CHAPTER-IV

SOCIAL JUSTICE AND THE ROLE OF JUDICIARY IN INDIA IN THE CONTEXT OF A CHANGED DOMESTIC AND GLOBAL ARCHITECTURE OF GOVERNANCE

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Section-I

Meaning and Nature :

In the realm of Political philosophy, it is the discussion of the concept of justice that has generated perhaps the worst, and on occasions quite loud and violent, controversies. In fact, while philosophers from the time of Plato down to the present day have spared no endeavours in explaining and analyzing the concept, it, still, remains a polemical idea as our experience suggests. The moral philosophers contributed heavily to the making of the issue more complex and debatable, leaving behind a trail of confusions. Possibly, the concept has suffered such a fate because of its ambiguity. The striking feature of the concept is that votaries of both the old and the new order have invoked the cause of justice to morally defend their respective positions. This abstract, universal and all-pervasive characteristic of justice ignites our mind to raise two questions. First, how does the idea of justice germinate in human mind? Secondly, since the concept of justice is invoked to defend the rightness of a cause, is justice fundamentally a moral concept? A satisfactory clarification of these two issues would require further probing into the meaning of their concept.[1] The debate about justice was not only confined to the western intellectual domain, the debate centered around Dharma, about Juga dharma, about the relationship between Dharma and Karma, is, in a central way, a debate about the concept of justice in the Indian intellectual traditions as well. In the west, there are several traditions of thinking about justice: the Homeric or the heroic tradition, the platonic – Aristotelian tradition, the Christian tradition and the Thomist tradition and above all, the modern liberal humanist tradition

of thinking.[2] However, man's desire for justice can be analysed as "the active process of preventing or remedying what would abuse the sense of injustice"[3]. The origin of justice, therefore, has to be traced to man's awareness of injustice in society and, consequently, to his craving for changing the situation. So, justice, fundamentally, is a social concept, which has its genesis in man's life in society.[4] Social justice is presumably opposed to individual justice. The concept of social justice is characterized by the idea that one can be just or unjust not merely towards an individual but also towards a community or a society – a community or a society is just because it is a community or a society of a certain kind – definable or describable in a certain way. It presupposes, among other things, that a community as a whole, and not just an individual human being, can be a moral entity, that it can be the object of moral assessment or moral sympathy as a community. However, in the liberal way of thinking, it is the individual - the individual, characterisable independently of a community, society etc. that has deserts and merits, that is the object of moral sympathy. So, the liberal humanist debate about justice has been almost entirely a debate about justice to an individual, to an individual human being. And there is a great deal of unclarity about how the conception of justice to a community can be incorporated into this debate.[5]

On the whole, justice is not an abstract and a static notion; rather it is a concrete and a dynamic concept to be comprehended in terms of the changing social relations of man. The concept entails an idea of change for the better in a definite direction, away from those human relations which is characterized by injustice in society.[6] F.H. Knight also argues in the similar vein, "The real task faced is that of social progress, definable only as a direction of change (in a complex sense, mostly negative) through alleviating some of the grosser injustices that a society can agree upon and find remediable. In short, there is now no such thing as justice "in general"; one can meaningfully discuss only fairly concrete injustices and procedures for their

mitigation with existing social machinery or the possible ways of improving the overall social organization".[7]

However, justice essentially entails an element of desirability or goodness in social life. It means that characterizing a thing as just, objectively we pass a moral judgement, justifying its desirability on the basis of the principle of goodness. Justice, thus, presupposes an idea of interpreting social relations of man in relation to ethics.[8] As Maurice Cornforth is of the view that the logical consequence of such ethical interpretation of conflicting interest in social life gives rise to the idea that "rational moral judgements are those that promote the reconciliation of interests and mutual tolerance of ideals."[9]

Broadly speaking, there are two such principles of reconciliation of interests as recognized by the normative concept of justice. The first of these principles is known as commutative justice. The principle of commutative justice suggests that it is the defence of the negative view of liberty, the implication of which is that the individual is in a position to best realize his own self if his activities are interfered with by others to the minimum. The other principle of reconciliation of conflicting interests in society is known as distributive justice. The problem of distributive justice does not arise simply from inequality of opportunities, benefits or total good; the central problem of distributive justice is one of determining the quantum of distribution in relation to the value of the attributes of those among whom the distribution is made. John Rawls, the most influential exponent of the liberal theory of justice, argues that rational individuals will choose two major principles governing justice in society. These two principles Rawls desires from what he describes as the "original position"; this he explains as a hypothetical situation in which no one knows his place in society nor his future. Logically, the two principles of justice, which are so derived from a fair agreement or bargain, establish what Rawls describes as the propriety of the statement that "justice is fairness."[10] However, a critic of Rawls has suggested that the "original position" is

an invention of Rawls so as to insert beneath the real edifice of liberal theory in order to justify it.[11] On the other hand, Marxism envisages a completely radical approach to morality. It strikes at the very roots of liberal morality and points to the necessity of emphasizing rationality and objectivity in ethics, whereby the vast majority of mankind would not be held at ransom by the standards of ethics practised by an oppressive minority.[12] Justice, therefore, can not be a principle of realizing the balance of antagonisms in social life. It has to be regarded as the principle of resolving the contradictions in society by locating and then overthrowing the basis of these contradictions, that is, by ending forever the domination of the exploiting classes in every sphere of society. But the pursuit of moral ideals, or the emphasis on moral reasoning, in the name of justice, only strengthens the status quo and the cause of that section which gains most from the continuation of that system.[13] As one perceptive observer writes, "..... the idea of justice in a class divided society requires the identification of the conflicting social forces and an inquiry into how the conflict of interests is intended to be resolved. In other words, it will have to be examined, institutionally and ideologically, what efforts have been made not to strike a balance between the conflicting interests, but to weed out the forces that lead to injustice and social conflict."[14]

The issues of justice and the Constitutional Scheme:

The demand for inclusion of fundamental rights in the constitutional scheme for India was first mooted by nationalist leaders after the Montford Declaration, 1918, that the progressive realization of the self-Government was the ultimate objective of the His Majesty's Government. The Nehra Committee in its report demanded a declaration of rights in the future constitution of India. The Indian National Congress at its Karachi Session in 1931 for the first time in its resolution drew up a comprehensive scheme not only of the fundamental rights and duties, but also of economic re-organisation which could ensure "social justice" to workers and peasants. In keeping

with cabinet Mission plan, 1946, the Constituent Assembly was constituted to draw up constitution for independent India. Intellectuals of different hues a nd colours were enabled by the Indian National Congress to be elected to the Assembly. The Congress was never ideologically a homogenous political outfit and therefore, it was not unnatural that people elected on congress ticket had divergence of opinions and visions on fundamental issues.[15]

The problem of justice in the newly born Republic was that of striking at the roots of those social, economic and political forces in the Indian society which give birth to injustice. The ugly manifestations of injustice are very much, evident in the untold miseries of the toiling masses. The New Constitution of India, which was adopted on November 26, 1949 by the Constituent Assembly provided the roadmap in which the problem of justice would be dealt with. Further, the constitution was the outcome of a series of debates among the framers of the Constitution in the Constituent Assembly and the debates were largely centered around the problem in identifying the factors responsible for precipitating and perpetuating injustice which would have to be removed in the new republic through the instruments enshrined in the new constitution. So, a reading of the mind of the framers of the constitution would throw enough light on the perspective in which the problem of justice in the newly born republic was supposed to be grappled with.[16]

During the British Raj in India, injustice had been manifest in the alienation between the people and the colonizers. People were denied their freedom socially, politically and economically. People were deprived of their rights to govern thereby paving the way for absolutising the ruling authority's position. Thus, Colonial Injustice in social and economic sphere was coupled with the denial of the ruling power to allow popular participation in the political sector.

Against this backdrop, it is, therefore, understandable that for the makers of the Indian Constitution the problem of justice was the problem of ascertaining the extent of socio-economic mobility and facilitating political participation in sync with the demands of the people of free India. Thus, it also entailed the question of priority and importance to be given to socio-economic or political mobility.[17]

In the Constituent Assembly, the framers of the republican constitution of India debated and discussed for almost three years which eventually, threw up polemic issues regarding the identification of the problem of justice. But Pandit Nehru tabled the objective Resolutions the words of which well reflected the image of free India and they were unanimously accepted in the constituent Assembly.[18] The concerned clauses read,

"..... wherein all power and authority of the sovereign independent India, its constituent parts and organs of Government, are derived from the people, and wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law, freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality, ..."[19]

Therefore, the resolution stood for political mobility. The position of the ruling authority in independent India would be relative and not absolute. It would be relative to the will of the people. This is another name of political democracy or political justice, hitherto denied to the people of India. But political justice was not enough. The objectives resolution stood for social and economic justice too. As a matter of fact, socio-economic justice would demand removal of the alienation gap between sections of society, socially and economically. It presupposes mobility in social and economic life. It expresses concern for the common man, for the poor, particularly, for those who have been the object of social and economic exploitation for centuries. So, socio-

economic justice in the negative sense entails curtailment of the privileges of the lucky few in society, and its positive connotation demands that the poor man, the sufferers, the exploited should have the full right and opportunity to rise to the highest position in life. Socio-economic justice is also qualitatively higher than political justice. Nehru regarded that freedom from want as the basis of liberty and that the essence of justice in free India would be measured in terms of substantive benefits to the poor, the hungry and the wretched. Therefore, the stability of the ruling authority is relative to its capacity to espouse the cause of socio-economic justice for the common man.[20] K.M. Munshi, one of the members of the Constituent assembly, was very much emphatic about the point when he says, "The next danger arises from the sagging economic structure of the country ..... Independence will be weighed in the scales of the essentials of life. If they are not forthcoming, the political structure is sure to collapse."[21]

It is, therefore, quite understandable that there were a good number of members in the constituent assembly who were eager to place socio-economic justice on a higher footing than political justice. However, some leading members of the assembly including Pandit Nehru, expressed strong reservations with regard to the inclusion of the idea of socialism in the constitution on the contrary, Shri V.D. Tripathi reacted sharply to the kind of skepticism about socialism among some of the members and suggested that it was urgently necessary that some safeguards should be so incorporated in the constitution as they would render the capitalists incapable to interpret social and political justice on their own terms.[22] A sub-committee under the chairmanship of Sardar Patel was constituted to advise the constituent Assembly about the rights which ought to be included in the Constitution.[23] It was felt necessary because the constituent assembly was sharply divided in two groups on the problem of differing versions of the concept of liberty. One school was represented by such stalwarts as K.M. Munshi, A.K. Ayyar, Thakurdas Bhargava. They attached priority to a code of

fundamental rights, to be guaranteed through the constitution against state intervention of any kind. The other school was represented by members like K.T. Shah, Seth Damodar Swarup and V.D. Tripathi. They declared their faith in the positive concept of liberty, suggesting thereby the incorporation of certain basic socio-economic rights for the common man to be protected by the state.[24] The Contrasting view points held by the members of these two schools are worth noting. A.K. Ayyar, for example, advised the fundamental rights sub-committee to follow the united states as their model for the protection of the basic rights of the people.[25] Munshi, in his note, also pleaded for judicial review for the protection of fundamental rights against possible encroachments by the state.[26] On the other hand, the absence of economic rights led V.D. Tripathi to declare that except for the right to vote, the poor man has not yet got any other right under the Constitution.[27]

Sarder Patel, after assessing the situation, mentioned in the Constituent Assembly:

There are two schools of thought in the committee and there was a large number of very eminent lawyers who could scrutinize every words of every sentence .... These two schools viewed the matter from two angles. One school considered as advisable to include as many rights as possible in the report – rights which could straight way be enforced in a court of law .... The other schools of thought considered it advisable to restrict fundamental rights to a few very essential things that may be considered fundamental. So, rights relating to social justice such as citizen's right to work and employment, education, maintenance in old-age, sickness or loss of capacity to work, living wage for workers, their participation in management, uniform civil code for the citizens were made non-justiciable while the rights pertaining to equality, life and personal liberty and property were declared as fundamental and justiciable.[28]

No doubt, the article dealing with the individual's right to property became the most contentious issue in the debate of the constituent assembly. Obviously, there was divergence of opinion among members of the constituent assembly regarding the sanctity of private property.[29] The right to property is an economic right, meaningful only to those who do actually possess property. The landless, property-less teeming millions have virtually no stake in it. The right to property, if recognized as a fundamental right, would facilitate economic discrimination and perpetuation of privilege. So, the implications of the right must be understood in the context of the rational standard of justice and accordingly, its operation must be a qualified one.[30]

In the sub-committee on fundamental rights, K.M. Munshi opined that the right of the state to expropriate private property should be subject to two restrictions, namely, (i) that expropriations should be permitted for public reasons only, and (ii) in exchange for just and adequate compensation to be decided in keeping with the conditions laid down by law. Prof. K.T. Shah put forward counter proposal as follows: (i) that private ownership in certain industries and in various forms of natural wealth shall not be recognized; and (ii) that the state shall have the right to acquire any private property on such terms and conditions as the legislature may deem it fit.[31] The sub-committee, going ahead on the basis of P.299 of the Government of India Act, 1935, said in clause 27 of the report, "No property, movable or immovable, of any person or corporations including any interest in any commercial or industrial undertaking, shall be taken or acquired for public use unless the law provides for the payment of just compensation for the property taken or acquired and specifies the principles on which and the manner in which the compensation is to be determined.[32]

The implications of the clause are highly intriguing. The two expressions "just compensation" and "due process", once incorporated,

would thus fortify the right to property against any possible legislative encroachment.[33] Drawing inspirations from the laissez-faire doctrine, Munshi said, "Right to property is one of the pillars on which democracy rests; remove it and the structure is sure to collapse once it is denied under the name of any 'ism', however glamorous, to secure social justice, individual freedom goes down with it; the citizen becomes helpless, impotent and without the means to assert his individual rights against the state."[34] Therefore, in the Advisory Committee, a serious controversy erupted following disagreement regarding the two expressions, namely, "due process of law" and "just compensation". Thus, K.M. Panikkar and G.B. Pant were very much critical of these two expressions and argued forcefully their position by suggesting to drop the word 'just' from this clause as well as leave the matter of the payment of compensation to the Government concerned to decide. This staunch opposition in the advisory committee, led them to delete the word 'just'.[35] However, commenting on the Interim Report on fundamental rights, Shri Ajit Prasad Jain raised an important Question: "Fundamental Rights in my opinion are embodied in the constitution with a view to protect the weak and the helpless. The present clause will have just the contrary effect. It will protect the microscopic minority of propertied class and deny rights of social justice to the masses."[36] However, in view of these charges and the discussion on it being far from satisfactory, Clause (19) was given further consideration which resulted in the incorporation of two new sub-clauses by the Drafting Committee. Though the spirit of the right remained as it was; there was no significant changes. In fact, the enforceable character of the right to property empowered the propertied few to protect their interests against the economic rights of the masses. So, the right of the few was given primacy vis-à-vis the Directive principles of State Policy and thus rendered the meaning of the latter irrelevant to the common man.[37] K.T. Shah, commenting on the draft constitution, regarded the rights as having "an exclusionist or

exclusivist tendency, in which the individual emphasizes his exclusive claims or possession of privileges or possibilities far more than that of his membership of a group or of a society, or of a community."[38] Intervening in the debate in the constituent assembly, Jawaharlal Nehru moved an amendment to Article 24. As a matter of fact, Nehru's amendment did not alter the substance of Article 24 materially. Nehru himself called his amendment a "compromise formula" and tried to justify and clarify the compromise formula by arguing that the concept of property had changed with changes in History; that property right could not be treated as an absolute right since this would lead to concentration of assets of the community in a limited number of hands to the detriment of the exercise of the same right by others. However, Nehru also categorically mentioned that there was no question of any expropriation without compensation in this connection, Nehru made a distinction between acquisition of property for "Governmental Purposes" and acquisition of property for "Social Purposes". The question of fair compensation, would, however, be applicable only to the former case, leaving the latter to parliament to determine various aspects involved in it.

