

CHAPTER – VI
CHANGING NATURE OF FEDERAL GOVERNANCE AND
CONSTITUTIONAL RESPONSES

I

The initial studies on Indian federalism has been largely shaped by the ideas of A.V. Dicey and K.C. Wheare. It may be noted that both them scholars analysed the issue of federal structure from institutional and juridical perspectives. The Indian federal system has been examined under different names such a horizontal arrangement of powers, a new contrivance designed to meet special requirements of the Indian society. Bomberal in his Foundations of Indian Federalism has raised doubts about the very nature of Indian federalism.¹

David Nice defines federalism as a system where two levels of governance can function simultaneously – the national level and the ‘sub-national’ level.²

Whatever may be the types of description, there is a common belief that federalism all over the world is undergoing changes both structurally and functionally. It is now a matter of debate whether the nature of Indian federalism can be fitted into K.C. Wheare’s description of it being ‘a quasi federal’ in nature where the centre is more powerful than the states. Structurally, from the constitutional perspective, it might be correct but functionally from the perspectives of contemporary political process, it exhibits somewhat different picture.

Historically viewed, India’s adoption of federalism at the time of independence was conditioned by several factors. The legacy of the Government Act., 1935 had been there. Even in the Act 1919, the idea of provincialism found a dominant place. Moreover, the vast and complex nature of the Indian polity convinced the national leaders that only under a federal scheme, different sections of people could live together. It was not administratively possible for one central government to administer the whole country.

It is rightly held that a federal system cannot be understood without a reference to the values which forms the core of constitutionalism. It may be mentioned that the Constitution embodies those cherished values which guided the freedom fighters. Indian nationalist spirit has been largely shaped by the feeling of anti-colonial power; the aim was to achieve freedom in all senses. The central point of analysis, in this connection, should be is there any conflict between national values (ends) and sub-national values (ends). If there is any, what will be the method of making reconciliation between these two? To what extent, constitutional arrangements can be useful in doing the best?

Thus, it will not be proper to find fault only with the federal arrangements. The constitution provides, as has been discussed in the preceding chapters enough scope for adjusting or altering the present scheme of things so that unity and harmony can be made to prevail.

One may refer to the prevailing federal system of the USA which is the result of development and expansion of federal authority over two centuries. The primary forces behind such a long process of evolution have been the effect of a number of crises. It may not be wrong to suggest that the enormous power of federal authority in the USA is the result of the changes in the nature of international politics – emergence of the USA as the only super-power, creating a uni-polar system. Political realities, both at the domestic and international front have contributed to this growth of federal authority. Quite naturally, mere text book type discussion and description of federal arrangements will not be sufficient to understand the interactions of inner forces well below the surface level political process.

So far as the Indian perspective is concerned, the nature of Indian federalism can be examined against the backdrop of national integration. It is admitted that the integrity and sovereignty of India must emerge from a conscious effort towards harmonization of the

distinct linguistic, ethnic and cultural entities which constitute the nation. Thus, national integration is -

“..... the breakdown of fragmented group existence based on particularistic loyalties and its suppression by generalist loyalties to the total aggregation of the political community in a nation.”³

Thus national integration can be achieved, it is believed, through a system where all segments of the society can take part in the governing process, based on decentralization of power at all levels. Thus, national integration signifies:

“...cohesion but no fusion, unity but not uniformity, reconciliation but not merger, agglomeration but not assimilation, solidarity but no regimentation of the discrete segments of the people constituting a political community/state.”⁴

One can find the same feeling in the words of Dr. B.R. Ambedkar in which he laid stress on national unity:

“...though India was to be a federation, the federation was not the result of an agreement by the states to join in a federation not being the result of an agreement, no state has a right to secede from it. Though the country and the people may be divided into different states for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source..... The Drafting Committee thought that it is better to make it clear at the outset rather than leave it to speculation.”⁵

II

It has been correctly observed that the study of Indian federalism has been basically shaped by the juridical approach adopted by scholars like A.V. Dicey and K.C. Wheare. In many cases, primary attention has been placed on the structural aspects of the federal system. But to understand the nature and content of federal dynamics,

one should go beyond such examination to find out the forces and factors that operate at the level of federal functioning scheme. Scholars have tried to express the nature of federalism in India in different terms. While D.D. Basu holds that the Indian Constitution is neither federal nor purely unitary but a combination of both. Boschwak expressed in Foundations of Federation doubts about the federal character of the Indian federation. Some members of the Constituent Assembly, drawing examples from other political systems, opined that federalism involves division of sovereign power between the central and local governments.

David Nice defines federalism as a system of governance that includes a national government and at least one level of sub-national governments.⁶ There is mutual relationship between these levels of governance and hence, the power of decision-making cannot be absolute. One segment may be influenced by the other. But in practice, a federal system gives each level the ability to make decisions without the approval (formal or informal) of the other level.⁷

Besides this, the concept of cooperative federalism (or popularly known as marble cake federalism) proceeds on the assumption that cooperation between the central and constitutional units is an essential factor for smooth functioning of the federation. On the other hand, is competitive model of federation holds that there will always be some form of competition for power-sharing between the central and provincial units.

At this point, a new concept of federalism demands detailed discussion. The term “creative federalism” convinced by President Johnson of the USA exhibits a different mode of federal dynamics. It may be recalled that with the help of the Congress, he passed the Intergovernmental Cooperation Act, 1968 as well as the Civil Rights Act. He also signed more than sixty bills on education providing educational group even though education had not been a federal responsibility. The

expansion of the role of the federal government has also witnessed a corresponding expansion of the role of the state governments as most of the federal programmes have to be implemented by the states.⁸

It may not be wrong to suggest that India opted for federal system in consideration of three reasons:

- 1) The basic reference to such model can be traced in the Government of India Act, 1935.
- 2) There was federal character of the leading federal organization organized into legitimate units.
- 3) The large size of the country demanded some form of decentralized system of governance.

From a different perspective, contemporary literature on Indian federalism points to the fact that the nature of Indian Federalism cannot be properly appreciated unless the difference between nationalism and sub-nationalism is properly understood. Thus, a federal system cannot be analysed unless the values underlying the system are analysed. India's national values have been shaped by the anti-colonial struggle which may be outlined as follows:

1. In the first place, there is the recognition of national integration as the basic ingredient of the federal governance.
2. There is the urgent need for the rapid economic development of the country which calls for a nation-wide participation of all the stake holders.
3. The need for science and technology along with the spread of higher education is well recognized.
4. There should be a relentless fight against poverty and social injustice.
5. There is the deep appreciation that India is not a mere country but a great civilization with deep rooted values of democracy and egalitarianism.

6. There is the faith the state should follow the principle of regional toleration – a basic foundational principle of secularism.
7. There is a belief that national integration can best be achieved through a sound linguistic policy which would satisfy all languages in a greater way.⁹

It is generally believed that in majority of cases, sub-national values do not conflict with national values. There may be instances of regional demands all over the country but most of these demands can be accommodated within the broad national framework. It is true that there are imbalances in development and disputes do occur over these inner.⁹

At this point, it may be mentioned that the American federal experience is different from that of the India's because language is not a issue in that system. Again religion is also not the major issue but race plays an important role in it. In India, then issues have been resolved through the broad concept of secularism both as an idea and a practical means for achieving national integration.

III

In order to situate the problem of India's federal governance within a broad frame, attempts have been made by the scholars to develop an acceptable and working model for the same. The slogan "locals know the best and choice be left to them" seems to be basic principle behind the creation of a federal arrangement. It is held that centralization in the matter of governance in public affairs has been an over-assertive tendency. At the same time, too much importance on economic dimension of both centralization and decentralization may not be an adequate those of explanation of the federal arrangement. Thus, the issue can be analysed from different perspectives.

1. Nature and categories of Federal states.
2. Reasons behind historical drift towards decentralization.

3. Advantages and Disadvantages of both centralization and centralization.

In this connection, a reference may be made to an article under the title “Installation of Federal authority within the Indian Political System”¹¹ by S.L. Verma in which he has tried to locate the federal authority within a general backdrop of both constitutional frame and the on-going political process. His main argument begins with the concept of a negative aspect of the Indian federation which he calls “betrayal of federalism”. It is true that the scheme of federalism in India does not conform to the ideal type of federation and has within it a number of features which are not, strictly speaking, federal in nature. But the entire idea of federalism as a pattern and a mechanism of governance should be contextualized within the fixed time. Frame when such an experiment was undertaken. Considering the geographical, economic, political and social formation, it was thought to be the only method through which the whole country could be brought under a common administrative framework.

