu Parishad (VHP), and Shiv Sena (SS), the political arms of the Hindu nationalist majoritarian movement known as Hindutva, on the grounds that the program espoused in these parties’ platforms and speeches was an incitement to religious strife and was an improper mixture of church and state. The Court rejected the claim, holding that Hindutva was not a religious movement, but the affirmation of a way of life.

Perhaps the most striking illustration of the intense relationship between religion and the Indian state is the treatment of family law. The drafters of the Constitution were aware of the need to provide a framework that accommodated the diverse religious practices of the population. The right of religious minorities to operate privately funded autonomous educational institutions was further explored in *T. M. A. Pai Foundation v. State of Karnataka*, where an eleven-judge constitutional bench adopted the general approach of the St. Stephen’s College case, but eliminated the fixed 50 percent ceiling on reserved places, opting for a more flexible approach that permitted case-by-case consideration of the needs of the affected religious community.

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158 See St. Stephen’s College v. University of Delhi, (1992) 1 S.C.C. 558 (state-aided Christian school may reserve 50 percent of the places for Christians). The right of religious minorities to operate privately funded autonomous educational institutions was further explored in *T. M. A. Pai Foundation v. State of Karnataka*, (2002) 8 S.C.C. 481, where an eleven-judge constitutional bench adopted the general approach of the St. Stephen’s College case, but eliminated the fixed 50 percent ceiling on reserved places, opting for a more flexible approach that permitted case-by-case consideration of the needs of the affected religious community.
Indian Constitution declined to impose a uniform civil code on the Indian population, in part to avoid conflict with religious practices. The directive principles look to the eventual adoption of a uniform civil code, but the nation continues to delegate to the communities the power to control marriage, divorce, and child custody. The result is successful religious pluralism, but at a great cost—the continuing imposition of discriminatory norms on poor women.

The Supreme Court has occasionally attempted to mitigate the impact of relegating poor women to the strictures of male-dominated religious codes, but to little avail. Thus, in *Mary Roy v. State of Kerala*,\(^{161}\) the Court held that restrictions on inheritance by women imposed by the law of the Christian community had been superseded by the Indian Succession Act. In *Mohammed Ahmed Khan v. Shah Bano*,\(^{162}\) the Court construed the criminal code to require the payment of maintenance to a divorced Muslim woman, but the Court’s language condemning the Muslim religious practice of divorce was so incendiary that it provoked communal rioting, causing the criminal code to be amended to eliminate the obligation. Judicial toleration of religious practices harmful to women reached its apex in *Saroj Rani v. Sudarshan Kumar*,\(^{163}\) when the Court, citing the values of marital privacy and religious tolerance, upheld the enforcement of religious laws requiring a Muslim woman to return to the conjugal home against her will. When, however, religious belief interferes with the efforts to end untouchability, the Supreme Court has not hesitated to compel a Hindu temple to admit an untouchable despite the temple’s religious belief that it would become defiled.\(^ {164}\)

### 4.5. Free speech

The Indian Constitution guarantees freedom of speech, assembly, and movement in article 19. Over the years, the Court has imposed sophisticated structural protections such as overbreadth, a ban on prior restraints, and a form of heightened scrutiny designed to preserve free expression.

The earliest clash between the Court and parliament took place in the context of the Court’s effort to protect political dissenters against censorship. In *Romesh Thapar v. State of Madras*,\(^ {165}\) the Court invalidated a seditious-speech law as overbroad, anticipating the United States Supreme Court’s overbreadth doctrine by at least fifteen years. In *Brij Bhushan v. State of Delhi*,\(^ {166}\) the Court

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\(^{162}\) A.I.R. 1985 S.C. 945.
\(^{166}\) A.I.R. 1950 S.C. 129.
firmly prohibited prior restraints. In *Sokal Newspapers Ltd. v. Union of India*, the Court recognized the preferred status of the press, requiring heightened standards of review in press freedom cases. In *Sokal Newspapers and Bennett Coleman & Co. Ltd.*, the Court ruled that indirect hindrances of the press, such as restricting the importation of newsprint, controlling newspaper prices, and limiting the number of pages were invalid under article 19. Most recently, on March 13, 2003, the Court recognized a right to receive information needed to cast an informed ballot.

Unfortunately, the Court’s generally thoughtful free speech jurisprudence is undermined by its continuing failure, since *Gopalan*, to review preventive detention of political dissenters under article 19. After all, the most effective form of censorship is the jailing of a political rival.

Similarly, the Court’s willingness to suppress criticism of the judiciary by treating such criticism as a contempt of court seriously erodes the Court’s ability to exhort others to respect free speech. For example, the recent imposition of a contempt sanction on the Booker Prize–winning author Arundhati Roy cannot be squared with a genuine commitment to free speech. In 2000, during demonstrations against the judiciary in connection with the Narmada dam project, Roy was cited for contempt for having coined slogans that were derisive of the judiciary. When she defended herself in the Supreme Court by filing an affidavit highly critical of the judiciary, Roy was found in contempt for “scandalising” the Court and “lowering its dignity.” She was sentenced to one symbolic day in jail and a small fine. With respect to the Court, jailing critics for contempt of court does more to lower the dignity of the Supreme Court of India than Roy’s heartfelt criticism. Sadly, the ghost of *Gopalan* still walks.

5. Conclusion

The rich and varied jurisprudence of the Supreme Court of India reflects constitutional law in all its manifestations. The struggle between the Court and parliament over judicial enforcement of the Constitution’s property clauses is a textbook study of the tension between judicially enforceable

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171 For a description of efforts to use the contempt power to silence critics in the United States, see NORMAN DORSEN & LEON FRIEDMAN, *DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK SPECIAL COMMITTEE ON COURTROOM CONDUCT* (Pantheon Books 1973).
constitutional rights and popular demands for wealth redistribution. It stands as a prime example of the “preservative” nature of constitutional rights. The effort to forge a jurisprudence of affirmative action, while respecting merit-based selection, is an inventive effort to meld conflicting values of equality and individual rights into a rough synthesis. It stands as a classic use of constitutional law as a means to harmonize opposites. The burst of judicial energy and inventiveness that characterized the PIL movement stands as one of the most remarkable mobilizations of judicial resources on behalf of the poor in judicial history. While PIL remains controversial, it provides a new model for courts seeking to make the rule of law relevant to the weakest segments of a society. Finally, the Court’s unfortunate preventive detention jurisprudence, a mixture of textual rigidity and lack of will, demonstrates that judicial independence and judicial review do not always result in a jurisprudence of human rights.

Whether one agrees or disagrees with aspects of the Supreme Court of India’s fifty-two years of constitutional adjudication, two points are clear. First, the Court undeniably has played a major role in protecting and sustaining democratic governance and the rule of law in India; and, second, its jurisprudence is so rich, so varied, and its institutional history so dramatic, that it can justly lay claim to being one of the most interesting and important constitutional courts in the world.