Thus, Nehru's construction of the clause suggests, firstly, that the sovereign will of parliament on questions of compensation would be final and, secondly, that the judiciary was not expected to play a role in such matters and substitute its own judgement for the judgement of parliament. However, Nehru also felt that the judiciary should be allowed to rectify the wrong committed by the representative of the people. So, Nehru's attitude towards the role of the judiciary vis-à-vis the question of compensation was marked by ambivalence.[39]

In any case, the right to property, a right relevant only to the microscopic propertied class, became well protected by the highest law of the country in the new republican constitution of India. Firstly, judiciary is empowered to declare any legislation that threatens the exercise of the right as ultra-vires. Secondly, laws enacted for realizing

the directive principles of state policy may be invalidated by the courts, if they came into conflict with the right to property because of the non-enforceable character of the Directive Principles of State Policy.[40] Professor Shibban Lal Saksena criticized article 31 in relation to the Directive Principles of State Policy in these languages,

"I also regard Article 31 about property as the charter of capitalism in this country. The Directive Principles of State Policy which have been so beautifully described in Part-IV cannot be realized so long as Article 31 forms part of the constitution. I would have wished that these Directive Principles had been incorporated as Fundamental Rights in the Constitution."[41]

No doubt, the constitution declined to alter the economic structure of the country and the class relations between the teeming millions and the propertied few by providing safeguards to the economic rights of the microscopic minority. As a result, the Directive Principles reduced to mere pious wishes – a catalogue of good intentions which are not backed by legal sanctions to make it a positive obligations. Socio-economic justice for the common man, in the substantive, positive sense, was not guaranteed by the constitution against the right to property. Thus, the meaning of liberty continued to be projected in negative and not in positive ways for the common man. The spirit of the objectives resolution was not properly appreciated in the provisions of the new constitution of India. The objectives resolution envisaged that the meaning of liberty would be judged in the perspective of equality and common good. The new Constitution betrayed even that sentiment.[42]

The ideal embodied in the objectives Resolution is dutifully reflected in the preamble to the Constitution, which as amended in 1976, summarizes the aims and objects of the constitution:

"We, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all;

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty sixth day of November, 1949, do hereby adopt, enact and give to ourselves this Constitution."[43]

However, the preamble to the Indian Constitution crystalises the concept of "social justice". It determines the objectives and the socio-economic goals for the attainment of which the Constitution has been established. The ethos of "social justice" found its expression from the slogans of "liberty, equality and fraternity" in the French Revolution into Dicey's rule of law and the American war of independence. The echo of these words is felt in articles 38 and 39 of the Indian Constitution.[44]

As Article 38 reads : "The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life." Articles 39 provides for certain principles of policy as set out in clauses (a) to (f) to be followed by the state in order to secure "Social Justice" in specific situations. Articles 39A contains provisions for equal and free legal aid. Article 40 provides for organizing village panchayats as units of self government and Article 41 provides for Right to work and Education.[45]

According to Article 37, Directive principles, though they are fundamental in the Governance of the country and it shall be the duty of the state to apply these principles in making laws, are expressly made non-justiciable. It means that the courts in India including the Supreme Court have no power to enforce them. This is in sharp contrast to the position of Fundamental Rights which are justiciable and, therefore, enforceable by the courts of law. Thus, while there is a judicial remedy for every violation of a fundamental Right, there is none available for the enforcement of Directive Principles.[46]

Nevertheless, Granville Austin considers these directives as aimed at furthering the goals of social revolution, "by establishing these positive obligations of the state, the members of the Constituent Assembly made it the responsibility of future Indian Governments to find a middle way between individual liberty and the public good.... between preserving the privileges of the few and bestowing benefits on the many in order to liberate the powers of all men equally, for constructions to the common good."[47]

However, the way in which the fundamental Rights were set against the Directive Principles, a contradiction was bound to occur. The concerned constitutional provisions precipitated an artificial antithesis between the rights of the individual and the obligations of an interventionist state to guarantee justice to the common man. The Part III of the Constitution dealing with Fundamental Rights enjoys a definite preponderance over Part IV dealing with the Directive Principles of State Policy. In course of actual working of the Constitution, it was envisaged that the provisions of Part IV were bound to clash with the provisions of Part III.[48] Dr. Ambedkar commented rather prophetically on November 25, 1949, when the new constitution was being adopted by the Constituent Assembly; he said, "we must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means

elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January, 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality .... we must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which the Assembly has so labouriously built up."[49]

Ambedkar's statement on what the constitution of India was going to concede to the common man in the name of justice is a revealing commentary. Nehru's analysis on the spirit of the objectives resolution had obvious emphasis on "common good", "equality", the substantive, socio-economic content of justice. The preamble to the Constitution as well as the Directive Principles of State Policy further, strengthened the idea. However, the non-enforceable character of the preamble and the Directive Principles of State Policy paved the way for promoting the interests of the few at the expense of the teeming millions of the masses of the population.[50]

The Debates in the Constituent assembly led to the emergence of a "Compromise formulae" which many theorists regarded as an excellent cover for defending the liberal Democratic perspective of justice that has guided the development of the Constitution.[51] A perceptive observer of the scene has correctly pointed out, "In other words, the idea of compromise led to a defense of unequal positions in society. Quite inevitably, this wrong perspective led to grim tensions, institutionally and ideologically, which soon became manifest in the years that followed."[52]

Section – II

Justice and the Constitutional Arrangement:

With the proclamation of the Republic and the Launching of the new Constitution in 1950, the Journey of Parliamentary Democracy began in India. This entailed a change in the composition of Political Powers. Under the new Constitutional arrangements, political power would be exercised by the chosen representatives of the people and not by a small number of bureaucrats characterizing the British rule. This change in form as well as content in power, it was presumed, would intensify interaction with the people, in the process, bringing them closer to the new ruling class. In any case, the common man had been the worst victim of the infamous legacy of British rule. During the British Raj, agricultural labourer, the Industrial worker and the poor artisan had to face, by far, the crudest form of injustice. The Indian masses had no voice in shaping the form and content of Political Power. Naturally, they used to lead a subjugated status in political terms. Since the colonial masters dictated the terms of Indian economy and it was eventually, reduced to an appendage of the British economy, so, the crass exploitation of the worst type was the order of the day.[53]

The concentration of economic power had reached to such an extent that the per capita national income in 1948-49 stood at Rs.255, one of the lowest in the world at that time.[54] Equally deplorable were the plights of the under-privileged classes which were plagued by the age old policy of untouchability and social segregation and were forced to lead a sub-human existence. So, this people of so-called low origin were helpless against the hazards and injustice of a social order which was marked by gross inequalities.[55]

The historic resolution of Pandit Nehru adopted by the Constituent Assembly on January 22, 1947 reads "wherein all powers and authority of the sovereign independent India, its constituent parts and organs of government are derived from the people; and wherein

shall be guaranteed and secured to all the people of India-justice-social, economic and political; equality of status, of opportunity, of freedom of thought, expression, belief, faith, worship, vocation, association and action." It was, further, inserted "wherein adequate safeguards shall be provided for minorities, backward and tribal areas and depressed and other backward classes." In keeping with this aim, Nehru maintained that "a vote by itself does not represent very much to a person who is down and out, to a person who is starving or hungry." He went on to add "political Democracy by itself is not enough except that it may be used to obtain a gradually increasing measure of economic democracy, equality and the spread of good things of life to others and removal of gross inequalities."[56]

Art. 12 of the Indian Constitution defines the term "the State" whereas Art. 13 provides for the rule for resolution of conflicts between a 'law' and a provision of the Constitution in connection with fundamental Rights. Fundamental Rights are safeguarded and protected because the right to constitutional remedies, available under Art. 32, is itself a fundamental right. So, Fundamental Rights as contained in Part III of the Constitution are enforceable in the Supreme Court by the operation of the Right to Constitutional remedies. On the other hand, Art. 226 Confers on every High Court the power to issue to any person or authority within its geographical jurisdiction, directions or orders or writs, for enforcement of any of the Fundamental Rights or for any other purpose. The powers Conferred by these two articles on the Supreme Court and the High Courts respectively, have helped them, to function as the custodians of Fundamental Rights.[57] The inclusion of Art. 13(1) and (2) in the Constitution is indicative of the desire of the Constitution makers to provide for all precautionary measures to protect Fundamental Rights. Art.13(1) states that all laws in force immediately before the inauguration of the Constitution which came into conflict with the provisions vis-à-vis the Fundamental Rights, be void. Art.13(1) can, therefore, have no retrospective effect. Art.13(2)

prohibits 'the State' from making any law which takes away or abridges any of the Fundamental Rights and also provides that any law made in contravention of the clause shall, to the extent of contravention, be void. Thus, post-constitutional laws in-consistent with any of the Fundamental Rights are void abinitio.[58] The incorporation of Art.32 in the constitution amply demonstrates the significance attached to the right to constitutional remedies by the framers. As Dr. B.R. Ambedkar observed, rights without remedies would remain 'glittering generalities without any binding effect on the state.[59] Further, he explained the importance of Art.32 as follows:

An article without which this constitution would be a nullity .... It is the very soul of the Constitution and the very heart of it.[60]

The Constitutional provisions relating to the right to equality forbids all kinds of unjust, undeserved and unjustified inequalities. The concept of equality is a recognition of the fact that men are equal in their final estimate. So, the concept of equality is a noble ideal which imparts dignity to the individual. Although absolute equality is an impossibility and what equality really means is that among equals the law should be equal and equally administered. Thus, the idea of equality is closely enmeshed with the concept of justice.[61] In our Constitution equality is sought to be achieved through Arts.14,15,16,17 and 18. The principal rule is stated in Art.14 which prohibits the state from denying to any person equality before the law or the equal protection of the laws. Art.15 elucidates the meaning of equality by prohibiting discrimination. Art.16 provides that there shall be equality of opportunity for all citizens in respect of employment or appointment to any office under the state. Art.17 prohibits untouchability and Art 18 forbids the state from conferring any title, besides a military or an academic distinction.[62] The framers of our Constitution have recognized the paramount place of the individual in society and in state and have made adequate provision to guarantee his right to freedom. They have also endeavoured to strike a balance between the spheres of personal

freedoms and social control. The right to freedom is guaranteed by Arts. 19 to 22. Art. 19 guarantees to the citizens only the enjoyment of certain civil liberties while they are free, whereas Arts.20 to 22 secure to citizens as well as non-citizens certain constitutional guarantees in regard to punishment and prevention of crime. Judicial pronouncements on the rights to freedom have revolved around the restrictions which have been imposed on them by the Constitution. Absolute individual rights can not be guaranteed by any modern state. So, our constitution itself has conferred upon the 'State' a power to impose by its laws reasonable restrictions as may be necessary in the larger interests of the community.[63]

So, the Constitution endeavours "to strike a balance between individual liberty and social control."[64] Art.23 and 24 guarantee the right against exploitation. Clause(1) of Art.23 provides for two different subject, namely, traffic in human beings and forced labour. The term 'traffic in human beings' should include not only prohibition of slavery but also of traffic in women or children or the crippled, for immoral or other purposes. Special provision for the protection of children is incorporated in Art.24 by providing that no child below the age of fourteen years, shall be employed to work in any factory or mine or engaged in any other hazardous employment.[65] India being a multi-lingual and multi-religious state, the protection of the cultural and educational interests of minorities based on religion or language is of paramount importance. Arts. 29 and 30 have been incorporated in the constitution to safeguard the interests of these minority groups which have virtually no parallel in the constitution of other countries. Clause(1) of Art.29 provides that any section of the citizens having a distinct language, script or culture of its own shall have the right to conserve the same. The right of conservation vis-à-vis a linguistic minority implies: (i) the right to free use of the language; (ii) the right to impart instruction in the language; (iii) the right to publish books or periodicals in the language; and (iv) right to perform any other lawful

act or to adopt any other lawful measures towards furtherance of conservation of the language. Clause(2) of Art.28 guarantees the right of admission into an educational institutions which provides that no citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them. Art.30(1) confers on all minorities whether based on religion, language, the right to establish and administer educational institutions of their 'choice'. So, it may be said that adequate judicial protection has been provided to the minority rights. However, the courts have also authority to see that these rights cannot be enjoyable in absolute and unqualified terms. So, the state has the right to impose limitations on them.[66]

Property is a vital social institution affecting the social, economic and political life of the community. So, the state determines the extent to which the right to property shall be guaranteed. Under our constitution, Arts. 31, 31A and 31B uphold the sanctity of private property. The aim of Art.31 is to secure private property against arbitrary expropriation by the state. It safeguards the right to property by defining the limitations on the power of the state to take away private property without the consent of the owner. One of the limitations is incorporated in Cl.(1) of this article which provides that "no person shall be deprived of his property save by authority of law."[67] Thus, Cl.(1) of Art.31 protects the right to property against deprivation by the state acting through its executive organ, the government. It may be observed that the power of the legislature to deprive a person of his property is not absolute for Cl.(2) of Art.31 imposes certain restrictions. It clearly lays down that no property shall be compulsorily acquired or requisioned except for a public purpose and under a law which provides for compensation for the property so acquired or requisioned. Cls. (3) to (6) of Art.31 and Arts. 31A and 31B are concerned with the exceptions to the general provisions of Cl.(2) of Art.31. The constitution promises to every citizen for promoting the ends of social justice and of

equality of status and opportunity and accordingly, the right to private property will have to be suitably held in check. In interpreting socio-economic laws, judges should keep in mind the dynamics of law and should be ever responsive to what justice Holmes stated as 'the felt necessities of the times.'[68]

The Constitution and the Directive Principles of State Policy:

The genesis of the Directive principles may be traced back to the Karachi Resolution of 1931 which stated that in order to end the exploitation of the masses, political freedom should be combined with real economic freedom. Part IV of the Constitution (Arts.36-51) contains the Directive principles which give a detailed exposition of the ideals set forth in the preamble of the constitution. The Directive principles are designed to supplement the Fundamental Rights and secure for collective well-being certain rights which are at variance in nature from the Fundamental Rights and which Part III of the constitution by its very nature cannot guarantee to the individual. But, the Directive Principles of State Policy are in the category of rights which are conferred by the state on the individual for the specific end of promoting the social well-being. The Directive Principles are also in the nature of duties that the state is called upon to discharge certain responsibilities to promote the welfare of the people by ushering in a social order based on social, economic and political justice.[69] Article 38 states, "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it can establish a social order in which justice, social, economic and political, shall inform all the institutions of the national life." Art. 39(b) lashes out against concentration of wealth in the hands of a microscopic minority. It reads, ".... that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good". Article 39(c) is more straight forward, "....that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment." Article 43 deals with

labour welfare. It reads, "The state shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities...." These Directive Principles are of non-enforceable in nature but they are "nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws," it is guaranteed in Article 37. The constitution, thus, leaves the impression that it recognized the essence of socio-economic justice as a value, that is, the constitution attached importance to these group of rights in order to bridge up the gap of inequality, prevalent among different classes of society. The constitution also made it an imperative for the Government to translate the socio-economic ideas into a reality for the common man through state intervention.[70]

In India, it appears that the Fundamental Rights have both created a new equality that had been absent in traditional Indian (largely Hindu) Society and have helped to preserve Individual liberty. A strong indication, therefore, of the reasonably healthy condition of civil liberties in India is the lack of criticism of their absence - and the credit for this, in some measure at least, must go to the Constitution.[71]

However, the presence of the Directive principles of state policy has prompted Dr. Wheare to comment "whether there is any gain, on balance, from introducing these paragraphs of generalities into a constitution".[72]

The political foundation of the Indian Republic being parliamentary Democracy, the notion of justice is likely to be constrained in its operation by certain typical parliaments' procedural regulations, as laid down in the Constitution laws, howsoever socially and historically important they are, would not be allowed to clash with the Fundamental rights contained in the Constitution. So, any

legislation to secure social justice would be allowed only to the extent as it would not take away the liberty of the individual, howsoever violative of social justice its operation might be.[73]

Other means in the Constitution for espousing the cause of justice: Universal adult franchise and social justice-

The decision of the constituent Assembly to grant universal adult franchise can be considered as a bold and momentous decision which was reflective of the faith reposed by the members of the Constituent Assembly in the Political wisdom of the Indian voters.[74] However, the formal process of exercise of vote may be termed as a reflection of the increasing involvement and participation of the voters, but, mere guaranteeing of universal suffrage has never resulted in the mobilization of the masses. The 'user attitude' as opposed to the 'participatory attitude' seems to be more common amongst the citizens. Nevertheless, guaranteeing of universal adult franchise provided an opportunity which was earlier denied to Indian citizens for giving expression to and reflecting the multi-track diversities of the society at which they are embedded in.[75] Oommen has very rightly pointed out, "....once freedom was achieved the temporarily frozen identities (particularly the regional-linguistic; religious caste; and tribal identities) gradually started assuming saliency".[76]

The fact that caste factor has come to play a critical role in shaping the electoral verdict also lends support to M.N. Srinivas's view that universal adult franchise has resulted in the re-assertion of caste based loyalties. However, Rajni Kothari has opined that universal adult franchise has neither given caste a 'new solidarity' nor has it 'reestablished its legitimacy'.[77] If the search for social justice were to be seen as establishing individual autonomy in society, the guaranteeing of universal adult franchise could well be hailed as being a positive measure in the direction of strengthening individual autonomy. But, obviously, caste based politics has precipitated caste solidarity in

society at the expense of individual autonomy.[78] Inspite of universal adult franchise, Kashyap castigates first Lok Sabha as the 'highly elitist body' and assessing the future prospects, he warns,

"The patience of the people seems to be on the verge of collapse. It has come to be widely believed that behind the disintegration and fragmentation of society and threats to national unity, the single most potent force is our politics of vote merchants and power brokers busy building their vote banks."[79]

Justice and centre-state relations under the constitution

The political structure of the Indian constitution is of an unusual variety which constraints one to describe it briefly. Some have characterized it as 'Quasi federal', others have labeled it as 'statutory decentralization' The members of the Assembly themselves declined to adhere to any theory or dogma about Federalism. Instead, they produced a new kind of Federalism to meet India's unique requirements. Right from the start, the Assembly was in favour of cooperative Federalism. Another important issue which is worth mentioning here that the drafting of the Federal provisions was marked by the relative absence of conflict between the 'centralizers' and the 'provincialists'. In any case, co-operative Federalism presupposes a strong central, or general Government, yet it does not necessarily produce weak provincial Governments that are generally administrative agencies for central policies. Indian Federalism may, possibly, fall into this category.[80] However, the political emphasis of the Indian constitution rapidly moved from a confedaral to a Federal to a unitary conception of the Indian Union during the brief period of existence of the constituent Assembly. As a matter of fact, the congress party used to enjoy overwhelming popularity throughout the country at the time of independence. This payed the way for the installation of a homogeneous Government at the centre as well as in all the States. This objective situation enabled the Indian Government to successfully

create the impression that the constitution was Federal in character and power-sharing between the two levels of Government was done on the basis of mutual consent.[81]

In any case, let us briefly discuss the constitutional position vis-à-vis centre-state relations and the institutions of Governor to understand and appreciate the true nature of Federalism in India.

Legislative Relations: Part-XI, chapter I of the constitution deals with the legislative relations between the union and the states. Arts.245 to Art.255 make up the entire gamut of legislative relations of the articles which have an interface with both the central and the state lists, Articles 246, 248, 249, 250, 251, 252, 254 may be specially mentioned. Art. 246 states (i) Parliament has exclusive powers to make laws with respect to matters enumerated in the union lists, enumerated in the seventh schedule of the constitution; (ii) Subject to clause (i) the states have power to make laws with respect to matters contained in list 111; (iii) subject to clauses (i) and (ii) states also have the power to legislate for such state or any part of it with respect to matters contained in list 11. Art. 248 vests the residuary powers of legislation to the union Parliament. Art. 249 authorizes the union Parliament to make laws with respect to any matter contained in the state list in the national interest. Again, Art. 250 empowers Parliament to legislate on any matter in the state list if a national emergency is declared. Art. 251 says that the State legislatures have authority to legislate on any matter which they are entitled to but, if such a law passed by State legislature is repugnant to any provision of a law made by Parliament, the union law whether passed after or before the state law, shall prevail. Again, Art. 254 through the clause of 'inconsistency', can dislodge state laws to uphold the union law.[82]

Administrative relations - Articles 256 to Art. 263 comprise the administrative relations between the Union Government and the States as enshrined in the constitution. The articles 256 - 257 along with Arts.

356 and 365 (the Emergency Provisions) provide huge opportunity to union Government to encroach upon the domain of the state Governments. The union Government can also give directions to the state Governments under Arts 339 (2) and 350(A) respectively. The former deals with drawing up schemes for the welfare of scheduled tribes and the latter to directions for providing facilities for instructions in the mother tongue at the primary stage to children of linguistic minorities.[83]

The constitution provides for three kinds of 'Emergencies' or abnormal situations. To deal with these Emergency situations, 'proclamation of emergency' may be made by the president at any time if he is satisfied that the security of India or any part thereof has been threatened by war, external aggression or armed rebellion (Art. 352). It may be made even before the actual occurrence of any such disturbance. But no such proclamation can be made by the president unless the union Ministers of cabinet rank, headed by the Prime Minister, recommend to him, in writing, that such a proclamation should be issued (Art. 352(3).[84] The major fall-out of a proclamation of emergency may be discussed below: under a proclamation of emergency, the Government of India is empowered to give direction to a state on 'any' matter, so that though the state Government will not be suspended, it will be under the complete control of the union executive, and the administration of the country insofar as the proclamation goes, will function as under a unitary system with local sub-Divisions. Once the proclamation of emergency is in vogue, the president shall have the constitutional power to change the provisions of the constitution vis-à-vis the allocation of Financial relations between the union and the states by his own order. But no such order shall have effect beyond the financial year in which the proclamation itself ceases to operate and further, such order of the president shall to be subject to approval by parliament.(Art. 354).[85]

The effects of a proclamation of emergency upon Fundamental Rights.

Art. 358-359 lay down the consequences of a proclamation of Emergency upon Fundamental rights. As amended up to 1978, by the 44th Amendment Act, This may be summarized as follows -

I) Art. 358 provides that the state would be free from the limitations imposed by Art. 19, as the rights available to a citizen under Art. 19, would cease to exist against the state during the operation of a proclamation of emergency. On the other hand, the right to move the courts for the enforcement of the rights or any of them, may be suspended under Art. 359, by order of the president.

II) Art. 359 would be applicable to an emergency declared on any of the grounds mentioned in Art. 352, i.e. war, external aggression or armed rebellion, while the application of Art. 358 is restricted to the case of emergency on grounds of war or external aggression only.

III) With the proclamation of emergency on the ground of war or external aggression, Art. 358 comes into operation automatically to suspend Art. 19. The application of Art. 359, specifying those Fundamental rights against which the suspension of enforcement shall be operative, requires a further order to be made by the president.

IV) Art. 358 suspends Art. 19; the suspension of enforcement under Art. 359 shall relate only to those fundamental rights which are mentioned in the presidents' order, besides Arts 20 and 21. So, under Art 20 or 21, a prisoner's or detune's right to move the courts cannot be taken away notwithstanding the fact that an emergency is in operation.

V) Neither Art. 358 nor 359 shall have the effect of suspending the operation of the relevant Fundamental right unless the law which affects the aggrieved individual contains a recital to the effect that "such law is in relation to the proclamation of emergency". In the

absence of such recital in the law itself, neither such law nor any executive action taken under it shall have any immunity from challenge for infringement of a fundamental right during operation of the Emergency [Cl. (2) of Art. 358 and Cl. (IB) of Art. 359].[86]

The Governor is the main functionary with respect to the continuing dialogue between the centre and the States Art. 154(1) lays down that the executive power of the state is vested in the Governor and is exercised by him either directly or through officers subordinate to him. The following set of articles define the Governor's role in the centre-state administrative relations. They are: 1) Art. 239 (2), 371, 371(A) and 356; (2) Appointment of the Chief Minister under Art. 164; (3) Proroguing or dissolving the Assembly under 174(2); 4) withholding of state bills for the president's assent under Arts. 200 and 201 of the constitution; 5) The Governor' use of discretionary powers under Art. 163(I) and (2).[87]

Constitutional Emergency in the States under Art. 356

The Constitution provides for carrying on the administration of a state in case of a failure of the constitutional machinery. It is a duty of the union to ensure that the Government of every State is carried on in accordance with the provisions of the constitution (Art. 355).[88] If the president is satisfied on receipt of a report from the Governor or otherwise that a situation has arisen in which the Government of a state cannot be carried on in accordance with the provisions of the constitution, he is empowered to proclaim an emergency.

The President may assume to himself all or any of the functions of the state or he may vest all or any of those functions in the Governor or any other executive authority; (ii) he may declare that the powers of the state legislature shall be exercisable by parliament and (iii) he may make any other incidental or consequential provisions necessary to give effect to the object of the proclamation.

However, the proclamation will have to be approved by the Houses of Parliament in the same manner in which a war emergency proclamation has to be approved. Every such resolution approving the emergency has to be passed by each house of parliament by a majority of the total membership of the house and by a majority of not less than two third of the members of that house present and voting.[89]

Reservation and the Constitution :

In the debate on social justice, policies of positive discrimination have frequently been regarded as 'compensation for past injury', while this representation has come essentially from western liberal democracies, in India, Marc Galanter has used this framework to discuss the special provisions for the Scheduled castes and scheduled Tribes. Against characterizations of this kind, it is important to stress that the objective of positive discrimination was to ensure that the effects of past social practices do not remain defining feature of the social landscape for all time to come. Members of the constituent Assembly singled out caste-based inequalities as the root-cause of unacceptable discriminations that necessitated to be set aside and removed. Positive discrimination was an instrument for realizing this goal.[90]

As Prof. Gurpreet Mahajan points out, "In making special provisions for the scheduled castes, the Constituent Assembly did not choose between various victims. Instead, it sought to see that inequalities on account of caste identities would not persist in independent India. This was in keeping with the primary concerns of liberal Democracy: in fact the latter has generally been concerned about inequalities that stem from social attributes or identities Guided by such liberal sentiments the constituent Assembly tried to establish a system of Governance in which caste, as a form of social identity, was not the basis of excluding people from the benefits of equal rights of citizenship. If anything, positive discrimination was to ensure that

groups that had previously been excluded from social and political life were now included on equal terms."[91]

The constitution provides for various special provisions for the promotion of the interests of the scheduled castes and Tribes. They are:

i) measures for the advancement of the Scheduled castes and Tribes are exempted (Art. 15(4) from the general ban against discrimination on the grounds of race, caste, and the like, enshrined in Art. 15.

ii) While the rights of free movement and residence throughout the territory of India and of acquisition and disposition of property are guaranteed to every citizen, the state many provide that the members of scheduled castes and scheduled Tribes shall not be entitled to alienate their property except with the concurrence of a specified administrative authority or except under specified conditions [Art. 19(5)].

iii) Art. 335 lays down that the claims of the members of the scheduled castes and the scheduled tribes shall be taken into consideration, consistently with the maintenance of administration, in the making of appointments to services and posts in connection with the affairs of the union or of a state.

iv) A special officers shall be appointed by the president to look into all matters relating to the safeguards provided for the scheduled castes and scheduled Tribes and to report to the president upon the working of those safeguards as enshrined in Art. 338.

v) Under Art. 339(i) the president may, at any time, and shall at the expiration of ten years from the commencement of the constitution, by order appoint a commission to report on the administration of the scheduled areas and the welfare of scheduled Tribes in the states.

Art. 339(2) provides for the executive power of the union to give directions to any such state as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the

Scheduled Tribes in the State. And, financial aid for the implementation of these welfare schemes is laid down in Art. 275(i).

Art. 164 mentions that in the states of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare, who may also be in charge of the welfare of the scheduled castes and other backward classes. Special provisions are enshrined in the Fifth and Sixth schedules of the constitution along with Art. 244, for the administration of areas inhabited by Scheduled Tribes.