Verma’s arguments in this paper touches upon issues like dominating parliamentary system, the nature and extent of the emergency provisions under the Constitution, the issue of over centralization, areas of conflict between the centre and the states and over all, the nature and dimensions of India’s party system.¹²

From another perspective the nature and working of the Indian federal system has been analysed by Md. Murtaza Khan in his paper “Structural Stability in Indian Constitutionalism: A study of Judicial Review.”¹³ He has tried to point out a number of issues involved in the power of judicial review which have their far reaching impact on the working of the Indian federal system. He has identified as many as seven factors in this respect.¹⁴ In this paper, he has explained the issue of judicial review in the context of constitutional amendments.

He begins his analysis with a reference to the Constitution (First Amendment) Act, 1951 which was passed to do away with the decisions of the Patna High Court which declared the Zamindari Abolition and the Land Reforms Act as unconstitutional. The First Amendment Act introduced Clause 4 in Article 15 enabling the state to make special provision for the benefits of the socially and economically backward classes to overrule the decisions of the Supreme Court in the State of Madras Vs. Champakam (1951, SCR 525).

The Fourth Amendment Act 1955 was passed to negate the Supreme Court's decision in Bela Banerjee's case wherein it was held that the term 'compensation' indicates fall and equivalent of cash for the property deprived and the question of compensation was justiciable.¹⁵ The Act inserted clause 2 in Art.31 to set aside the Supreme Court judgement in Subodh Gopal Vs. The State of West Bengal (1954, SCR 589). It also referred to the case of Saghir Ahmed in this context.¹⁶ In this connection, references can be made to Kerala Agrarian Reforms Act and the Madras Land Reforms Act which were challenged before the Supreme Court. In a similar context, the Seventh Amendment Act of 1964 was challenged in Sajjan Singh case and the Supreme Court upheld the Act.

It may be recalled that until the Golaknath decision in 1967, the Supreme Court was of the opinion that Parliament can amend any portion of the Constitution by following the procedure laid down in Art. 368 and Art.13(2) has the coverage of this power of amendment. But the interpretation of Art.13(2) in the Golaknath case altered this power equation as the judgement clearly state that the word "law" used in Art.13(2) indicates only 'ordinary law' and not the "constituent law" that is amendment.

This decision stood in the way of Parliament's power to amend Fundamental Rights, especially those Fundamental Rights to Property and as a result, a spate of constitutional amendments with far reaching

consequences were passed. Of all these amendments, the 24th, 25th and 29th Amendment Acts deserve special mentioning. The nature and scope of Art. 368 came under amendments. In clear terms, it stood as an amendment under Art. 368 will not come under the narrow scope of Art. 13(2). The validity or otherwise of a Constitution Amendment Act shall not be open to question on the ground that it takes away or affects the fundamental right. The 25th Amendment Act was passed in the wake of the decision by the Supreme Court in R.C. Cooper case when it was held that the Banking Companies Act violated the guarantee of compensation under Art.31.

These Amendments Acts were challenged in Keshavananda Bharati case (Popularly known as the Fundamental Rights case). It was held that an amendment passed by the Parliament is not law writing the meaning of Art.13.

With a view to overcoming the problem created in the decision of the Keshavananda Bharati Case, clauses 4 and 5 were inserted in Art. 368 by Forty Second Amendment Act, 1976. But these were struck down by the Supreme Court in Minerva Mills Case. The supreme Court held: "Since the Constitution has conferred a limited power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed a limited amending power is one of the basic features of our Constitution and therefore the limitations on that power cannot be destroyed. Parliament cannot under Article 368 expand the power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features."¹⁷

The process which started with the passing of the Constitution (First Amendment) Act, 1951 found its culmination in the Constitution (Forty-second Amendment) Act, 1976 which has been described as "a product of a strange political situation".¹⁸

It may be recalled that the Congress President, on February 26, 1976, appointed a Committee to have a second look at the Constitution and to find out the important loopholes which had to be plugged through constitutional amendment. The Committee which was composed of twelve members, included, among others, Sardar Swaran Singh (Chairman), H. R. Gokhale and S. S. Ray. It has been observed that the operation of internal emergency and the imprisonment of a number of opposition leaders', provided "an excellent opportunity for the ruling party to push through the wide ranging 42nd Amendment, perhaps in the shortest time that was possible."¹⁹

On November 2, 1976, the Lok Sabha, by 336 to 4, passed the Constitution (44th, renumbered 42nd Amendment) Bill.

The Constitution (Forty-second Amendment) Act is so comprehensive and wide-ranging that it has been called "a mini-Constitution".²⁰ The Constitution (42nd Amendment) Act, 1976, has amended the Indian Constitution in some important areas. The Act contains as many as 59 clauses. In the first place, the Preamble has been amended. Secondly, the Union Government has been given wide powers to deal with 'anti-national activities'. Thirdly, the Directive Principles have been accorded a higher position than the Fundamental Rights. Fourthly, Art. 368 has been further amended to keep amendments outside the purview of judicial scrutiny. Fifthly, it has been laid down that the central laws can be declared unconstitutional only by the Supreme Court and the State Laws by the respective High Courts, and for invalidating a law, two-thirds majority of the Constitution Bench will be necessary. The Constitution Bench of the Supreme Court must consist of not less than seven Judges and the High Court Bench of not less than five Judges. In case a High Court has less than five Judges, the verdict must be unanimous. Sixthly, High Courts' power of issuing writs has been severely curtailed. Seventhly, the entire jurisdiction of the Civil Court, including the High Courts and

the Supreme Court has been proposed to be taken away and conferred on the administrative tribunals. Eighthly, the High Courts' supervisory jurisdiction under Arr. 227 over the administrative tribunals has been taken away. Lastly, "education" has been transferred to the list from the State List.

Since the Constitution (Forty-second Amendment) Act, 1976, amended a number of articles of the Constitution, it is proposed to divide the entire amended Act into several sections to find out the nature and implications of the changes brought about by the Act.

II. Changes in the Preamble: their implications.

In this section, before a discussion is made of the importance of incorporating a Preamble to a Constitution, reference should be made to the observation of Prof. Ernest Barker who, in his Principles of Social and Political Theory, has included the Preamble to the Indian Constitution after the Table of Contents. Regarding this inclusion, he has observed, "It seemed to me, when I read it, to state in a brief and pithy form, the argument of much of the book, and it may accordingly, serve as a key-note. I am the more moved to quote it because I am proud that the People of India should begin their independent life by subscribing to the Principles of a political tradition which we, in the west, call Western; but which is now something more than Western."

It is very often asked; what is the importance of the Preamble to a Constitution in so far as it is agreed that the Preamble cannot be treated as a part of the Constitution? It has been observed by an authority²¹ on the subject that the Preamble of a Statute "has been said to be a good means of finding out its meaning, and as it were, a key to the understanding of it; and, as it usually states, or professes to state, the general object and intention of the legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity or to the meaning of words, which have more than one, or to keep the effect

of the Act within its real scope, whenever the enacting part is, in any of these respects open to doubt." He also added that the Preamble "cannot either restrict or extend the enacting part (of a Statute), when the language and the object and the scope of the Act are open to doubt."²²

In a similar way, Justice Story observed '*Inter alia*':²³

"The Importance of examining the Preamble, for the purpose of expounding the language of a Statute, has been long felt and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the Preamble of a Statute is a key to open the mind of the makers, as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the Statute It is properly resorted to where doubts or ambiguities arise upon the words of the enacting part; for If they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the Preamble.

"There does not seem any reason why in a fundamental law or constitution of government, an equal attention should not be given to the attention of the framers, as stated in the Preamble. And, accordingly, we find that it has been constantly referred to by statesmen and jurists to aid them in the exposition of its provisions."

On the question whether the Preamble to a Statute can confer any power on any part of the government, he further observed²⁴ in the context of the American Constitution, that "the preamble never can be resorted to enlarge the powers confided to the general government or any of its departments It cannot confer any power per se; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the Constitution. Its true office is to expound the nature and extent and application of the powers

actually conferred by the Constitution, and not substantively to create them."