Above all, there is a general directive in Art. 46 that the state shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the scheduled castes and the scheduled Tribes and shall protect them from social injustice and all forms of exploitation. Besides, there are temporary provision for special representation of and reservation of seats for scheduled castes and scheduled Tribes in the legislatures under Arts 330, 332, 334 of the constitution.[92]

Under Art. 340, the constitution provides for the appointment of a 'commission to investigate the condition of backward classes. The first such commission was appointed in 1953, with Kaka Saheb Kalekar as its chairman. The second Backward Classes commission was constituted in 1978 during the Janata Party rule. It was headed by B.P Mandal. The commission considered that 52 per cent of the total country's population belonging to other back-ward classes. (OBC). It suggested educational concessions, reservation facilities and financial assistance in order to uplift the conditions of the OBC, They recommended that the reservation for the OBCs in Government services and educational institutions should be extended to 27 percent. As the Scheduled Castes and Scheduled Tribes were already enjoying 15 percent and 7.5 percent reservations respectively, the commission proposed further reservation in a manner so that, the total amount of reservation would add up to 49.5 percent, without dishonoring the

Supreme Court of India's direction in this respect, that overall level of reservation should not cross the 50 percent mark. But the decision of the V.P. Singh - Led Government to implement the Mandal Commission recommendations in 1990, evoked robust protests from the so-called upper castes leading to caste flare-ups in different states.[93]

Legislative action and judicial responses to the issue of justice in India.

The issue of social justice during the era of single party dominance (1950-1976) -

In his classic work on the Indian constitution, Granville Austin writes, "The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement".[94]

The Indian constitution which became operational three years after independence, displays the progressive views of the westernized intelligentsia in many respects within the constituent Assembly. This group was led by Nehru, Ambedkar, the chairman of the drafting committee, also belonged to this group.

Guided by wider notions of human rights, Fundamental rights a kind of preamble to the constitution promoting equal rights without discriminations on grounds of religion, of race, of caste, of sex or of geographical origins - as well as respect for the liberty of speech and religion, are strongly advocated.[95] on the other hand, Directive principles of state policy which is incorporated in the constitution asserts that the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and Political, shall inform all the institutions of the national life.[96] A robust opposition around property rights gained ground which Nehru had to face immediately after

independence, testified to the fact that even for Nehru it was an uphill task. It was, no longer, Gandhi standing in his way of promoting the ideas pertaining to his brand of socialism, rather, conservative Congress-men scuttled his initiative favouring 'socialist lines'. Thus, the simmering tensions grew within the Congress fold and turned the agrarian reform, the role of planning in the Indian economy and agricultural co-operatives into hotly debated issues.[97] Nevertheless, as Sudipta Kaviraj Writes, "Feudal and other conservative resistance could, in principle, be broken down if the congress encouraged the mobilization of the masses and was willing to use the already achieved mobilizational levels for radical purposes consistent with its own programmes. But one of the central decisions of the Nehru Government was on this question even though it sometimes did not abrogate its reformistic programmes, it decided to give them a Bureaucratic rather than a mobilizational form."[98]

In the Nehruvian scheme of 'law and social change', the essential elements of law as a tool of planned development in a liberal democratic society could perhaps be described as follows.

i) Law is not a mystical creation.

ii) It consists of rules that are created by a Sovereign Parliament and other legislative bodies.

iii) Law acquires legitimacy if and when: (a) it serves the overall principles of justice, and (b) it is arrived at by a process of democratic discussion.

iv) Once a law is made it cannot be undermined but has to be respected.

v) If people want to change the law, they have to do so by constitutional methods; and the constitution imposes no substantive limits on the change.

vi) Law can be an instrument to achieve social and political transformation; but such changes have to be crafted into a law and not just left to the good sense of the people.

vii) In order to achieve social and economic change, powerful bureaucracies have to be created to enable the transformation of society.

viii) Such Bureaucracies, along with the assistance of courts, where necessary, are expected to plan, persuade, cajole, threaten and punish in order to effect compliance where there is a lack of congruence between a declared norm or goal and its compliance.

ix) The courts are not centres of rebellion; they are needed to interpret the law and to keep the various bureaucracies from straying too greatly out of their jurisdiction and exceeding their powers.

x) People have fundamental rights; but Judges are expected to interpret these in a reasonable way.[99]

When the constitution became operational, there were no great expectations from Judges; nor, for that matter, were there any great fears that Judges would place any major impediment in the way to planned social change through law. With its 'any process' as opposed to 'due process' clause, the constitution had given an edge to parliament over the judiciary. The Judges had no other choice but to accept the 'procedure' enacted by the legislature, even if they felt that it fell short of what they would have wished. The Judges themselves had been schooled in the 'black letter' law tradition. Deep down, even within that tradition, the judges knew that their job was a lot more creative than simply interpreting the law. However, given the juristic techniques they had inherited, they were expected to get involved in controversies; at the same time they were expected not to be controversial. It did not

take long for these assumptions about the judicial role to be disproved.[100]

Legislative action and judicial responses to the issue of justice - Changing perspective of Socio-Political and Economic Dimensions of Political Process.

With the proclamation of the Republic and the coming into effect of the new constitution in 1950, it was expected, that It would draw the people closer to the new ruling class. Needless to say the common man had been the worst victim of the British rule. The plight of the agricultural labourer, the industrial worker and the poor artisan had been characterized by the cruelest form of injustice. Politically, the Indian masses had no voice in shaping the form and content of political power during the years of British rule. Socially and economically, they were wedded to a type of economy that permitted exploitation of the worst type.[101]

Therefore, It is necessary to keep in mind that in order to understand the magnitude of the problem of justice it is essential to study the depth and extent of socio-economic injustice in India at independence. It is also important to analyze the steps taken by the Government, through the enactment of different legislative measures, towards providing substantive justice to the masses of the population and examine, to what extent, these measures have measured up with or fallen short of the peoples' expectations[102] A close look at India's economy shows that it was essentially a backward country, dependent primarily on agriculture and industry playing a very minor role. Agriculture and not industry, constituted the backbone of Indian economy. While in 1948-49,49.1% of the national income came from agriculture, in 1949-50 it rose to 49.8% and in 1950-51 it stood at 51.3%. Income from mining, manufacturing, land-trades, transpor t, communication and commerce showed a declining trend. In 1948-51, 72.4% of India's working people were engaged in agriculture. No doubt,

it is indicative of the typical features of an under-developed economy, that is, over-dependence on agriculture and extremely poor return from the industrial sector. The agrarian sector itself presented a very dismal picture. Agrarian relations were marked by gross discrimination in the pattern of land holdings with around 60% of the agricultural labourers occupying less than 20% of the total cultivated area while 20% of the farmers controlled 50% of the total land holdings. The Industrial scene also displayed an equally disturbing picture. The growth of the Industrial sector was characterized by two significant features. First, Industrial development in India proceeded mainly under the auspices of private enterprise, both foreign and Indian. Secondly, already in those years of slow Industrial growth, a tendency of concentration of a number of Industries in a few hands was very much in evidence.[103] Commenting on this concentration of economic power, M.M. Mehta opined, ".....Judged from broader social, moral and even economic consideration it may as well be argued that such concentration may, in the long run be highly detrimental to the economic and social well being of the community. They may tend to perpetuate and even aggravate the existing inequalities in the distribution of wealth and income between different classes of society .....they may even deny to a large section of the populace equality of opportunities for self-development and progress".[104]

Given this concentration of economic power in the hands of a microscopic section of population of the country, India was ranked one of the lowest in the world in terms of per capita national income with only Rs. 255 in 1948-49.[105] In social terms, the position of the under privileged classes were equally deplorable as the age old policy of untouchability and social segregation had forced them to lead a life of sub-human existence. The untouchables do actually come from the poorest strata of society which rendered them vulnerable against the hazards and injustice of a social order characterized by inequality.[106]

The constitution of India sought to address these questions by incorporating provisions under the directive principles of state policy, part XVI pertaining to the protection of the scheduled castes and Tribes and by declaring in the preamble that one of the major aims of the constitution would be to promote "Justice Social, Economic and Political".[107]

It should, however, be remembered that the Parliamentary notion of justice was limited in its scope by certain typical norms of bourgeois legality. Firstly, such laws would have to be framed within the framework of Parliament's procedural regulations, as laid down in the constitution, secondly, laws, howsoever socially and historically urgent they are, would not be allowed to collide with the Fundamental Rights contained in the constitution. In case of such a conflict, the judiciary would intervene and declare such piece of legislation ultra vires on the basis of Art. 13(2). Therefore, any legislation to guarantee social justice would be allowed only as long as it would not take away the liberty of the individual, howsoever violative of social justice its exercise might be.[108]

Following independence, the state apparatus altered its character and mode of functioning because of the pressures from society released by the democratic process and through the operation of self-serving state policies. Rapid industrialization and subsequent social equity were the two primary objectives of the Nehruvian State. Its programme for social reform was not completely disingenuous but its strategy was fully bourgeois. While it raised the aspiration for alleviation of poverty, it seemed reluctant, in practical terms, to risk sacrificing the support of the propertied classes in Indian society for its immediate achievement.[109]

However, an examination of the character of the legislative enactments in different spheres is thus indispensable for an understanding as to how the Indian parliament has, over this long

period of time, come to terms with the problem of justice and in what way social legislation has run its course to provide justice to the ordinary people.[110]

Legislative enactments vis-à-vis Agrarian reforms

After independence, it was strongly felt to institute reforms in the agrarian domain. Firstly, there was the problem of the abolition of intermediaries (The third actor placed between the tiller and the state, the Zamindars as well as the 'middlemen' who with the blessings of the Zamindari system, thrived during the British rule). Secondly, there was the need of conferring rights on the tenants safeguarding their tenure. Thirdly, there was the issue of deciding the size of the land holdings and thereby, put a brake on the concentration of land-holding.[111]

The need for removing the bottlenecks characterising the system, especially in the face of opposition from the conservative elements in the judiciary, led to the enactment of the constitution (First Amendment) Act 1951 and the consequent incorporation of Article 31A in the constitution. The proprietary rights of the Zamindars could now be taken away by the states through suitable enactment of legislative measures (Agriculture being a state subject under the constitution) and the initial legal impediments were thereby removed to bring the statutory tenant in direct relationship with the state. By virtue of this amendment again, Article 31B was incorporated in the constitution. It made abundantly clear that the land reform Acts passed by the different State legislatures were made immune from judicial scrutiny, since these Acts now had come under the Ninth Schedule of the constitution.[112] The right to property guaranteed under Art.31 of the constitution seeks to achieve economic justice. The provisions of the constitution relating to this particular right have been significantly changed by the constitution (First Amendment) Act, 1951, the constitution (Fourth Amendment) Act, 1955, the constitution (Seventeenth Amendment) Act, 1964, and the constitution (Twenty Fifth

Amendment) Act, 1972. It may be said that these amendments rightly recognize that the rights of the community in the final balance are more important, because eventually they affect the rights of the individual also. Thus, it hinders the process for the establishment of a welfare state on a socialistic pattern.[113] In fact, in the mid-50s it was reported officially that as a positive fall out of the adoption of these slew of legislative measures, the system characterized by middlemen, had almost disappeared between 1947 and 1956.[114] A Government of India document stated, ".....by the end of the first plan period intermediaries have been abolished almost entirely throughout the country. But few pockets remain where action is still needed."[115]

The real situation, however, is far from satisfactory. The cherished goal of eradicating intermediaries has not been achieved, notwithstanding the fact that all the states have passed laws to this effect. A crucial factor is that the laws themselves are not radical enough to do away with the vast amount of privilege that go with the big landlords Another factor may be that such laws have been framed in a number of states which are characterized by lack of conformity and devoid of substance.[116] The share-croppers and the poor agricultural labourers were at the receiving ends of injustice vis-à-vis land-related issues. An inquiry committee was appointed by the Government of India in the late 50s which brought to the fore that massive ejectment of tenants all over India has been a regular feature in violation of the provisions of the various land-reform Acts. Since the land-lord is allowed to eject a tenant to resume land for personal cultivation, taking advantage of such provisions which are essentially inserted to help the bonafide cultivator to return to the land, the absentee land-lords get the lands back and cultivation is done by hired labour or through crop-sharing. The failure of the ceiling laws has been particularly caused by the laws themselves, as there is no uniformity. Since the second plan, it is left to the individual state Governments to decide whether ceiling should be imposed on the basis of family as on unit or an individual.

The ceiling laws were made further ineffective by exempting plantation of tea, coffee, rubber etc. from their purview which helped the big landlords to by-pass the legal hurdles comfortably by getting orchards established overnight or setting up mechanized or co operative farms. Apart from these, nexus between officials of civil administration and revenue department with the big landlords and the poor shape of land records were two other impediments responsible for skewed implementation.[117] The Government has committed itself to make heavy investments in irrigation, rural electrification, community development etc. in order to promote "Green Revolution". Needless to say, the big farmers are the direct beneficiaries of these Governmental endeavours[118] As the Appu Committee Report notes, "All these measures have led to a marked increase in agricultural productivity and naturally, those with more land have derived a larger share of the increased prosperity. This process has also led to greater concentration of wealth in the hands of the rural elite in direct contravention of the Directive principles of state policy."[119]

Parliamentary enactments vis-à-vis Industrial labour's interests.

At independence, the Indian industrial scene was characterized by the concentration of major industries in a few hands. Obviously, this leads to unequal distribution of economic power spawning further inequality in the society. In the post-independent India, justice presupposes a fair deal to the industrial workers as well as a firm commitment to labour welfare. A study of the various enactments relating to labour would help us to understand the role of parliament in this context.[120]

Art. 39(c) of the Indian constitution places a moral injunctions upon the state to make sure that the operation of the economic system does not "result in the concentration of wealth and means of production to the common detriment."[121] Moreover, the constitution enables the state to impose certain duties upon the citizens, so that the

directives are implemented in making a law to ensure minimum wages to workers in keeping with the directive under Art. 43.[122]

A very important legislative enactment has been the Factories Act of 1948, amended subsequently by parliament to meet the changing needs of society. The Act provides a 48 hour-week for adult workers and prohibits the employment of children under the age of 14 in any factory. The Act also prescribes the minimum standards of lighting, ventilation, safety, health, etc. to be provided to the workers which the employers are legally bound to comply with.[123] The Industrial disputes Act. (1947) prescribed for conciliation and adjudication of labour disputes for which an elaborate system of labour courts and industrial and national tribunals were also provided. Thus, Industrial relations laws may be said to have established a regime of active Government intervention. Such Interventionist industrial relations regime was justified on the ground that it could achieve several important objectives, namely, protecting the workers in their conflicts with the employers; secondly, ensuring certain minimum rights to workers which were expected from a democratic and a welfare state; and most importantly, maintaining Industrial peace so important for achieving Industrial growth. To achieve these ends, some additional welfare legislations were enacted by the Government over the years, such as, the Employees provident Fund and miscellaneous provisions Act of 1952, maternity benefit Act of 1961, payment of Gratuity Act of 1977, Employees pension scheme of 1995. In the similar vein, Industrial disputes Act was amended in 1982 and 1984 respectively, to protect workers against the unfavourable impacts of lay-off, retrenchments and closures.[124] In addition to these labour welfare laws, Parliament has passed laws to provide benefits to specific categories of workers. The plantation labour Act., 1951, the Mines Act, 1952, and the bidi and cigar workers (conditions of Employment) Act, 1966 are few such examples of this category of Parliamentary enactments.[125] In keeping with the recommendations of the Monopolies inquiry commission which

clearly warned against the growing danger of the monopoly houses, the monopolies and restrictive trade practices (MRTP) Act was passed in 1969 and the Industrial licensing policy, too, was altered in February 1970.[126] During the '70s, the fragmentation of the working class was presented in ideological terms as the division between the organized and unorganized sectors came to the surface. The more privileged organized sector secured its interests at the cost of the less-privileged unorganized sector. Throughout this period, and more importantly after the 70s, workers organized spontaneous actions as a protest against the failure of organized union to agitate for the improvement of their working conditions. A clear pattern could, however, be noticed in these actions. Now, for the first time, employers started to serve their 'charter of demands' on unions. These included demands for a ceiling on dearness (or cost of living) allowance, rationalization, and automation. The dismantling of the norms and structures of collective bargaining completed the process of fragmentation of the labour movement that had begun with the emergence of political unions 10 years earlier. By the mid-80s it had become practically impossible to initiate a concerted and unified 'labour' response to the industrial policies that had weakened the old order.[127]

During the 1970s, the Government emerged as the single largest employer of contract and casual labour. In 1970, the contract labour (regulation and abolition) Act was passed. This Act merely regularized the system of contract labour. Though the title of the Act suggests the abolition of contract labour, but the contract and casual labour were divested of judicial remedies, and the Government presented itself as the sole arbiter to decide on whether or not contract labour ought to be abolished in any industry, operation or establishment. The traditional trade unions with their formal structures and approach, did not come forward to provide assistance for the articulation of the demands of unprotected and unorganized labour. Instead, many a voluntary organizations and groups came forward to espouse their cause and

sought recourse to constitutional provisions and in particular, Articles 14 and 21 of the constitution providing for protection against discrimination and for the right to life.[128]

Welfare of children, parliamentary initiatives and Governmental programmes.