The Preamble to the Constitution of India, as it stands today, is founded on the Objectives Resolution which was moved in the Constituent Assembly by Jawaharlal Nehru on 13th December, 1946 and adopted by it on 22nd January, 1947 which embodied the following principles :

"(1) This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance of Constitution ;

(2) wherein 1 the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India shall be a Union of them all; and

(3) wherein the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution, shall possess and retain the status of autonomous units, together with residuary powers and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are Inherent or implied in the Union or resulting therefrom ; and

(4) wherein all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people ; and

(5) 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 ; and

(6) wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes ; and

(7) whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea and air, according to justice and law of civilized nations ; and

(8) this ancient land attain its rightful and honoured place in the world peace and the welfare of mankind."

It is Interesting to note that nowhere in the Resolution stated above, the words like "Socialist" or "Secular" have been used. Equally interesting is to note that the final shape of the Preamble adopted in the present constitution, has dropped the word "integrity" originally included in the Resolution.

The roots of shifting change of attitude of the leaders towards socialism and secularism could well be noticed as early as in 1945. Nehru wrote in that year : "In the context of society to-day, the caste system and much that goes with it are wholly incompatible, reactionary, restrictive and barriers to progress. There can be no equality in status and opportunity within its framework, nor can there be political democracy, and much less, economic democracy. Between these two conceptions conflict is inherent and only of them can survive."²⁵

The Congress Socialist Party's statement²⁶ that "there could be no socialism without democracy" was further strengthened by the observation of Jawaharlal Nehru in 1951 when he held:

"After all, the whole purpose of the Constitution, as proclaimed in the Directive Principles, is to move towards what I may call a *casteless*

and classless society. It may not have been said precisely in that way; but that is, I take it, its purpose, and anything that perpetuates the present social and economic inequalities is bad."²⁷ With regard to secularism, the Indian National Congress in 1931 Karachi Resolution made it clear that "the State shall observe neutrality in regard to all religion."

That the Government was keen in introducing a socialist society was clear in the statement made by Nehru in the National Development Council in 1954 when he said that he was aiming to frame a "socialistic picture of society." This was reflected in the Industrial Policy Resolution of the Government. The Cabinet, while reviewing the Industrial Policy Resolution 1948, decided that it "had to be interpreted in terms of the socialistic objectives."²⁸ In late December, after two days of debate, the Lok Sabha passed a resolution which made the "socialist pattern" the official policy of the Government and a guide to the Planning Commission in drawing up the Second Plan.²⁹

In conformity with declaration of the objective of "socialist pattern of society" in the Lok Sabha, the Congress, at its Avadi Session at Madras in January, 1955 passed a resolution which stated that "in order to realise the object of the Congress Constitution and to further the objectives stated in the Preamble and the Directive Principles of State Policy in the Constitution of India, planning should take place with a view to the establishment of a socialistic pattern of society, where the principal means of production are under social ownership or control, production is progressively speeded up and there is equitable distribution of national wealth."³⁰

With the adoption of the principle of 'Socialist Pattern of Society', public sector industries began to play dominant role. On April 30, 1956, just before the presentation of the Second Plan, the government brought before the Parliament an industrial policy resolution to modify already existing 1948 Industrial Resolution. The new Industrial Policy

Resolution, while expanding the scope of the public sector, increased 'the number of industries to be included in this category, from six to seventeen. Included in this industry such as iron and steel, machine tools and heavy electricals as well as mining fell under the jurisdiction of the public sector.

Though Congress Party's commitment to socialism was welcomed in general, it did not escape criticism. The orthodox followers of Gandhi viewed the stand of the Congress as a radical departure from Gandhian concepts. To this criticism, Shriman Narayan was quoted to have replied:

"Is not Gandhianism, socialism of a type? In the contents of the economic policy resolution, it has been made clear what socialism is. That means full employment, more production and economic and social justice for all. We have laid emphasis on small scale and cottage industries in order to provide fuller employment. According to our ideal the State will be encouraged on a co-operative basis. Therefore, the contents of the Economic Policy Resolution are in no way opposed or inconsistent with the Gandhian conception. On the other hand, we are moving close to the same ideal. Gandhiji's socialism was of the Sarvodaya type and that is what we are aiming at ours is not of the Western type."³¹

But in spite of the Government declaration for achieving socialistic pattern of society, sharp differences arose between the supporters of large-scale industry and those of cottage industry. To resolve the dispute, Prof. P. C. Mahalanobis, the then Chairman of the Indian Statistical Institute and adviser to the Planning Commission, drew up a "plan frame" which proposed the creation of a large basic industries sector as the foundation for further economic development and decentralized cottage industry sector to eradicate the problem of unemployment and provide a satisfactory flow of consumers goods.

The National Development Council approved the proposal in the first week of May, 1955, while the Working Committee of the Congress endorsed it only a few days later, in its meeting at Berhampur, Orissa. It was, for the first time; that the village and cottage industries secured an important place in the Congress Policy and accordingly, it found its place in the policy of the Second Plan.

The Second Plan may be taken as a synthesis between socialism and Sarvodaya - a compromise between the traditionalists and the modernists in the Congress Party. Although the Plan's emphasis was clearly on the development of large scale heavy industry, the decentralised sector was given sufficient encouragement to provide a workable consensus on the objectives of planning as exemplified in the Second Plan. That the Congress Party, while adopting this important decision, had ambivalent attitude and that it had to depend upon the government leadership, was clear from the observation made by the then Congress President, U. N. Dhebar. He said.³² "Some of us are not clear. And we argue whether the social revolution should precede the economic revolution or the latter the former. Similarly, we are not clear about the methodology and the technique of the new struggle And because we are not clear we turn to the Government and ultimately to Panditji."

A study of the Constituent Assembly Debates will make it abundantly clear that the Constitution was the result of a combined influence of Patel's conservatism and Nehru's inclination towards socialism, though it was Fabianism. But It should be noted that over the year leading to the Constituent Assembly he changed from Marxist or a Laski style socialist to an empirical gradualist.³³ It was, perhaps, Patel's conservatism that prevented Nehru from putting the "Socialism" in the objective Resolution. A beautiful summary has been given by a scholar on this issue when he says.³⁴ "The difference between Nehru and the other three members of the Oligarchy was one of approach, not

of basic belief. Nehru felt an emotional and intellectual obligation to attack India's social problems. Patel, Prasad and Azad, somewhat more conservative than Nehru, were committed only to effective government. Yet the attitudes of all four were rooted in humanitarian outlook. If the good of the many demanded the sacrifice of the few-as in Zamindari abolition it would be done."

To what extent, the Assembly members were really in favour of including socialism in the Constitution, has been summed in the following words :³⁵

"What was of greatest importance to most Assembly members, however, was not that socialism be embodied in the Constitution, but that a democratic Constitution with a socialist bias be framed so as to allow the nation in the future to become as socialist as its citizens desired as its needs demanded. Being, in general, imbued with the goals the humanitarian bases, and some of the techniques of social democratic thought, such was the type of Constitution that Constituent Assembly members created."

With regard to the inclusion of the concept of secularism in the Preamble, it may be stated that the secular state is important to the future of Indian democracy itself. "The secular state is thus a fundamental aspect of India's democratic experiment, an experiment which might conceivably break down as much by establishing Hinduism as the state religion as by eliminating freedom of the press."³⁶

The problem of India as a secular state is as complex as anything. The existence of a number of religions, dominant place of Hinduism, communalism and vigorous impact of the West - all these factors have directly *or* indirectly contributed to the complexity of the problem. Again, the political set-up of different neighbouring countries Pakistan and Burma with their leaning on Islam and Buddhism respectively, just

immediately after the attainment of independence exerted no less influence upon the Indian political setting. "Despite the very different policies of India's immediate neighbours, the significance of India 'as a secular state must also be gauged in terms of the very considerable prestige and influence of India among other Asian countries As the largest and most populous non-communist country, and with a stable government and democratic leadership, it would be surprising if India did not exert considerable influence in South and South-east Asia. From this point of view, any major experiment undertaken in India, whether be it land reforms, five-year plans, general elections with universal adult suffrage, or the development of a secular state, will have far reaching implications for the rest of this region."³⁷

Like many other concepts of Political Science, the word "secularism" has also varied definitions. An agreed and all comprehensive working definition seems to be like this :

"The secular state is a state which guarantees individual and corporate freedom of religion, deals with the Individual as a citizen irrespective of his religion, is not constitutionally connected to a particular religion nor does it seek either to promote or interfere with religion."³⁸ From this definition, it follows that under the conception of secularism, three sets of relationships, viz., religion and the individual, the state and the individual and the state and religion, can be studied.

III. Constitutional framework and the concept of secularism

It should be noted that nowhere in the Constitution, the word "secular State" has been used. A careful reading of the debates in the Constituent Assembly will show that Prof. K. T. Shah tried to include the word "secular" in the Constitution. He brought the proposal in the form of a new article which provided:

"The state in India being secular shall have no concern with any religion, creed or profession of faith."³⁹ But he failed to get his proposal

adopted in the Constituent Assembly since it was decided that had the proposal been included in the Constitution, it would result in a conflict with Art. 25 which has permitted the State to intervene in matters connected with religion in the interest of social reform.

The Constitution of India in Part III, from Art. 25 to Art. 28, guarantees freedom of religion. Art. 25 (1) provides : "Subject to public order, morality and health and to other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-

(a) Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.

(b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I. The wearing and carrying of 'Kirpans' shall be deemed to be included in the profession of Sikh religion.

Explanation II. In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious Institutions shall be construed accordingly."

In search of the origin of this provision a reference is always made to a similar provision contained in the 1937 Constitution of Eire which says : "Freedom of conscience and the free profession and practice of religion are subject to public order and morality, guaranteed to every citizen".⁴⁰ But the language used in the Article of the Indian Constitution is very similar to that of the resolution on fundamental rights adopted at the Karachi Congress in 1931 which proclaimed :

"Every citizen shall enjoy freedom of conscience and the right freely to profess and practise his religion, subject to public order and morality."⁴¹

It is interesting to note in this connection, the Constitution of the Kingdom of Nepal, while stipulating that the monarch must be an "adherent of Aryan culture and Hindu Religion, guarantees freedom of religion to all citizens In the following provision :⁴²

"Every citizen, subject to the current traditions, shall practise and profess his own religion as handed down from ancient times. Provided that no person shall be entitled to convert another person to his religion."

Similar guarantee of freedom of religion can also be seen in the U.S. Constitution. The First Amendment to the Constitution (1791) proclaims : "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."⁴³

In the Constitution of Switzerland in Paragraphs 1 and 2 of Art. 50, it has been provided : "The free exercise of religion is guaranteed within limits compatible with public *order* and morality. The Cantons and Confederations may take measures necessary to maintain public order and peace between the members of the different religious communities and to prevent encroachments by ecclesiastical authorities upon the rights of citizens and of the State."⁴⁴

Section 116 of the Commonwealth of Australia Act, 1900 proclaims: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as qualification for any office or public trust under the Commonwealth."⁴⁵

Art. 124, of the Constitution of the U.S.S.R. (1936) states :

"In order to ensure to citizens freedom of conscience, the church in the U.S.S.R. shall be separated from the State, and the school from the church. Freedom of religious worship and freedom of anti-religious propaganda shall be recognised for all citizens."⁴⁶

Under Art. 20, the Constitution of Japan, 1946 provides :

"Freedom of religion is guaranteed to all. No religious Organization shall receive privileges from the state, nor exercise any political authority. No person shall be compelled to take part in any religious act, celebration, rite or practice. The state and its organs shall refrain from religious education or any other religious activity."⁴⁷

In the Universal Declaration of Human Rights, 1948, under Art. 28, it has been declared :

"Everyone has the right to freedom of thought, conscience and religion, his right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."⁴⁸

Art. 4 of the Constitution of the West German Republic, 1949 states :

"Freedom of faith and conscience and freedom of religious and ideological profession shall be inviolable. Undisturbed practice of religion shall be granted. No one may be compelled against his conscience to perform War service as a combatant. Details shall be regulated by a Federal law."⁴⁹

Similarly, Section 2 of the Canadian Bill of Rights, 1960⁵⁰ recognises the freedom of religion in the following provision :

"It is hereby recognized and declared that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms, namely (e) freedom of religion"⁵¹

On an examination of the above provisions relating to right to religion, it will be seen that all of the provisions are based on at least three distinct principles. In the first place, the doctrine of secularisation of the State has been the underlying principle of all these Constitutions, secondly, rule of religious equality has become the cardinal principle while acknowledging the right to religion; and thirdly, in all these declarations, freedom of conscience has been sought to be guaranteed.

Under Art. 25 (1), concepts like freedom of 'conscience', 'profession', 'practice' and 'propagation' have been used, making the implications of the provision much more Important.

By using the words "all persons", the Constitution-makers intended to widen the scope of the freedom so that all persons including aliens can enjoy the right. In *Ratilal v, State of Bombay*,⁵² Chagla, C. J., in course of delivering his judgement held that "the religious freedom which has been safeguarded by the Constitution is religious freedom in the context of a secular State." A similar opinion was expressed In *Saifuddin Saheb v. The State of Bombay*⁵³ when Ayyanger, J., held that provisions of the Indian Constitution relating to freedom of religion "emphasize the secular nature of Indian democracy which the founding fathers considered should be the very basis of the Constitution."

But the judgment suffers from a flaw. Neither Art. 25 nor Art. 26 prohibits the State from recognizing any religion as the State religion. On the other hand, these two articles cannot, in any way be construed to confer the State to recognize any religion as State religion. Since the

Constitution refers to various communities, it can be inferred that the Constitution gives indirect recognition to these religions.

Again Art. 27 of the Constitution declared that "no person should be compelled to pay any taxes, the proceeds of which are specifically appropriated In payment of expenses for the promotion or maintenance of any particular religion or religious denomination."

Similar provisions are found in the Constitutions of Switzerland and Japan. Art. 40 of the Swiss Constitution, 1874 provides :⁵⁴

"No person may be compelled to pay taxes the proceeds of which are specifically appropriate in payment of the purely religious expenses in any religious community of which he is not a member."

Again, Art.22 of the Constitution of Japan proclaims" No religious organisation shall receive any privileges from the State, nor exercise any political authority "⁵⁵

The present article of the Indian Constitution, i.e., Art. 27 embodies the principle arrived at in the U.S.A. in a judicial decision which said :⁵⁶

"No tax in any amount, large or small can be levied to support any religious activities or Institutions, whatever they may be called, or whatever form they adopt' to teach or practise religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

With regard to the nature of Art. 27 of the Constitution, it has been observed by Basu:

"It is to be noted that what the present article of our Constitution prohibits is taxation or the specific appropriation of the proceeds of any tax for the promotion of any particular religion or religious denomination. It would not bar any provision by which religious institutions are benefited along with secular ones, without any

discrimination, or by which all religious institutions are benefited alike."⁵⁷

Art. 28 of the Indian Constitution is concerned with freedom as to attendance at religious instruction or religious worship in certain educational institutions. It provides:

(1) "No religious instruction shall be provided in any educational institution wholly maintained out of state funds.

(2) Nothing in Clause (1) shall apply to an educational institution which is administered by the state but has been established under any endowment or trust which requires that religious instruction shall be imparted in such Institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of the State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is minor, his guardian has given his assent thereto."

Similar provisions may be found in the Constitutions of the U.S.A., Eire, Japan and West Germany.

In the United States, it has been followed from the First Amendment that the principle "establishment of any religion" would mean that classrooms in a public school cannot be used for religious instruction, nor can the public school use its power to further: religious programme by releasing its students on condition that they attend the religious classes.⁵⁸ But if any public school extends opportunity to the students to join the religious classes without force or coercion, there shall be no unconstitutionality.⁵⁹

Art. 44 (2) of the Constitution of Eire provides :⁶⁰

"Legislation providing State aid for schools shall not ... be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction In that school."

The Japanese Constitution of 1946 in its Art. 20 says-

" The State and its organs shall refrain from religious education or any other religious activity."

Art. 7 in its Clauses (2) and (3) of the West German Constitution (1948) provides :⁶¹

"(2) Those entitled to bring up a child shall have the right to decide whether it shall receive religious instruction.