The constitution (Ninety-third Amendment) bill 2001 which is called the (Eighty-Sixth Amendment) Act 2001 casts a duty on the state through Art.21 to provide free and compulsory education to all children of the age of six to Fourteen years in such manner as the state may, by law, determine. Article 24 provides that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment clauses (e) and (f) of Article 39 provide that the state shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not compelled by economic necessity to enter avocations unsuited to their age and strength and that children are given opportunity to develop in a healthy manner and in conditions of freedom and dignity and that children and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions, says justice Bhagwati, demonstrate the great anxiety of the founding fathers of the constitution to protect and safeguard the interest and welfare of children in the country.[129]

The declaration of the Rights of the child was adopted by the general Assembly of the United Nations in 1959 and Article 24 of the international covenant on civil and political Rights 1966 contained the said provision too. The children's Act 1948 has made elaborate provisions to cover this.[130] Notwithstanding, the absence of specification of construction Industry in the schedule to the employment of children's Act 1938, the constitutional mandate that no child below the age of 14 years can be employed in construction work is

prone to violation. Therefore, Government should make sure that the Constitutional mandate in this respect is duly honoured.[131]

Government data reveal in September 2007 that only three out of 100 child labourers have made it to school twenty years after India launched its ambitious programme to put every child in classroom. This also signals the failure of the National child labour policy pioneered by Rajiv Gandhi's Government in 1988. A planning Commission Working group on child labour has suggested detailed changes to the policy ahead of the 11th Five year plan and the ministry of labour which is responsible for eradicating child labour, have accepted the recommendations. On 10th October 2006, the union Government banned children below the age of 14 from working in residences, Hospitality industry and hazardous jobs. The ban imposed in 2006 is an extension of India's child labour (prohibition and regulation Act of 1986) which banned children under the age of 14 from working in hazardous industries like fireworks and match-stick making.[132]

Parliamentary legislative initiatives vis-à-vis Backward Community and Depressed classes.

Social legislation in this area involves mainly to improving the lot of the scheduled castes and tribes of the so-called "untouchables" and of the women.[133] We would confine ourselves in the context of this study only with the parliamentary enactments that aim to improve upon the conditions of the backward community and the depressed segments of the society. Towards this end, an important legislation has been the untouchability (offences) Act. 1955.[134] Article 17 of the Indian constitution abolishes "untouchability", and its practice in any form is made an offence punishable under the law.[135] However, the substantive aspect of justice in the field of untouchability too remains an issue of. Economic justice. The terrible poverty and economic degradation constitute the utter helplessness of those "untouchables" is,

particularly, in evidence in the magnitude of indebtedness prevalent among these backward communities.[136] The untouchability offences Act was amended in 1976 making its penal clauses more stringent. The Act has also been renamed as the protection of civil Rights Act. One significant new provision of the Act is that a person convicted of an untouchability offence, will be disqualified from contesting the elections.[137]

The spirit of equality pervades the provisions of the constitution of India as the main aim of the founders of the constitution was to create an egalitarian society wherein social, Economic and political justice prevail and equality of status and of opportunity are made available to all.[138] However, certain classes of Indian citizens are, for historical and traditional reasons, under severe social and economic disabilities that they cannot effectively enjoy either equality of status or of opportunity.[139] The constitution, therefore, accords to these weaker sections of society compensatory or protective discrimination through various articles including articles 15(4) and 16((4). Articles 15(4) authorizes the making of any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled Tribes and Article 16(4) authorizes the making of any provision for the reservation of appointments of posts in favour of any backward class of citizen which in the opinion of the state is not adequately represented in the services under the state.[140]

However, the court "may scrutinize the Government's designation of backward classes to see that the beneficiaries are indeed the backward classes".[141] Similarly, the courts may examine the Government's schemes to see that they work in favour of the intended beneficiaries and not to their detriment and that the extent or method of operation of the schemes does not unduly impair the rights of others.[142]

After the transfer of power, when India adopted a constitution of her own the Right to equality became one of the Fundamental Rights of the Indian citizens. Simultaneously, the founding fathers of the new polity and constitution felt that there is a crucial need for a policy of positive discrimination for the welfare of the backward people in the Indian society. Accordingly, provisions were made so that, 15 percent and 7.5 percent seats and posts respectively are kept reserved for the people belonging to scheduled castes and scheduled tribes in educational institutions and Government and public sector undertakings. The provision of reservation is meant for various legislatures also. The constitution envisages withdrawal of these privileges after a stipulated period of time when the disparities between the people belonging to the so-called upper and lower castes appear to be insubstantial.[143] The Twenty third (1969), Forty Fourth (1979), sixty second (1989) and seventy ninth (1999) Amendments to the constitution have been made thus far, in order to extend the reservation for scheduled castes and scheduled tribes in parliament and state assemblies respectively, for ten years each time.[144]

The constitution of India provides for separate provisions for the amelioration and advancement of all 'backward classes', in general. But, It does not define 'backward classes'. Instead, Art. 340 provides for the appointment of a commission to investigate the conditions of 'backward classes". Accordingly, a commission headed by Kaka Saheb Kalelkar was appointed in 1953. The report was submitted to the Government in 1955. But, the tests recommended by the commission appeared to be too vague and bereft of much practical value. With the Janata Party coming to power, the second backward classes commission was set up under the stewardship of B.P Mondal in 1978. It submitted its report in 1980. It suggested educational concessions, reservation facilities and financial assistance to ameliorate the conditions of the OBCs (other backward classes/castes). They also fixed

the reservation for the OBCs in Government services and educational institutions at 27 percent.[145]

Nearly a decade later, on August 7, 1990, the then Prime Minister V.P.Singh announced that the Mandal Commission recommendations would be implemented and that consequently 27 percent of all jobs under the direct control of the central Government would be reserved for persons from backward castes.[146] However, when the National Front Government under the leadership of V.P Singh decided to implement the recommendations of this commission in 1990, the announcement antagonized feelings of the bulk of the upper caste people which gave birth to several protest movements and eventual caste clashes in different states.[147]

Some other legislative enactments including a few land-mark amendments/acts:

The Seventeenth Amendment (1964) amends the definition of the term "estate" in Article 31-A to include lands held under Ryotwari settlement and also other lands in respect of which provisions are normally made in land-reform enactments. The Amendment has retrospective effect from January, 26, 1950, the day on which the constitution was inaugurated. It also amends the Ninth schedule of the constitution to include 44 state enactments relating to land reforms in order to remove any uncertainty or doubt that may arisen in regard to their validity. Again, the thirty-fourth Amendment (1974) provides constitutional protection to 20 Acts passed by the various Legislatures of states facilitating land-reforms, by including them in the 9th schedule to the constitution. The constitution (Sixty Sixth Amendment) Act, 1990, added a further group of land reforms enactments passed by the state legislatures to the ninth schedule of the constitution, thus taking them out of the purview of judicial review.[148]

Of all the amendments of the constitution during a period of twenty six years since its inauguration, the Forty Second Amendment

stands out as the most comprehensive one. No proposal for amendment of the constitution has attracted so much of attention and criticism in the past as this amendment does. The exponents argued that the amendment was necessitated for removing the difficulties which had arisen in achieving the objective of socio economic revolution which would end poverty and ignorance, disease and inequality of opportunity. On the contrary, those who criticized and opposed the amendment alleged that they were intended to destroy the democratic character of the constitution as it was originally crafted.[149] By expanding the scope of Art. 31C, it was provided that if any law seeks to implement any of the directive principles included in Part-IV, such law would be altogether immune from judicial review on the ground of contravention of Fundamental Rights. This runs counter to what was provided in the original constitution. The load on Fundamental Rights, in short, became ruthlessly heavy after the cumulative burden of Arts. 31A, 31B, 31C, 31D, 51A. Apart from correcting some of the distortions introduced by the 42nd Amendment, the 44th Amendment Act introduced additional changes, e.g. by removing the Fundamental right to property in Art. 19(1)(f) and Art. 31(2). Besides, the Janata Government have themselves retained some of the provisions as amended by the 42nd Amendment, which they considered to be beneficial, e.g. Art. 74(1), Art.311.[150]

Two more legislations relating to local Government and decentralisation are worth-noting here because of their compatibility with commitment to social justice.[151] The Constitution (Seventy-third Amendment) Act, 1993, is a landmark amendment of the Constitution, which provides for an elaborate system for establishing panchayats, as units of self-Government, which for the first time in the Constitutional history of independent India, details the Constitution of Panchayats, duration for which they would function, membership of Panchayats, Constitution of Finance Commission to review financial position of Panchayats and several other related matters. It also adds a new

schedule, namely, Eleventh Schedule to the Constitution, listing 29 subjects which are to be handled by the Panchayats. The constitution (seventy fourth Amendment) Act, 1993 is also a very important amendment and deals with the establishment of Municipalities as a part and parcel of the constitutional system.[152]

Judicial Responses

Apart from the parliament, the other important institution the role of which has been critical in shaping the idea of justice is the Indian Supreme Court. It is important to study how far the Supreme Court has demonstrated its awareness about the importance of the larger social interests as distinguished from the interest of the individual. An enquiry into the judicial decisions of the Supreme Court as to how the court has responded to the issues of socio-economic justice may, perhaps, help us to better appreciate the role of the judiciary vis-à-vis the issues which are of relevance to the masses.[153]

Once the constitution came into effect, the courts came up with a series of judgments that held up constitutional provisions on both property and special provisions for disadvantaged citizens, and struck down state Government actions curbing freedom of speech as unconstitutional.[154] The first amendment bill was introduced in May 1951 which involved three significant changes. They were a)the addition of clause 4 to Article 15, by which Government was empowered to make special provision for backward classes of citizens (b) the insertion of 31a and 31b, by which acquisition of land by the Government could not be challenged on grounds of inadequate compensation and the Ninth Schedule was created in which land reform legislation was to be placed, protecting it from judicial review and (c) clause C was added to Article 19, by which Government could limit freedom of speech " in the interests of the security of the state".[155] The first Amendment Act, 1951 added Cl.(4) to Art. 15 to supersede the decisions of Madras High Court and the Supreme Court in Champakam

Dorairajan v. State of Madras. This deals with Right to equality and this clause makes special provision for the advancement of any socially and educationally backward classes of citizens.[156] Regarding the insertion of clause c to Article 19, Nehru must have been influenced by the armed peasant insurrection in Telengana led by CPI, which finally prompted him to argue - "Every state must have the right of ..... 'police power' ..... every state has to defend itself against an external enemy or an internal enemy and freedom is limited for that purpose."[157] The courts had been holding up many of the land reform legislations.[158] Naturally, these land reform related cases led to a major political conflict with the Government.[159] Zamindari abolition legislation was doing the rounds but no thought was given to protecting it through constitutional safeguards. So, predictable judicial decisions led to predictable panic. Article 31b was inserted in part-III of the constitution by the constitution (First Amendment) Act, 1951. It added the Ninth Schedule Containing 13 items, all relating to land reform laws, immunizing these laws from challenge on the ground of contravention of Article 13 of the constitution, which inter alia, provides that the state shall not make any law which takes away or abridges the rights conferred by part –III and any law made in contravention thereof shall, to the extent of the contravention, be void. Art. 31A was inserted to enable acquisition of estates, take-over of property for a time, abolition of managing Houses et.[160] Its constitutional validity was upheld in Sankari Prasad Singh Deo Vs. Union of India (1952) as well as Sajjan Singh Vs. State of Rajastan Cases. However, in Golaknath and others Vs. State of Punjab (1967), a bench of 11 judges by majority of six to five, overruled these decisions. It was held that constitutional Amendment is "Law" within the meaning of Article 13 of the constitution and therefore, if it takes away or abridges the rights conferred by Part-III thereof, it is void. It was declared that the parliament would have no power from the date of the decision (February 27, 1967) to amend any provisions of Part-III so as to take

away or abridge the fundamental rights.[160] As Sudhir Krishnaswamy writes, "By declaring that amending power draws from the plenary legislative power of parliament the Golaknath Majority alludes to the doctrine of parliamentary sovereignty in the united kingdom; a constitutional principle which is not easily accommodated by the text of the constitution. While it is true that Article 368, as it then stood, did not contain the word 'power' and its marginal title employed the word 'procedure', the conclusion that amendments were an exercise of legislative power leads to absurd consequences".[162]

Again, the Supreme Court gets locked up within the narrow confine of legal formalism vis-à-vis its other roles. The Supreme Court looks upon its owns role within the narrow framework of legal formalism. Moreover, while parliament applies its political expertise in evaluating an issue and thereby, is in a position to relate it to the dynamics of social change, the Supreme Court's expertise of legal formalism prevents it for placing an issue that comes before it in its specific historical context. This explains why the Indian Supreme Court has not been able to follow consistently even some of the very well-known established principles of liberal and non-conservative interpretation in its handling of cases where the issues of socio-economic justice have been involved.[163] Obviously, there was a conflict between the interests of legality and the interests of social justice. The Supreme Court, however, guided by the reasoning of legal positivism, gave its verdict in a number of cases. In 1957, the Supreme Court took up the case of Raja Bahadur Motilal Poona Mills Ltd. Vs, Tukaram Piraji Musale and others. The judiciary was supposed to give verdict on the stand of the management as well as right of the workmen to go on strike.[164] The Supreme Court, in its judgement, justified the stand of the management, its argument being,