(3) Religious instruction shall form a part of the curriculum in state schools with the exception of non-confessional schools. Religious instruction shall, without prejudice to the state's right .of supervision, be given according to principle of religious societies. No teacher may be obliged against his will to give religious instruction."

Coming back to Art. 28 of our Constitution, it will be noticed that this Article is confined to educational institutions maintained, aided, or recognised by the State. It does not relate to institutions other than these, which have no connection with the State, Clause (1) of Art. 28 relates to institutions wholly maintained by State funds, Clause (2) relates to educational institutions which are administered by the State under some endowment or trust and Clause (3) refers to institutions receiving aid out of State funds and institutions which are simply recognized by the State. No institution, maintained by State funds exclusively, shall impart religious instruction of any kind. But institutions which are maintained partly by public funds or are recognized by the State shall be free to impart religious instructions,

provided they do not compel members of other communities to follow or attend such courses without their consent.

Art. 28 of the Indian Constitution may be taken as an example of compromise between two opposite considerations. On the one hand, exploitation in the name of religion had dominated the scene for a long time thereby causing conflict among rigid religious dogmas. Since there were more than one religion, it was not possible on the part of the State to impart religious instructions. On the other hand, religion forms the central core of India's national life and considering its importance State could not ban religious instructions at all. Naturally, the Constitution of India follows the middle course. It totally bans religious instructions in State-owned educational institutions, but does not ban it in other denominational institutions. But even as regards those other institutions, it seeks to prevent the fostering of religious dogmas, by Art. 28 (3) and again by Art. 29(2).⁶² On the other hand, in institutions which are not maintained either wholly or in part by the State but are merely administered by the State as a trustee under a trust or endowment created for the purpose of imparting religious instruction, there cannot reasonably be any bar to the provision of religious instruction, for the state does not thereby lose its secularity or impartiality.⁶³

IV. Scheme under the Indian Constitution for the regulation of individual - State relationship - State guarantees rights and privileges to the citizens.

Apart from the individual and corporate freedom of religions, the Constitution of Indian makes elaborate provisions which regulate the relationship between the States on the one hand and the individuals on the other. In other words, specific provisions have been incorporated in the Constitution defining the rights and duties relating to religion of a citizen. After guaranteeing in Art.14, the right to equality before the law

and equal protection of the laws,⁶⁴ the Constitution goes on in Art. 15 (1) to provide :

"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

The scope of this clause is very wide. It is leveled against any State action in relation to citizens' rights, whether political, civil or otherwise. Thus a provision for communal representation or election on the basis of separate electorates according to communities offends against this clause and any election held in pursuance of such a law, after the commencement of the Constitution, must be held to be void.⁶⁵

On the question of effect on freedom of religion of legislation prohibiting Hindu polygamy, it was contended by some that the practice of polygamy was a part of Hindu religion. In this issue is involved the question whether such legislation does not discriminate against Hindus contrary to Art. 15 (1). This question was sought to be answered in *State of Bombay v. Narasu Appa*.⁶⁶ It was contended that the Bombay Prevention of Hindu Bigamous Marriages Act discriminated between of social reform to Hindus, restricting them to monogamy while allowing Muslims to continue the practice of polygamy. Moreover, the Hindus were discriminated against also in relation to Christians and Parsis, since severe penalties were provided in the impugned Act than in the Penal Code applicable to other two communities for whom monogamy was also the law.

The Bombay High Court felt the necessity of inflicting severe penalties to make the law socially effective. Considering Art.15 (1) exclusively, it held that the legislation did not single out the Hindus on the ground of religion only. The legislature had to take into account the social customs and beliefs of the Hindus and other relevant aspects before deciding whether it was necessary to provide special legislation making bigamous marriages illegal.

But what constitutes a discrimination was sought to be defined in *Kathi Raning v. Saurashtra*,⁶⁷ wherein Sastri C.J., observed-

"Discrimination involves an element of unfavourable bias if such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may well be that the Statute will, without move, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those Articles. But the position under "Art. 14 in different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified."

What Art.15 (1) means is that no person of a particular religion, caste etc., shall be treated unfavourably by the State when compared with persons of other religions and castes merely on the ground that he belongs to a particular religion or caste etc.⁶⁸ The significance of the word 'only' is that other qualifications being equal, the race, religion etc., of a citizen shall not be a ground of preference or disability. If there is any other ground or considerations for the differential treatment besides those prohibited by Article, the discrimination will not be unconstitutional.⁶⁹

V. Application of the non-discrimination principle in certain cases.

Art. 15 (1) of the Indian Constitution lays down the basic democratic principle that the State shall not discriminate against any citizen on grounds only of religion, caste etc. This general principle is applicable specifically in three cases, namely, (1) public employment or office, (2) admission to State educational Institutions, and (3) voting and representation in legislatures.

With regard to employment, the guarantee has been provided both positively and negatively. Art. 16 (1) embodies the principle of equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. In a negative way, Art. 16 (2)

provides : "No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for or discriminated against in respect of any employment or office under the State."⁷⁰

There are at least two exceptions to this principle. One is found in Art. 16 (4) which provides:

"Nothing in this article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the State."

Another exception to this democratic rule may be found in Art. 16 (5) which states :

"Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination." Thus the Commissioner and his subordinate officers in the Madras Hindu Religious Endowments Department must be Hindus. This imposition of religious qualification on officers appears to be incompatible with the principle of secularism.

Again, a close relationship can be found between Art. 16 (4) and Art. 335 of the Indian Constitution. Art. 335 of the Constitution which relates to the claims of Scheduled Castes and Scheduled Tribes to services and posts provides :

"The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

Art. 16(4) refers to "any backward class of citizens" which includes the Scheduled Castes and Tribes as well as others. In this connection, it should be mentioned that a peculiar situation arose in the case of *Vinkatramana v. State of Madras*.⁷¹ The Madras Government had issued a Communal Government Order making reservation of posts for Harijans, backward Hindus, non-Brahmins, Brahmans, Muslims and Christians. As a result of this arrangement, a Brahman was refused a particular appointment without any regard to his qualifications simply because he belonged to the Brahman community and the number of posts reserved for his community had already been filled. The Supreme Court declared the Communal Government Order of the Madras Government void since it was repugnant to Art. 16 (1) and (2). The Central point on which the decision of the Court was based was that the order had gone beyond the reservation of posts for backward classes envisaged in Clause (4). It had established a distribution of posts among all communities according to fixed ratios, and this infringed on the petitioner's fundamental rights.⁷²

But the definition as regards backward classes had different meaning in an Order of 1921, issued by the Mysore Government which stated "all communities other than Brahmanas who are not adequately represented in the services" are backward communities.

Subsequently in *Kesava Ayengar v. State of Mysore*,⁷³ the High Court upheld the order under which seven out of ten posts were reserved for the backward classes. Commenting on this decision, A. T. Markose asserted : "It is common knowledge in India that there are many groups or castes in the class 'Brahmans' who are very much backward educationally and unrepresented in government employment. A classification on such naked communal nomenclature is approved by the High Court. The battle for social integration could be lost before it was scarcely begun."⁷⁴

The principle of non-discrimination is again applicable in relation to admission to state educational institutions. As has already been said,⁷⁵ Art. 29 (2) 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."

On the basis of the Communal Government Order, mentioned above, the Government denied admission to a lady candidate in a medical college. The candidate complained that she was denied admission to the medical college on the ground that she belonged to the Brahman community. As the Madras High Court gave judgment in her favour, the government appealed to the Supreme Court for final decision. In this famous case of *Champakom Dorairajan v. The State of Madras*,⁷⁶ the Supreme Court held the Government Order unconstitutional in as much as it distributed seats among the communities according to a fixed ratio. The Court found that the classification made in the Order was a clear violation of the fundamental right of the citizens guaranteed under Art. 29 (2).

This decision gave rise to a serious constitutional problem: how to reserve seats for the Scheduled Castes and Tribes and other backward classes in the light of the Non-discrimination principle of Art.29(2)? To fill the lacuna, the Constitution (First Amendment) Act, 1951, was passed which inserted a new Art. 15 (4). The new clause states that :

"Nothing in this Article or in Clause (2) of Art. 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes." Its Objects and Reasons,⁷⁷ it stated, while explaining the reason for amplifying Art. 15 (3) : "In order that any special provision that the State may make for the educational, economic or special advancement of any backward class of citizens may not be challenged on the ground of being discriminatory, it is proposed

that Art. 15 (3) should be suitably amplified." But it is important to note that the amendment does not validate the distribution of seats on communal lines as it was done in the Madras Government Order, but only validates reservation of seats for these weaker sections of the community.

VI. Application of the principles of non-discrimination in political functions -Basic issues and Judicial pronouncements.

The application of the principle of non-discrimination among the citizens in political functions, that is, voting and representation, has been dealt with in Art. 325 of the Indian Constitution. It states :

"There shall be one general electoral roll for every territorial Constituency for election to either House of Parliament or to the House or either House of the Legislature of a state and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, sex or any of them."

The notable feature of this provision is that the Constitution does not prescribe any religious or caste requirements for voting. Art. 326 simply states that elections shall be held on the basis of adult suffrage. It provides :

"The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage, that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence unsoundness of mind, crime or corrupt or illegal practice shall be entitled to be registered 'as a voter at any such election.'"

The second important feature to be noted in this connection that the Constitution, under Art. 325, only recognises "one general electoral roll for every territorial constituency." That is to say, the system of separate communal electorates has not been recognised by the Constitution. But under Arts. 330 and 332, the Constitution makes special provision for the reservation of seats for the Scheduled Castes and Scheduled Tribes in the Central and the State Legislatures. Special provision has also been incorporated in the Constitution under Art. 331 for the representation of the Anglo-Indian Community in the House of the People. According to the original Art. 334, this system of reservation of seats for these classes was to cease after a period of ten years from the commencement of the Constitution or in 1960. But the period of reservation of seats has been further extended.⁷⁸

The special arrangement gave rise to serious problem, especially under the system of double - member constituencies (e.g., one reserved and one general seat). Such a problem came before the Supreme Court in the case of *V. V. Giri v. D. S. Dora*,⁷⁹ in which the Court upheld the election of Scheduled Tribes candidates to both the reserved and the general seats.⁸⁰ In 1961, Parliament enacted legislation providing for the division of two member Constituencies. Although it helped in eliminating certain problems, at the same time gave birth to others. "Thus a non-Scheduled Classes person residing in a constituency for which there is a reserved seat will be unable to stand for election to that seat. If he is a person of limited financial resources it will be difficult for him to conduct an effective election campaign in another constituency where he is less well known."⁸¹

The question whether a State law can provide for separate electorates for the members of various religious communities, in election to local legislative bodies was decided by the Supreme Court in *Nainsukh Das v. State of U.P.*,⁸² in which the Court observed : "Now it cannot be seriously disputed that any law providing for elections on the

basis of separate electorates for members of different religious communities offends against Art. 15 (1) The Constitutional mandate to the state not to discriminate on the ground, *Inter alia*, of religion extends to political as well as to other rights."

In concluding this section, it may be mentioned here that the idea of granting special privileges to the weaker section of the Community is in conformity with India's aim to be a welfare state. The Founding Fathers realised that these weaker section of the society, long oppressed and exploited by the privileged classes, should be given protection, at least for a time-limit, so that they can come to the forefront of national life and compete with others on a basis of relative equality. But this scheme has an inherent defect which should not be overlooked. Not all the citizens belonging to this category are interested in utilising this protection for improving the condition of the class as a whole. On the contrary, there are few who under the protective umbrella of the Constitution are interested in augmenting their personal ambition, to the exclusion of others, belonging in the same class. So special care should be taken while granting privileges to these sections with a view to helping the deserved ones.

Separation of State and Religion.

Right from the days of Machiavelli, a prominent tendency has become visible in the realm of Political Science, that is, the cry for separation of State and religion. It is agreed that unless this separation is made in the Constitution, the way remains open for state interference in the individual's religious liberty. But the problem is to define what constitutes the key of the separation of the State and religion. In this connection a reference may be made to a United State Supreme Court decision in⁸³ which the Court defined separation of church and the State as follows :

"Neither a State nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another No tax in any amount, large or small, can be levied to support any religious activities or institutions whatever they may be called, or whatever form they may adopt to teach or practise religion. Neither a State nor the federal government can, openly or participate In the affairs of any religious organizations or groups and vice-versa. In the words of Jefferson, the clause against establishment of religion by law was intended to enact a wall of separation between church and the State."⁸⁴

Although the Indian Constitution does not contain any such declaration, there are at least three aspects which, taken together, are intended to support the principle of separation of State and religion. These principles are as follows :

- (a) There is no provision regarding an official state-religion ;
- (b) there can be no religious instruction in state-schools ; and
- (c) there can be no taxes to support a particular religion.

VII. Concluding observation: How far India is a Secular State-Secularism in practice.

The foregoing discussion makes it clear that the Constitution of India strictly adheres to the principle of secularism without using the term in the body of the Constitution. The provisions relating to right to religion are so widely phrased that a correct interpretation of them shows that the underlying principle of the Constitution is the rejection of the demand of any religion to be superior to others. Moreover, the Indian National Congress, the political party which has a long tradition of non-communal nationalism, has always stood for secular character of the State. Moreover, the national leaders like Gandhi and Nehru, throughout their lifetime, supported this doctrine in their actions and speeches. The ideal of secularism was best expressed by some of the

members of the Constituent Assembly and the present scheme of the Constitution does really reflect the intentions of the founding fathers. In the Constituent Assembly, Pandit Lakshmi Kanta Maitra observed :⁸⁵

"By secular State, as I understand it, is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular religion in the State will receive State patronage whatsoever. The State is not going to establish, patronise or endow any particular religion to the exclusion of or in preference to others and that no citizen in the State will have any preferential treatment or will be discriminated against simply on the ground that he professed a particular form of religion. In other words, in the affairs of the State, the professing of any particular religion will not be taken into consideration at all. This, I consider, to be the essence of a secular State. At the same time, we must be careful to see that in this land of ours we do not deny to anybody the right not only to profess or practise but also to propagate any particular religion ... the Constitution has rightly provided for this not as a right but also as a fundamental right. In the exercise of this fundamental right, every community inhabiting this State professing any religion will have equal right and equal facilities to do whatever it likes with its religion provided (that) it does not clash with the conditions laid down there."

Again, Shri H. V. Kamath held the following opinion when he said:⁸⁶

"It is clear to my mind that if a State identifies itself with any particular religion, there will be rift within the State. After all, the State represents all the people who live within the territories, and therefore, it cannot afford to identify itself with the religion of any particular section of the population."

Lastly, the observation of Shri Ananthasayanam Ayyangar will conclusively prove that the framers wanted to make India a secular State. He declared:⁸⁷

"We are pledged to make the State a secular one. I don't by the word 'secular', mean that we do not believe in any religion, and that we have nothing to do with it in our day-to-day life. It only means that the State or the Government cannot aid one religion or give preference to one religion as against another. Therefore, it is obliged to be absolutely secular in character."

Before concluding the present discussion, a few words in regard to Art. 17 of the Constitution (corresponding to Art. 11 of the Draft Constitution of India) are necessary. Art. 17 lays down:

"'Untouchability' in abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'untouchability' shall be an offence punishable in accordance with law."