"In our view, the true test was to find out the reason for which the strike was commenced or continued, and it was unnecessary to consider or decide whether there was a common law right of the

workers to go on strike or whether the workmen had the right to go on strike as a means of collective bargaining against a change which they did not like....."[165]

Again, in 1957, the Supreme Court gave its verdict in the Kerala Education bill, 1957, being confronted by two conflicting issues: Whether the Education bill, passed by the Kerala legislative Assembly with the purpose of discharging the obligation of the State to introduce free and compulsory education under Article 45 of the Directive principles of state policy, would be upheld or whether the right of the minorities to set up and administer educational institutions of their own choice under Article 30((i) was to be protected, since this right was going to be affected by the aforesaid bill in the interest of providing free and compulsory education to children below fourteen years.[166] However, the chief justice, in the final section of his verdict, said in categorical terms, "No educational institutions can in actual practice be carried on without aid from the state and if they will not get it unless they surrender their rights they will, by compulsion of financial necessities, be compelled to give up their rights under Article 30(i). The legislative powers conferred on the legislatures of the states by Arts. 245 and 246 are subject to the other provisions of the constitution and certainly to the provisions of Part-III which confers fundamental rights which are, therefore, binding on the state legislatures....."[167]

Further, in 1967, the Supreme Court reposed its faith in the logic of legal positivism in the case of L.C. Golaknath & others Vs. State of Punjab. The petitioners, who tried to justify the possession of surplus lands and the non-amendable character of the Fundamental Rights, had their arguments based on the following reasoning. First, the Fundamental Rights are a part of the basic structure of the constitution. Secondly, Articles 368 only lays down the procedure of amendment, but the power to amend is only a legislative power conferred on parliament under Article 245, 246 and 248 of the constitution. Thirdly, the expression 'law' within Article 13(2) of the

constitution does not exclude amendment and so an amendment that clashes with the fundamental right is rendered void. The Supreme Court by a decision of 6:5 declared that Parliament had no power to amend Part–III of the constitution with effect from 27th of February, 1967 and held the constitution (17th Amendment) Act as ultra vires.[168] After Golaknath, the Supreme Court's orientation towards legal positivism in the pronouncement of its verdicts became far more menacing. This was abundantly clear in the court's judgment in H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur & others Vs. Union of India [(1971) (3) SCR 9] which is popularly known as the privy purse case.[169]

To what wild extent the subjective reasoning of the judges can go was, however, revealed most glaringly in R.C. cooper V. Union of India (1970 (3) SCR 530), popularly known as the Bank Nationalisation case. The major ground of the petitioner's argument was that since Articles 19(i) (f) and 31(2) were not mutually exclusive a law providing for acquisition of property for a public purpose would be tested for its validity on the ground that it imposed limitations on the right to property which were not reasonable.[170]

The Supreme Court upheld the cause of the petitioner and showed total lack of social awareness, combined with the subjectivist premise that the Rights of a few individuals, however, microscopic they may be, have to have preponderance over societal claims which, led Shah J. to make the following observation:

"There is no satisfactory proof in support of the plea that the enactment of Art. 22 of 1969 was not in the larger interest of the Nation, but to serve political ends, i.e. not with the object to ensure better banking facilities or to make them available to a wider public, but only take control over the deposits of the public with the major banks and not to use them as a political lever against industrialists

who had built-up Industries by decades of Industrial planning and careful management."[171]

Even after the constitution (Seventeenth Amendment) Act, 1964, the Supreme Court tried to re-assert its supremacy in the two decisions of P.Vajravelu Mudaliar vs. special Deputy Collector, Madras & another (1965 (i) SCR 614) and L.C. Golaknath & others Vs. State of Punjab (AIR 1967 SC 1643), thereby escalating the tension between parliament and the Supreme Court to a dizzy height. As a matter of fact, the Supreme Court's verdict in the Golaknath case created such an unprecedented situation that parliament had to hurriedly amend the constitution (Twenty Fourth Amendment Act.) in 1971, so as to give effect to atleast some of the policies so loudly announced by the Government for quite a long time.[172]

In 1965 the Supreme Court gave its verdict in Sajjan Singh Vs. State of Rajastan, notwithstanding the enactment of the constitution (4th Amendment) Act, 1955. When some legislative measures adopted by different states for giving effect to land reforms were collectively challenged in the courts, parliament enacted the constitution (17th Amendment) Act, 1964, by virtue of which the validity of these as well as other Acts, which were likely to be struck down ,was safeguarded. As a result, Article 31A was amended and 44 Acts were made immune from judicial scrutiny by their inclusion in the Ninth schedule of the constitution.[173] Notwithstanding Judiciary's conservative reaction, there has been in the parliament, as one commentator has correctly pointed out, no unanimity on the meaning of land reforms, on the attitude towards compensation, or on any of our national policies. This situation has considerably contributed to the Supreme Court's rather conservative position mainly on issues of social justice.[174] S.P. Sathe was, perhaps, right when he argues, "Although the judicial restraint is very creditable, it is submitted that the restraint has stemmed more from a restricted view of the judicial functions entertained by the court

rather than from a conscious effort to make the constitution responsive to the needs of the society."[175]

Property Rights under the Indian constitution and the tussle between the judiciary and the legislature.

Art. 31, 31A, and 31B recognize the sanctity of private property. The object of Art. 31 is to secure private property against arbitrary expropriation by the state. It protects the right to property by defining the limitation on the power of the state to take away private property without the consent of the owner. One of the limitations is contained in Clause (1) of this article which provides that "no person shall be deprived of his property save by authority of law" It may be noted that the power of the legislature to deprive a person of his property is not absolute for Clause (2) of Art 31 imposes certain restrictions. It expressly, lays down that no property shall be compulsorily acquired or requisitioned except for a public purpose and under a law which provides for compensation for the property so acquired or requisitioned. Clause (3) to (6) of Art. 31 and Arts 31A and 31B are concerned with the exceptions to the general provisions of cl.(2) of Art. 31. The constitution (First Amendment) Act., 1951, inserted Arts. 31A and 31B to secure constitutional validity of the Zamindari abolition laws in general and certain specified state Acts enumerated in the Ninth Schedule of the constitution in particular.[176] The main issues involved in property cases may be grouped under two Heads, namely; (i) what amounts to deprivation, acquisition or taking possession of property ; and (ii) Justiciability of compensation. Thus, the Judgment in Chiranjitlal Chowdhury V. Union of India and Dwarkadas V. Sholapur Spinning and weaving Co. has laid down two important principles, namely:

(i) That mere deprivation does not confer any right to compensation on the person so deprived; and

(ii) The right to compensation only arises when there is acquisition or taking possession by the state of the property of which an individual is deprived. These principles were reversed by the Supreme Court in State of West Bengal V. Subodh Gopal Bose and others and Saghir Ahmed and another V. State of U.P and others.[177] These cases established that 'acquisition' does not necessarily mean acquisition of legal little to the property by the State, but might comprehend cases where a person has been 'substantially dispossessed' of his property, or where his right to use and value of his property has been 'materially reduced'. All these three types of deprivation being similar to an 'acquisition', compensation should necessarily be paid. To override the above-mentioned judicial decisions which were considered an impediment in the way of social welfare legislation, parliament enacted the constitution (Fourth Amendment) Act, 1955. By Fourth Amendment Act, the words 'taken possession of ' or 'acquired' in Cl.(2) of Art.31 were substituted by the words 'compulsorily acquired or requisitioned ; The Act also made explicit, what was implicit in the original CL. (2) of Art. 31, namely, that property could only be acquired for a public purpose.[178] Even after the Fourth Amendment Act, in several cases decided by the Supreme Court between 1955 and 1968, it was held that the. Question of compensation could be raised despite the constitutional provision to the contrary if the compensation was illusory as to be no compensation at all.[179]

Art. 31A was introduced in the constitution by the constitution (First Amendment) Act, 1951 with a view to implementing agrarian reforms. Art. 31B also added by the First Amendment Act. It specifies laws included in the Ninth Schedule which was also added by the First

Amendment Act. Art. 31B provides that notwithstanding any decision of a court or tribunal, none of the Acts included in the Ninth Schedule can be impugned on the ground that they have contravened any of the Fundamental Rights. It may be noted that the immediate object of the enactment of Arts. 31A and 31B was to override the judicial decisions in Kameshwar Singh V. State of Bihar and to protect the acquisition of Zamindari estates and reforms in the system of land tenure in various states against any attack on the ground of infringement of any of the Fundamental Rights.[180] The constitution (Fourth Amendment) Act, 1955, has widened the scope of Art. 31A and the Ninth Schedule by removing some of the limitations springing from fundamental rights which stood in the way of promotion of several social welfare legislation. The Fourth Amendment Act also widened the scope of the Ninth Schedule so as to include seven new Acts. All these Acts have been placed beyond Judicial Review. Similarly, the constitution (Seventeenth Amendment) Act, 1964, was enacted for the purpose of giving further effect to certain socio-economic policies laid down by various provisions of the constitution. In fact, the Seventeenth Amendment Act was passed after the decision of the Supreme Court in Karimbil Kunlickoman v. State of Kerala. The Seventeenth Amendment Act also amended the Ninth Schedule in order to include Forty-Four State Acts within its purview to secure their immunity from unconstitutionality.[181] In a recent article, Nivedita Menon brings out this disjuncture between the Supreme Court and the parliament in a very succinct manner when she says, "It seems to me that the judges of the Supreme Court, being unconstrained by democratic accountability, remained untouched by the pressures of 'Political Society'. The Supreme Court, therefore, could continue to uphold an impeccably 'liberal' version of rights such as it imagined to be prevalent in the 'civil society' of the west. The parliament, on the contrary, had both to be directed by political society as well as to control it. What we see in the first Amendment act is the logic of this situation."[182] There is no denying the fact, from the

instances discussed above, that the Supreme Court has been particularly sensitive on occasions when vital issues, like property interests, have been at stake, in the fast changing political landscape of the country. No doubt, the enormous scope of judicial charisma as manifested in so many decisions, indicates that, objectively the Supreme Court is structured in a situation that places judicial supremacy definitely on a higher pedestal than the paramountcy of parliament. This implies that, in the independent Republic of India, the Judicial notion of justice, fundamentally flawed with the ideas of obsolete laissez-faire individualism, has been prioritized.[183]

Indira Gandhi's triumph in the 1971 parliamentary elections afforded the executive and parliament an opportunity to evolve adequate response to the Court. As Prime Minister, she took a series of measures to clip the wings of the Supreme Court. New constitutional amendments were brought in, to shield social legislations that abridged fundamental rights from the purview of judicial review, specified that the amendment procedures conferred sovereign powers on parliament, directed the directive principles to be controlled by fundamental rights, and said that 'no law containing a declaration that it is giving effect to specified directive principles shall be called into question on the ground that it is not giving effect to such a policy.' The parliament passed the 24th and 25th amendments, which sought to reduce the level of judicial review of legislation, especially laws enacted to implement some directive principles.[184] The court mulled over these measures in Kesavananda v. Union of India on 31 October, 1972. It overruled Golaknath's emphasis on the 'transcendental nature of Fundamental rights' but said that the parliament could not 'alter the basic structure and framework of the constitution.' The verdict rejected the attempt to exclude statutes from judicial review but accepted that directive principles could override fundamental rights subject, however to judicial review. The preponderance of the executive over the judiciary intensified during the Emergency, which Prime Minister Indira Gandhi

promulgated after a high Court verdict pertaining to election went against her. The challengers of the Emergency also suffered a setback when the Five judge Supreme Court bench led by Ray, and comprising Beg, Bhagwati, Chandrachud and Khanna ruled 4:1 (Khanna dissented) that the actions of the executive could not be examined by any court. The majority said that section 16A (9) of MISA (Maintenance of Internal security Act) was constitutionally valid since the grounds for detention were a matter of state and not to be revealed to the detainee.[185]

Simultaneously, Indira Gandhi initiated measures to pack the court with pliable Judges and as part of the initiative, she also got rid of judges who were seen as anti-Government and perceived to be hostile to her policies. The 42nd Amendment passed by Indira Gandhi's Emergency regime in 1976 tried to 'kill' the basic structure by asserting that there shall be no limitation whatsoever on the constituent power of the parliament to amend the constitution' (clause 5) and removed the jurisdiction of the court on the issue (clause 4). Judicial independence was severely compromised in the period preceding and during the emergency.[186]

The Minerva mills case challenged the validity of two clauses in the 42nd Amendment. The majority struck down a constitutional amendment that took away challenges to any law that gave effect to the directive principles. Chandrachud opined that while harmony between fundamental rights and directive principles was a basic feature of the constitution, retaining the purity of the means (Fundamental Rights) to achieve the directive principles was of momentous importance.[187] Bhagwati's opinion in Minerva Mills v. Union of India developed the distinctive character of basic structure review in a sharper fashion. He carefully analyses the opinion in Kesavananda and Indira Gandhi carefully, and points out that the majority view in these cases show that Fundamental Rights are not part of the basic structure of the constitution and therefore they could be abrogated or taken away by

parliament by an amendment under article 368.'[188] In Minerva Mills case, the court was faced with the constitution (42nd Amendment) Act, 1976 which sought to amend Article 368 and conferred unlimited constituent power on parliament and excluded judicial review of constitutional amendments. This amendments sought to replace the textual basis for the Keshavananda opinion. Any useful model of judicial review of constitutional amendments has to be necessarily in sync with substantive constitutional principles traceable to the constitution, taken as a coherent whole, and not attached to the particular phrasing of any article.[189]

However, as Jacobsohn (2008) points out, the court also marginally asserted its authority to invalidate a constitutional amendment that contravened the basic structure of the constitution. Notwithstanding the ambiguity as to what constituted the basic structure-only a judge could tell if something contravened it. The judgments in Golaknath, Kesavananda, and Minerva Mills embody the articulation of a rights-based framework of the constitution that would be regarded sacrosanct by the court.[190] The court's verdict in the Prime Minister Election case also upheld the court's 'assertion of power to review constitutional amendments but without challenging the executive' and provided 'social legitimacy' to the basic structure doctrine.[191]

If during Nehru's era the judiciary was placed on the defensive, in the early 1970s there was the remarkable support for it that was partly political and partly the expression of discontent with the overtly majoritarian, arbitrary and increasingly personalized rule of Mrs. Gandhi. As a matter of fact, gains were squandered away during the Emergency when the Supreme Court was charged of being not just an 'institution of state' but a 'regime' Judiciary.[192]