This is a very important provision in so far as the intentions of the framers of the Constitution to abolish some iniquitous social customs and disabilities from our country are concerned. With an eye to this provision, the Parliament, on 8th May, 1955, passed the Untouchability (offences) Act, 1955 for prescribing, "punishment for the practice of 'untouchability' for the enforcement of any disability arising therefrom and for matters connected therewith." This Act was come into force since 1st June, 1955 and "extends to the whole of India." Moreover, it has declared in one section of the said Act⁸⁸ that where any act consisting an offence under the Untouchability (Offences) Act is committed in relation to a member of a Scheduled Caste as defined in Clause 24 of Art. 366 of 'the Constitution of India, "the Court (of Law) shall presume, unless the contrary is proved, that such act was committed on the ground of "untouchability." In conformity with this idea, the Constitution, under Arts. 330, 332 and 334 provides for the

reservation of seats for the Scheduled Castes and Tribes in both the Central and State Legislatures. Special adjustments in qualifications have been made in an effort to fill the quota of posts reserved for Harijans. Government employing authorities are required to submit annual reports on the number of Harijans appointed and the cause of default are dealt with by the Commissioner for the Scheduled Castes and Scheduled Tribes.⁸⁹ A reference may be made here to Art. 46 of the Constitution which affirms:

“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.” Since the commencement of the Constitution in 1950, various active steps have been taken by the Central and State Governments for the Welfare of the Harijans. Here a peculiar case of contradiction can be noticed between the government's objective of a casteless society and its policy of granting special privilege on the basis of caste. This was revealed in the parliamentary debate in April 1955 when a private member's bill entitled the Caste Distinction Removal Bill was introduced.⁹⁰ Mr. Fulsinghji B. Dabhi wanted in his Bill to remove caste distinctions among Hindus for official and public purposes. But the Bill was opposed by Dr. Monomohan Das, parliamentary secretary for education and a Scheduled Caste member, on the ground that this removal of caste distinction would deprive the Scheduled Castes of their special privileges.

Despite such criticism, the Government has, in many times, attempted to ameliorate the grievances of the people belonging to this section of the community. One such attempt by the Government was the appointment of the Backward Classes Commission to determine the criteria by which any section of the people, besides those already belonging to Scheduled Castes and Tribes, could be treated as socially and educationally backward. The Commission listed as many as 2399

additional castes and recommended that these castes should be granted special privileges by the State as is done in the case of Scheduled Caste and Tribes.

In this section, having discussed the important aspects of secularism in India, the obvious conclusion one may derive is that India had already been following the path of secularism since the adoption of the Constitution in 1950. Even before the attainment of independence, the activities of the Indian National Congress will reveal that it had always stood for a classless, casteless society. The ideal of secularism is clearly embodied in the Constitution and it is being implemented in substantial measure. The inclusion of the words 'secularism' as well as 'socialist' in the Preamble is an attempt to make them more explicit. The fact that the Desai Government, during its tenure between 1977 and 1979, did not delete these words in the subsequent constitutional amendments to undo the effects of this amendment, points to the justification of their inclusion in the Preamble through the Constitution (Forty-second) Amendment Act. There have been very little critical reactions to them.

VIII. Changes brought about by the 42nd Amendment in the Directive Principles of State Policy: Directive Principles given precedence over Fundamental Rights - its implications.

The Constitution (Forty-second Amendment) Act, 1976, observed in the "Statement of Objects and Reasons" that "the democratic institutions provided in the Constitution are basically sound." But "these institutions have been subjected to considerable stresses and strains and that vested interests have been trying to promote their selfish ends to the great detriment of public good."

The 42nd Amendment Act, therefore, sought "to amend the Constitution, to spell out expressly the high Ideals of socialism, secularism and the integrity of the nation, to make the directive

principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles."⁹¹

With this end in view, the Act amended Arts. 39, 43 and 48. In Art. 39, for Clause (F), the following clause has been inserted, namely:

(F) That children are given opportunities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."⁹²

A new Art. 39-A was inserted which aims at giving all citizens opportunity in connection with legal aid. The article provides.⁹³ "The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are denied to any citizen by reason of economic or other disabilities."

For better industrial atmosphere and more production, industrial peace is necessary. This is possible where there is scope for workers' participation in the management possible, a new Art. 43A was inserted which provides:⁹⁴

"The State shall take steps, by suitable legislation or any other way, to secure the participation of workers in the management of undertakings, establishments or other organization engaged in any industry."

After Art. 48 of the Constitution, a new Art. 48A has been inserted. This new article is mainly concerned with the preservation and improvements of wild-life and forests of the country. It states : "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country."⁹⁵

These changes in the Directive Principles will go a long way in accelerating the pace of country's development along the path set out in Art. 38 of the Constitution wherein it has been categorically stated 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 nationallife."⁹⁶

It may be recalled here that Part IV of the Indian Constitution, dealing with the Directive Principles, is designed to bring about 'social and economic revolution', the imperative of which was felt immediately after the attainment of independence. The gravity and magnitude of the problems relating to the total upliftment of those people who had been suffering from social evils for last two centuries was pointed out by Prime Minister Nehru, when he observed⁹⁷ "if one cannot solve this problem soon, all our paper Constitution on will become useless and purposeless." In order to comprehend the importance of these Directives, a detailed study regarding their evolution and nature will be of immense help.

IX. Place of the Directive Principles as determined by the Judiciary conflicting attitude of the Court-Importance of the Directives acknowledged by the Judiciary.

The real nature and significance of the Directive can best be understood from the stand taken by the Judiciary in various cases. But here an observer is bound to be confronted with a delicate problem - the problem of reconciling the diametrically opposite views of the Judiciary. In some cases, the Judiciary, replying mainly on the non-Justiciable character of the Directives, took extremely rigid views and made the Directives subservient to Fundamental Rights; but in subsequent cases, the court, realising the importance of the Directives in the broader perspective of constitutional setting, attached due

importance to them. In the case of *The State of Madras v. Champakam Dorairajan*,⁹⁸ The Supreme Court held:

"The Directive Principles of State Policy which by Art. 37 are expressly made unenforceable by a Court cannot over-ride the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under Art.32. The Chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any Legislative or Executive act or order, except to the extent provided in the appropriate articles in Part III. The Directive Principles of State Policy have to conform to and run subsidiary to the chapter on Fundamental Rights. In our opinion that is the correct way in which the provisions found in Parts III and IV have to be understood. However, so long as there is no infringement of any Fundamental Rights, to the extent conferred by the provisions in Part III there can be no objection to the State acting in accordance with the Directive Principles set out in Part IV, but subject again to the Legislative and Executive powers and limitations conferred on the State under different provisions of the Constitution."

This stand taken by the Supreme Court influenced the decisions of the several High Courts in deciding several cases.⁹⁹ It may be pointed out in this connection that this rigid interpretation of the Supreme Court paved the way for passing the First and the Fourth Amendments to the Constitution in 1951 and 1955 respectively.

But the court did not stick to this decision for a long time. In the case of *H. M. Quareshi v. The State of Bihar*,¹⁰⁰ the Court, while commenting upon the relationship between Parts III and IV, that in view of the apparent conflict between the two regarding their incompatibility with one another, "a harmonious interpretation had to be placed upon the Constitution and so interpreted it means that the State should certainly implement the Directive Principles but must do in such a way that its laws do not take away or abridge the

Fundamental Rights, for otherwise the protecting provisions of Chapter III will be a mere rope of sand."

The Supreme Court laid great stress on the principle of "harmonious construction" while giving an advisory opinion regarding the Kerala Education Bill, 1957.¹⁰¹ It was held :

"Although certain legislation may have been undertaken by a State in discharge of the obligations imposed on it by the Directive Principles enshrined in Part IV of the Constitution, it must, nevertheless, sub-serve and not override the Fundamental Rights conferred by the provisions of the Articles contained in Part III of the Constitution.

The Directive Principles have to conform to and run subsidiary to the Chapter on Fundamental Rights. Nevertheless, in determining the scope and ambit of the Fundamental Rights relied on by or on behalf of any person or body the Court may not entirely ignore these Directive Principles of State Policy laid down in Part IV of the Constitution but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible."

In a similar way, the Court stressed the importance of the Directive Principles in the case of *The State of West Bengal v. Subodh Gopal Bose*.¹⁰² In this case, Justices S. R. Das and Jagannadhadas declared that the Court cannot ignore the importance of the Directive Principles in any way as having no hearing on the interpretation of constitutional problems. In the opinion of Jagannadhadas, J.:

"I am also of the view that the Courts may not ignore the directive principles, as having no hearing on the interpretation of constitutional problems since Art. 37 categorically states that 'It shall be the duty of the State (Including the legislature by virtue of the definition of "State" in Part III made applicable by Art. 36) to apply to these principles in making laws "

Apart from these cases, in many cases¹⁰³ the Judiciary interpreted the real nature of the Directive Principles and their relationship with Fundamental Right. Even the famous case of *Golaknath v. State of Punjab*,¹⁰⁴ wherein the transcendental position of the Fundamental Rights was upheld, the Supreme Court referred to the Directive Principles of State Policy. According to Subba Rao, C. J., Parts III and IV constitute an integrated scheme forming a self contained code and the scheme being an elastic one, the Directive Principles can be implemented without coming into conflict with any of the Fundamental Rights contained in Part III of the Constitution.