The issue of reservation, court system and the parliament:-

Observers of Indian social scene are sometimes baffled by the fact as to how the Indian constitution emphasizes equality and at the same time provides for reservation in education and employment and in representative bodies. This seemingly dichotomous position has often been resolved by the judiciary and when it failed to do so, by parliament in favour of substantive equality as originally envisaged by the constitution makers. The framers of the constitution engaged in efforts to eradicate the effects of past discrimination by providing an effective equality and equalization code, well supplemented by a mandate for social justice that would finally result in a unified India.[193] With the promulgation of the Indian Constitution in 1950. the affirmative action programmes were first contested before the courts because they ran counter to the fundamental rights regarding equality and the idea of equal opportunities. The first amendment was passed in 1951 as a reaction to this new trend. But the Judges continued to interrogate that their quotas really benefited 'socially and educationally backward classes' and not castes. This conflict crystallized in the early 1960s when the central Government and Supreme Court turned out to be equally hostile to caste based quotas. Soon after the cabinet rejected the Kalelkar report on the ground, inter alia, that its definition of the backward classes relied to a large extent on caste criteria, the Supreme Court gave a land-mark judgment based on the same premises in the Balaji v. State of Mysore case in 1963. The verdict of the Supreme Court was guided by two considerations:- Firstly, it disapproved of quotas whose total exceeded 50% of the posts in the administration or places in educational Institutions and secondly, it considered that caste should not remain a predominant criterion of affirmative action.[194] Mare Galanter assertively argues that the supreme courts' judgement was especially hostile to taking caste ranks into account as a measure of backwardness. On the other land, it was prepared to regard caste as a relevant unit for assessing low literacy rates and any other form of

social backwardness. But the court failed to make this distinction clear and therefore, encouraged the notion that 'caste' was in all respects removed from the selection of backward classes.[195]

On the other hand, Congress also demonstrated reluctance to recognize caste as a legitimate criterion for affirmative action. Caste and caste based reservations were disregarded in favour of Economic criteria, socialist Programmes, or national unity, even though these claims clashed with article 16 (4) of the constitution in which economic criteria are not mentioned. In any case, they were often pretexts for cloaking the desire to maintain the status quo.[196] In the 1970s, as the case of Andhra Pradesh demonstrates, the Supreme Court Questioned the maximalist interpretation of Balaji and recognized caste as an important criterion of backwardness. It was especially evident in Tamil Nadu where the political impetus was sanctioned with sympathy by the judges.[197] At the national level, another attempt for the welfare of other backward classes was made in 1978 by the Janata Government by appointing the second Backward classes commission under the chairmanship of B.P Mandal. But the Janata Government could not survive to see the commission to complete its report. The national Front Government under the leadership of late V.P. Singh, announced on August 7, 1990 that his Government had decided to implement the 'first phase' of Mandal commission recommendations and that 27 percent jobs in central services and public sector undertakings were to be reserved for socially and educationally backward classes.[198]

The Supreme Court okayed the V.P Singh Government's order on 27 percent quota for OBCs and 49.5 per cent overall reservation and struck down the Narasimha Rao Government's order of September 25, 1991, including 10 percent reservation on economic criteria and raising the total reservation to more than 50 percent. The Supreme court ruled that the 'Creamy Layer' among the backward classes must be excluded from reservation. The Mandal Commission recommendation to reserve 27 percent Jobs in central Services for persons from backward classes

excluding the 'Creamy layer' became effective on September 8, 1993, with a notification issued by the then welfare Minister, Sitaram Kesari.[199]

The core of various Supreme Court judgments on reservation is the consistent ruling that caste alone cannot be the yardstick for identifying the beneficiaries as it would run counter to the principle of anti-discrimination enshrined in Article 15 (i). The judiciary, therefore, had to invent the concept of the "creamy layer" in order to bring in the economic criterion, along with caste, to justify reservation. The creamy layer principle has been followed since 1993 to exclude economically well-off persons from the preview of reservation in the public services, following the Supreme Court's judgment in the Indra Swahney case. Since its decision in the M.R. Balaji case in 1961, the Supreme Court has been consistently following another principle, i.e. maximum limit of 50 percent for reservation in the public services and in educational institutions. This is because the court believes that reservation exceeding 50 percent would militate against merit and efficiency which would, eventually, result in reverse discrimination with very few seats or vacancies remaining for the non-back-ward classes. This merits and demerits of both these principles have been debated since then and the Supreme Court is still to dispose of some cases posing serious challenges to them.[200]

The Constitution (73rd Amendment) Act, 1992 and the Constitution (74th Amendmen t) Act, 1992 introduced a third-tier of local Government at rural Panchayats and urban municipalities respectively. Moreover, these amendments extended quota-based representation on elected bodies for scheduled caste and scheduled tribe communities and introduced new quotas for women. The validity of these amendments has not been challenged.[201] The constitution (77th Amendment) Act, 1995 added Clause 4-A to Article 16 which provides for reservation in favour of Scheduled Castes and Scheduled Tribes even where public jobs are filled up by promotions. Again, the

Constitution (85th Amendment) Act, 2001 Amended article 16 (4-A) to protect consequential seniority of those who benefit from affirmative action in promotions.[202] In Indra Sawhney Vs. Union of India, the Supreme Court contended that equality was a basic feature of the Constitution and that the 50 percent limit on Reservation quotas, the ban on quota based promotions in public employment, and the exclusion of the 'creamy layer' in the identification of other backward caste beneficiaries are mandatory legal propositions which emerge from this basic feature.[203] Subsequently, the parliament has amended the Constitution to clearly override these restrictions and when these amendments were challenged under the basic structure doctrine, the court upheld the Constitutional Amendment in the case of M. Nagaraj V. Union of India in 2007.[204]

Industrial Labour and the State since the 80s

We have already mentioned that several Labour laws have been enacted for improving conditions of workers through the initial decades of independence. But, the New Industrial policies were put in place by the Government during the 80s which saw a clear break from the earlier ones. The thrust consisted of the geographical relocation of industries and technological up gradation, combined with liberalization, de-regulation, and delicensing. This new policy regime is underpinned by competition, liberalization and exports. Since the 80s though employment has been static, labour productivity has steadily been increased. These policies also gave rise to new and distinctive problems for labour organizations. Industrial sickness was widespread in the old Industrial centres.[205]

Industrial sickness involves more than job losses. It also entails social security benefits to which workers have contributed through-out their working lives. Workers began to experiment with Industrial Cooperatives and started to take over sick units. However, such strategies have by no means been common occurrences and are indeed

exceptions. In fact, they were fiercely resisted by all concerned, including Government, Industries, financial institutions, the Judiciary and established trade unions.[206] The Industrial policy which is characterized by liberalization, competition, and exports now, requires emphasis to be laid on the sanctity of the market and on globalised capitalism. It envisages the removal of such distinctions as that between small-scale and large scale Industry, and between monopolistic national and international corporations, as well as to bring Government's involvement in Industry to an end. This policy shift, in particular, meant for labour an end to protection of employment to any degree and any deliberate endeavour to generate employment. In short, the new policies seek to limit the Government's role to providing for education and health, leaving all other issues to the market. Therefore, the new policy-orientations have allowed Industry enough liberty and latitude in its dealings with labour.[207] A perceptive observer on the scene serves a note of caution when she says, "Thus, for the first time, labour is faced with a situation in which it is reborn with no crutch to bear on, obliged to stand on its own two feet and articulate its own interests, i.e. interests that are inherent to it in its role in the productive process. The legal support structures that gave rise to a great deal of optimism during the 80s through public interest litigations by voluntary groups is rapidly losing its appeal by the judiciary. Indeed, at a recent conference of lawyers and judges, Manmohan Singh, the Finance Minister openly appealed to the higher judiciary not to put the brakes on the process of marketization and liberalization of the economy by invoking constitutional provisions, such as the right to life and equality in the name of social justice".[208]

The issue of social justice, social Rights and the proactive courts in an age of Globalized Governance:-

The role of judiciary in India can better be appreciated by dividing it into various distinct, but overlapping phases in sync with Political and public evaluation. In the First phase, the early 'tension' years of the 1950s the Government charged the judiciary of standing in the way of progress. In the second phase, from 1960 to around 1965 or so, came the 'compromise' years dominated by justice Gajendra Gadkar, when the judiciary became interested in using the law for 'social engineering' and evolved compromises, seeking a quietus to the controversy . The third phase overlaps with the second and is largely an assertion of judicial power, leaning in favour of 'libertarian' values. The fourth phase comprised the ill-fated years of the Emergency, when judicial power was curtailed and the judiciary lost some of the ground that it had won for itself. The fifth phase was the post Emergency phase, when the judges not only placed their power over all authorities, public or private but claimed the status of an independent Institution of Governance that had its own separate public interest, people oriented, constitutional goals. The sixth phase was primarily a consolidation of the post emergency phase, even though the judges of the late 1980s and early 1990s have sometimes been criticized for blunting the radical edge of the public interest litigation which developed immediately after the emergency. The seventh, the contemporary phase represents the Supreme Court's direct involvement in issues of Governance, forcing other institutions of Governance to do what they are supposed to do by using the new and powerful methods of investigation of public interest litigation.[209]

We have already discussed the judiciary's Journey almost through all the phases as outlined above. We could now move into a discussion pertaining to the changing role of judiciary in a post-emergency situation and subsequently, we would also examine the role of judiciary for promoting the issues of social justice when the state

itself is undergoing a metamorphosis under the influence of Globalization.

One of the leading legal minds of independent India, justice Gajendra Gadkar said, 'Judges realize that the main strength of judicial administration in a democratic country is the confidence which the public in general and the litigating public, in particular, places in their fairness, impartiality and objectivity of their decisions.[210]

But, during Emergency in India from 1975-7, the leader (in this case, Indira Gandhi) did attempt to control courts by restricting their independence or impartiality; limiting the scope and depth of the court's decision-making by putting several issues beyond the scope of judicial scrutiny; or by proclaiming the non-challengeability of decrees vital to establishing and maintaining her rule. During 'crisis' regime of this kind, courts are not expected to perform their functions as cheeks on the executive and as promoters of citizen's rights. [211]

Therefore, one of the ways the Supreme Court could engage to recover public legitimacy within the restrictions imposed by the draconian laws and the most unfriendily political environment, is to negotiate an public image as a protector of civil liberties without incurring the wrath of the Government. This assertion by the courts, as some scholars believe can only explain post-emergency 'Activism'.[212] As Rajeev Dhavan writes, "The immediate post-emergency phase of the judiciary turned out to be a dramatic social double promotion for the judiciary. Not only did it recover from its all time low as a 'regime' judiciary and restore its position in constitutional polarity to the Government. It slowly worked its way into becoming an institution of Governance. Such an institution is one that arrogates wide powers and responsibilities to itself to achieve the public good, has a direct rapport with the people, and acts with a self-assured sense of autonomy to achieve the purposes for which it claims to be ordained."[213] In any case, most experts concur that India's Supreme Court and lower court's pro-

active behaviour on social rights can be traced to the immediate post-emergency era when justices evolved user-friendly approaches to the court. A high court ruling that the Prime Minister was guilty of corrupt electoral practices was one of the prime reasons for Prime Minister Indira Gandhi's assumption of emergency powers. The Supreme Court, rejecting Nine High courts' objection as to the constitutionality of the executive order when the detainees appealed, overruled the lower courts and in the process experienced an erosion in its authority for allowing Indira Gandhi and her associates to violate civil liberties. In so doing, the court not only refused to grant relief to the victims of preventive detention but also came close to endorsing the emergency regime itself. The peoples' out-cry against the judgement precipitated a crisis of legitimacy for the Indian supreme court.[214]

As a matter of fact, the middle classes groaned under excessive regulation and the poor were constantly reminded that welfare schemes and resources meant for them had been siphoned off by politicians. Justice Krishna Iyer and a host of other Supreme Court judges masterminded a judicial policy that ensured moves towards establishing the judiciary as an institution of Governance. The Apex court devised a new procedure for dealing with such cases arising out of the faith in the judiciary that it was not just a backstop but a corrective institution of last resort. Therefore, the public interest law movement was aimed at establishing a direct link with India's discontented segments of the society and give them a voice of sorts in Governance which they had never experienced before. Alongside, the second object was to make social justice the essential goal of the constitution, enabling the judiciary to play the role of a custodian of social justice with a positive obligation to ensure that it was achieved.[215] Lloyd I. Rudolph and Susanne Hoeber Rudolph made a very succinct point when they wrote, "The practice of judicial review survived the buffeting of the 1970s, though the court emerged chastened. It showed skill in recapturing its role in 1980s when, by

beginning to entertain public interest legislation (PIL) similar to class action suits in the US - it laid the basis for the judicial activism of the 1990s. Because the court's PIL version of judicial activism suited Indira Gandhi's (1980-4) and Rajiv Gandhi's (1985-9) populist agendas, the two congress Prime Ministers did not perceive PIL as a threat to their Governments' claim to parliamentary Sovereignty. The court's decision and actions in the pre-economic reform phase of judicial activism sought to enforce citizens' fundamental rights (Basu 1994:433, table VI) and, more broadly, to protect the human rights of the poor and powerless. The court sought to safeguard human rights against state abuses, e.g. Police brutality and torture, custodial rape, inhuman treatment in Jails and "protective" homes. In the late 1980s and early 1990s the court extended its judicial activism to protecting the viability of public goods, e.g. clean air and water and uncontaminated blood supplies"[216]

However, public interest litigation could begin and did flourish in India because its Supreme Court exercises original jurisdiction not only with respect to disputes between different units of the federation (article 131) but also with respect to the enforcement of Fundamental rights (Article 32). Evolution of the court's original jurisdiction under Article 32 led to the so called "epistolary jurisdiction" which recognizes even postcards from jail in-mates or victims of state impropriety and lawlessness as writ petitions. In the early 1980s chief justice P.N. Bhagwati and justice Krishna Iyer seized the initiative in promoting this novel jurisdiction. Subsequently, the court modified article 32 by allowing PIL litigators to bring class action suits on behalf of the poor, oppressed, and victimized because, in the view of the court, they are often not capable of representing their own interest.[217] But the Judiciary of the 1990s beat a hasty retreat and returned to the practices of the 1960s whereby judges monitored official action for illegality, unreasonableness and procedural lapses. While accepting the broad tour de force of the new public interest law, the judiciary acted,

largely, as an overseer of the rule of law, a problem solver when issues became too hot politically and a facilitator when the Government was seen not pursuing its own promises sincerely.[218]

Judicial activism in a post-Emergency era vis-à-vis social justice issues especially Right to health and Education.

The analysis of court's approach in Minerva Mills demonstrates that section 4 of the 42nd constitution (Amendment) Act, 1976 amended Article 31-C to provide that no law giving effect to the policy of securing 'all or any of the principles laid down in part –IV' shall be deemed to be void if it takes away or abridges the fundamental rights to equality, freedom or property set out in Articles 14, 19, or 31 respectively. It was argued that this amendment destroys the harmony between part III and IV of the constitution by making the fundamental rights conferred by part – III subservient to the directive principles of state policy in part IV of the constitution. The balance between part-III and IV was accepted as a basic feature by Chandra Chud in Minerva Mills.[219] In 1978, parliament by the constitution (forty-fourth Amendment) Act, amended the constitution to drop the right to property and compensation from the chapter of fundamental rights and make it only legal right which could be taken away by the authority of the law. The amended right was placed under Article 300A of the constitution. It is to be noted that parliament could delete the right to property as a fundamental right by constitutional amendment in view of the unanimous finding of the Supreme Court in Kesavananda Bharati V state of Kerala that right to property was not a basic feature of the constitution. In that sense, the judiciary took the position that it was for the parliament to decide the extent of property rights in the constitution and determine the economic policies of the nation without the Judiciary sitting in judgment over them.[220]

The first PIL case involving 'under-trials', many of whom had been detained for period longer than the maximum prison terms

awardable for the offences with which they had been charged. The Supreme Court issued orders releasing such prisoners en masse on personal bonds close on its heels, another case Khatri V State of Bihar came up for consideration of the Supreme Court in which several in mates of a jail, also in Bihar, had been willfully blinded by the police. Here, the Supreme Court apart from ordering rehabilitation of the inmates through vocational training in an institution for the blind, awarded also monetary compensation to the victims. Later the areas under PIL expanded to include bonded labour, unorganized labour, Tribes affected by development projects, Environmental Protection, Public health, public sanitation, management of state run hospitals, management of blood banks, conservation of wildlife, distribution of government largesse, Road traffic management, maintenance of standards in public education etc.[221]

In the first three decades after independence, Supreme. Court judges treated social rights as part of the directive principles, thereby allowing it to play a second fiddle to fundamental rights; in the 1970s, the court talked of harmony between two sets of rights; and by the 1980s and 1990s several judgments of the Apex court read social rights as part of the fundamental right to life with dignity.[222] The system of Bonded labour stands prohibited by article 23 of the constitution. However, as justice Bhagwati points out that though the constitution became operational as far back as 26th January 1950 and many years elapsed since then, no sincere effort was made to implement Art 23 to banish the inhuman practice of Bonded labour. It was only in 1976 that parliament enacted the bonded labour system (abolition) Act. 1976 providing for the abolition of Bonded labour system with a view to preventing the economic and physical exploitation of the weaker sections of the people. However, the pernicious practice of bonded labour has not yet been totally wiped out even after the enactment of the Bonded labour system (abolition) Act. 1976 from the national scene and that it continues to cast a shadow over the social and economic life

of the country.[223] Again, Article 17 of the Indian constitution prohibits the practice of untouchability. While the Fundamental rights are not enforceable against private individuals, Article 17 is an exception and it makes it mandatory for the state to make sure that private individuals do not indulge in untouchability. The protection of civil Rights Act, 1955, and the Scheduled castes and scheduled Tribes (prevention of Atrocities) Act, 1989, were both enacted to give effect to Article 17. The Supreme court struck down a challenge to the 1989 Act and upheld its constitutional validity in State of Madhya Pradesh Vs. Ram Krishna Balothia in 1995. Nevertheless, the continued practice of untouchability across the country reinforces the need to continue reservation for the SCs and the STs beyond the constitutionally-stipulated definite time frame.[224] In a celebrated case on bonded labourers, Bhagwati talked of a right to live with dignity but went on to say that since the directive principles were not enforceable in a court of law, it may not be possible to compel the state through the judicial process to make provisions by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity but where legislation is already enacted by the state providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the state can certainly be obligated to ensure observance of such legislation....[225]

In Olga Tellis, a journalist and two pavement dwellers challenged a Government order on demolishing their make-shift accommodation. A five-judge bench led by Chandrachud observed that a right to life included a right to livelihood, and the petitioners' argument that their right to livelihood would be at stake by the evictions was right. Nevertheless, no one had the right to encroach on public lands. Therefore, the verdict allowed the Government to evict the dwellers without making it obligatory on the part of Government to provide them with alternative accommodation facility.[226]

The justiciability of 'Right to health' and a more substantive interpretation of the right to life (Article 21) came up for consideration of the Apex court in the CESC Ltd v. Subhash Chandra Bose. Ramaswamy expanded the definition of health from the absence of disease to a more positive state of complete physical, mental, and social well-being. But the majority led by Ranganath Mishra said that it was a matter for the legislature, not the court. Subsequently, in consumer Education research V union of India, Ramaswamy's opinion became the dominant view. Ramaswamy argued that the workers had a fundamental right to health and medical aid during service and after retirement in the case of hazardous industries like asbestos. But this judgment did not extend the right to health to even all categories of workers. So, the right to health to all citizens remains a distant dream.[227] In education cases, the notion of a 'right' came before the law. Forty-five years after independence, the court transformed education into a fundamental right for children aged 6-14 years. However, the judgment in the famous Unnikrishnan v. state of AP provided a weak remedy where the judges made a declaratory statement affirming the strength of the right without necessarily designing a remedy. In 2002, the parliament passed the 86th constitutional amendments providing for free and compulsory education for all the children aged between 6-14 years as a fundamental right under Article 21A. However, the judiciary had a huge impact on legalizing the right to education and at the policy level, the Unnikrishnan judgement must have contributed handsomely to the Government's universal education policies and the education guarantee scheme, the midday meal scheme in primary schools and a ruling on free text books until Class IV. These schemes must have facilitated more access by poor children to learning materials.[228]

However, a recent study indicates that the supreme court seems to be showing a c onservative bias on social rights during the late 1990s. This study further confirms that as the memory of the

Emergency receded, and a newer cohort took -over at the Supreme Court, judges reverted back to their traditional stance of legal positivism. The judiciary's response, during the late 1990s fell short of addressing the key concerns in education with remedies suggested on improving access rather than quality. Private rather than Government providers were at the receiving end of court's flak for failing in their obligations. By and large, the judiciary harped more on client-provider obligations and less on regulations and financing, perhaps, because judges saw state provision and financing as a legislative or executive prerogative.[229] Krishna Iyer's caustic comment in the late 1980s is worth mentioning here:

Who is more against directive principles is easy to answer ....Every progressive educational measure, every price-control order, every policy decision even land acquisition for welfare measures has been Canvassed before the 'Third chamber' with consequences not often complimentary to the court.[230]

EPP argues that a rights' revolution did not occur in India because rights advocacy groups in India were weak and fragmented, handicapped by weak institutionalization and dependence on charismatic leadership. Further, EPP's survey of cases shows that the court's support for rights claims increased from 35 per cent during emergency to about 70 percent in 1990. The judge-led social action litigation produced a vibrant support-structure of NGOs and other groups on environmental issues. Such vibrancy, however, has not resulted in NGOs, choosing litigation as a viable strategy for ensuring the delivery of health and education rights.[231]

Addressing a conference of chief ministers and chief justices on 8th April 2007, Dr. Manmohan Singh, the Prime Minister of India, Zeroed in on PILs - the opinion often used by interest - Groups and individuals to challenge Government policy-to argue that these should be subjected to filter. Again, delivering on 26th April 2007, the K.N.

Katju Memorial lecture on 'separation of powers under the constitution and judicial activism' the then Lok Sabha Speaker, Mr. Somnath Chatterjee forcefully argued that the lines separating the different organs of the state were getting blurred as a section of the judiciary seems to be of the view that it has authority by way of what is described as "judicial activism" to exercise powers which are earmarked by the constitution for the legislature or the executive.[232] On the contrary, Fali S. Nariman, a leading constitutional expert and practising lawyer of the Supreme Court opined that "judicial overreach" the prime Minister spoke about is the direct result of legislative and executive neglect or "under-reach", that is, poor performance in the making of laws and their execution. If the judges need to introspect, politicians also need to introspect and ask themselves whether they have fulfilled the aspirations of the people who put them at the wheel of Governance. If judges are to get off the backs of parliamentarians, politicians and bureaucrats those who claim the right to govern-must come up with a much better record of performance, only when they do, will the people of this great country give us back, majority Government both at the centre and in the states.[233]

As a matter of fact, after the germination of the seeds of the concept of PIL in the soil of our judicial system, the rule of PIL has been nourished with care, nurtured and developed by the courts of India led by the Apex court of the land. PIL gained momentum over the days, got rooted firmly in the Indian judiciary and it finally, came of age in S.P. Gupta v. Union of India. Fostered by judicial activism, PIL has become an increasingly important vehicle with a valuable and respectable record in the domain of constitutional and legal strategy for the 'unrepresented and under-represented'.[234]

People of India, no w, know that the court has constitutional power of intervention which can be invoked to ameliorate their miseries arising from repression, governmental lawlessness and administrative deviance. Under-trial as well as persons charged with committing

crimes, women in protective custody, children in juvenile institutions, bonded and migrant labourers, unrecognized labourers, untouchables and scheduled tribes, hapless agricultural labourers who fall prey to ill conceived mechanization, women who are bought and sold, slum dwellers and pavement dwellers, kins of victims of extra judicial execution, these and many more groups now flock to the supreme court under Article 32 and the High Court's under Article 226 of the constitution seeking justice.[235]

However, there is now a large body of cases decided in the last decade where the court has not only betrayed a lack of sensitivity towards the rights of the poor and disadvantaged sections of society but has also made gratuitous and unmerited remarks vis-â-vis abuse of public interest litigation. This decade has also been the decade of 'economic reforms'. Several public interest cases were filed during this period challenging alleged perversions, corruption and other illegalities involved in the execution of the new economic policies. Almost all these cases were struck down. In some of them, the court indicated and made remarks implying an abuse of public interest litigation. Hence, one could reasonably argue that a change in the philosophy of the supreme court with regard to public interest litigation has been discerned during the era of economic reforms.[236]

In the BALCO Employees union Vs union of India (2002 Vol. 2 SCC 343) case, where the employees union of the Government company had challenged its disinvestment on several grounds including the arbitrary and non-transparent fixation of its reserve price, the supreme court while dismissing the petition observed that public interest litigation is now tending to become publicity interest litigation or private interest litigation and has a tendency to be counter-productive, surprisingly, the court while refusing to consider the petition of B.L. Wadhera came up with the argument that he was not directly affected by the disinvestment of BALCO.[237] In Ekta Vs Union of India, the Supreme Court declined to stop the eviction of slum-dwellers in Kolkata

who had been living in those slums for the last 30 years or more, notwithstanding the fact that they had no other access to housing nor were they being offered any alternative place to go by the Government. This was a case where the High Court had ordered the eviction describing slums as a public nuisance. In another case (Azadi Bachao Andolan Vs Union of India, 2003), the Supreme Court even refused to investigate the issue whether the land Acquisition Act in so far as it allowed compulsory acquisition of land from persons who are dependent upon that land for their livelihood is transgressive of their fundamental rights, since the act does not require the Government to provide them with alternative land or an alternative means of livelihood. Hence, it deprived them of their livelihood by such compulsory acquisition of land.[238]

Again, the I.R. Coelho judgement of the nine judge Bench is disturbing because it accords priority to fundamental rights over the directive principles of the constitution at a time when the neoliberal agenda of the State is being upheld in various judgements of the court. Interestingly, the bench opines that it is wrong to suggest that directive Principles are the exclusive domain of equality and justice under our constitution. Thus, there was an obvious shift from the earlier position of Supreme Court when they used to give emphasis on maintaining the fine balance between fundamental rights and the directive principles. It may be noted here that Article 38(2), inserted by the 44th Amendment in 1978, directs the State to strive to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different occupations, The aim of this Amendment is that the fundamental right to equality under Article 14 cannot be delinked from the larger question of egalitarianism. In fact it is equalitarianism that gives meaning and content to the right to equality.[239]

An expert on constitutional law observed, "It is indeed tempting to argue that the recent drawing back of the court in PIL, and the fears expressed by it of the possible abuse of PIL is because the court has in fact bought the ideology underlying the economic reforms - an ideology which venerates the virtues of the free market and undermines the role of the state in providing education, jobs and the basic amenities of life to its citizens. Such an ideology runs counter to the court's earlier expansive interpretation of Article 21".[240]

Some scholars have interrogated the commitment of the Indian Courts to the rights of the poor and to the constitutional imperative of creating an egalitarian Socialist Republic. No doubt, the Indian Courts have failed to safeguard the socio-economic rights of the common people of India who constitute the vast majority of the Indian population. The class structure of the Indian society and the consequent elite domination of the Indian judiciary may be in part attributable to the overall lacklustre performance of the judiciary in mitigating the miseries of the multitude. In the 'consequentialist' assessment of the judiciary, judges had stood by agrarian land-lords at a time when the legislatures were trying to abolish feudalism; sided with business against labour, generally supported a monopolistic press, undeserving princes, the corporate sector and privileged property owners Finally, the judiciary dealt the final blow to the sovereignty of parliament and the people by denying legislatures the power to amend the constitution. However, the consequentialist theory that the judges were class biased received a jolt during the emergency when the Government's commitment to planned development and poverty alleviation became strikingly questionable. The early years of the public interest law movement was characterized by social justice concern as against the Government's suspect intent vis-à-vis laws favouring poor tenants, workers and the unemployed. But, the judiciary seemed to be a little less positive about social justice issues since the 1990s. On the

whole, the judiciary has still to carry the class bias tag in a milder form.[241] In an ultimate analysis, the welfare of a society is mediated by the structure of entitlements available to its constituent members, and that the nature and scope of these entitlements are crucially shaped by the legal framework and Governance system regulating society's functioning.[242]

Thus, the supreme Court has broached the problem of justice in a fundamentally flawed perspective. In its fascination for peddling the idea of justice as a balance of conflicting interests, it has, in essence, made a regular plea for the defence of the liberty of the individual where social interests have been at stake, in the name of 'harmonious construction', 'defence of the constitution', 'rule of law'; finally, the Court, guided as it is primarily by a conservative philosophical ethos, has failed most singularly to trace the social roots of such conflicting demands.[243] As an observer writes, "The Demand for Democratic rights Cannot entirely be separated from the demand for social change..... while maintaining the position that the gamut of rights touching the entire spectrum ranging, say, from health, education and forestry to land reforms is to be considered in a comprehensive discussion of democratic rights, and that this requires fundamental changes in the social order, the system is tested on its own premises and confronted with violation of the more limited range of constitutional rights that it in fact claims to recognize."[244]

However, over-reductionist inferences about the consequences of judicial decision-making strengthened the allegation of class-biases which, finally, depicted the judiciary in a bad light. But, 'more objective evaluation of judiciary' demands to take cognizance of the fact that the judiciary, has, over the years, taken long strides and in the process, evolved from being a mere institution of state to an institution of Governance in its ownright.[245]

Therefore, judiciary's contribution to the overall Governance process in India should not be underemphasized as it provides one of the pillars of Democracy and buttresses the Democratic Governance to meet the challenge of a billion mutinies.[246]

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