The Supreme Court, again in the case of *Keshavananda Bharati v. The Union of India*, popularly known as the Fundamental Rights case, 1972, while declaring the second part of Art. 31 (c) which was inserted by the Section 3 of the 25th Constitution Amendment Act void, recognised the importance of the Directive Principles. In the opinion of the Court, the Directive Principles laid down the ends to be achieved while the Fundamental Rights should be taken to mean the means through which the goals are to be realized. It was also pointed out that the Indian Constitution "does not subscribe to the theory that the end justifies the means adopted."¹⁰⁵

X. Executive-Legislative attitude towards the Directives.

Side by side with judicial attitude towards the Directive Principles of State Policy, it is necessary to find out the outlook of the Executive and the Legislature because, in the ultimate analysis, it will be seen that these two organs of the Government, in a parliamentary democracy, exercise real power in implementing the underlying policies of the Constitution.

That the government attaches importance to these Directives can be best understood from the fact that the Constitution had to be amended twice (First and Fourth Amendment) for implementing the

Directives. Introducing the motion for consideration of the Fourth Amendment to the Constitution in the Lok Sabha on March 14, the Prime Minister said:¹⁰⁶

"I would like to draw the attention of the House to something that is not adequately stressed either in Parliament or in the country. We stress greatly and argue in the Courts of law about the Fundamental rights. Rightly so, but there is such a thing as also the Directive Principles of the Constitution. Even at the cost of repeating them, I wish to read them out These are, as the Constitution says, the fundamentals in the governance of the country. Now, I shall like the House to consider how you can give effect to these principles if the argument which is often used even, if I may so with all respect, by the Supreme Court's interpretation of the Constitution. They are wiser than we are in interpreting things. But I say, then if that is correct, there is an inherent contradiction in the Constitution between the Fundamental Rights and the Directive Principles of State Policy. Therefore, again it is upto this Parliament to remove the contradiction and make the Fundamental Rights subserve the Directive Principles of State Policy."

The Government, in the same spirit, defined the scope of the work of the Planning Commission, established on 15th March 1950. The Resolution of the Government of India declared:¹⁰⁷

"The Constitution of India has guaranteed certain Fundamental Rights to the citizens of India and enunciated certain Directive Principles of State Policy, in particular, 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 national life, and shall direct its policy towards securing, among other things ;

(a) that the citizens, men and women equally, have the right to an adequate of livelihood ;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good ;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."

The Draft First Five-Year Plan, recognising the Importance of the Directives, observed *inter alia*.¹⁰⁸

"The economic and social pattern to be attained through planning is indicated in the Directive Principles of State Policy enunciated in Arts. 36 to 51 of the Constitution. In terms of these Directive Principles, the State's to regard the raising of the level of nutrition and the standard of living of the people as its primary duties. The economic policy of the State must be governed by, the obligation placed upon it to secure that the citizens, man and women equally, have the right to adequate means of livelihood. The State has to endeavour, within the limits of its economic capacity and the stage of development reached, to make effective provision for securing the right to work, the right to education and the right to public assistance in cases of unemployment, old age, sickness, disablement, and in the cases of undeserved want. For attaining these ends, the Directive Principles enjoin that the ownership and control of the material resources of the country should be so distributed as best to sub-serve the common good and that the operation of the economic system should not result in the concentration of wealth and the means of production in a manner detrimental to the common good. Special stress is laid on the need to secure to all the workers-agricultural, industrial and others, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. In furtherance of these aims, the state is to endeavour to organise agriculture and animal husbandry on modern and scientific lines and to promote cottage industries on individual or co-operative lines.

Briefly, the Directive Principles visualise an economic and social order based on equality of opportunity, social justice, and the right to work the right to an adequate wage and a measure of social security for all citizens. They do not prescribe any rigid economic or social framework, but provide the guidelines of State Policy. Planning in India has to follow these guiding lines to initiate action which will, in due course, produce the desired economic and social pattern."

Similarly, the First Five-Year Plan further stated "¹⁰⁹

"The Directive Principles of State Policy enunciated in Arts. 36 to 51 of the Constitution make it clear that for attainment of these ends, ownership and control of the material resources of the country should be so distributed as best to sub-serve the common good, and the operation of the economic system should not result in the concentration of wealth and economic power in the hands of a few. It is in this larger perspective that the task of planning has to be envisaged."

Again, with the adoption of the principle of "Socialist Pattern of Society" in December 1954 as the economic goal, the Directive Principles of State Policy again found a place of prominence in the declaration of the second Five-Year Plan which stated *inter alia*:¹¹⁰

"Essentially, this (socialist pattern of society) means that the basic criterion for determining lines of advance must not be private profit, but social gain, and that the pattern of development and the structure of socio-economic relations should be so planned that they result not only in appreciable increase in national income and employment but also in greater equality in income and wealth. Major decisions regarding production, distribution, consumption and investment- and in fact all significant socio-economic relationships - must be made by agencies informed by social purpose. The benefits of economic development must accrue more and more to the relatively less

privileged classes of society, and there should be progressive reduction of the enumeration of incomes, wealth and economic power."

That the socialist pattern of society is a flexible concept, adjustable with the changing circumstances found vocal support in the following observation. ¹¹¹

"The socialist pattern of society is not to be regarded as some fixed or rigid pattern. It is not rooted in any doctrine or dogma. Each country has to develop according to its own genius and traditions. Economic and social policy has to be shaped from time to time in the light of historical circumstances. It is neither necessary nor desirable that the country should become a monolithic type of organization offering little play for experimentation either as to forms or as to modes of functioning.

... The account of the socialist pattern of society is on the attainment of positive goals, the raising of living standards, the enlargements of opportunities for all, the promotions of enterprise among the disadvantaged classes and the creation of a sense of partnership among all sections of the community. The Directive Principles of State Policy in the Constitution have indicated the approach in broad terms; the socialist pattern of society is a more concretised expression of this approach. Economic policy and Institutional changes have to be planned in a manner that would ensure economic advance along democratic and egalitarian lines, Democracy, it has been said, is a way of life rather than a particular set of institutional arrangements. The same could be of the socialist pattern."

It may not be out of place here to refer to the fact that even before the attainment of Independence, the Congress Party had declared in many occasion that it would work for the prevention of concentration of wealth and power in fewer hands and the abolition of vested interests

inimical to society and thus it would bring about a society based on egalitarianism. In its election manifesto issued in December, 1945, the Party stated *inter alia* :¹¹²

"The most vital and urgent of India's problems is how to remove the curse of poverty and raise the standard of the masses For this purpose, it will be necessary to plan and coordinate social advance in all its many fields, to prevent the concentration of wealth and power in the hands of individuals and groups, to prevent vested interests inimical to society from growing, and to have social control of the mineral resources, means of transport and the principal method of production."

Since 1950, the Planning Commission has drawn up six plans of economic development of which five plans have so far been implemented. The first three plans covered the period from 1951 to 1966; but the final version of the Fourth Plan was formulated in 1969 with a lapse of three years. The Fifth Plan was formulated in 1972-74.

The net result of these Plan efforts has been satisfactory. The Third Plan, for example, wanted to establish progressively greater equality of opportunity and to bring about reduction in disparities in income and wealth and a more even distribution of economic power. It may well be noticed that these are the ideals already included in Art. 39 (b) and (c). Definite and calculated steps have been taken to fulfill the ideals contained in Arts. 39 (e) and (f), 41, 42 and 43 - all related to the economic and social welfare of the all kinds of labour - agriculture, industrial or otherwise. It has been estimated that between 1951 and 1961, the total production of industry and agriculture increased by 42% in spite of the fact that the living condition of farm workers deteriorated during the period of the First Five Year Plan. Side by side with this aspect, it is to be mentioned that India's net national income increased by about 69% between 1951 and 1966, covering the period of first three five year plans.¹¹³

In the Fourth Plan, though the agricultural sector developed well, bringing about "green revolution" in some parts of the country, the industrial sector failed to keep pace with the former. Accordingly, the Fifth Plan puts emphasis on rapid industrial development. As regards the objectives of the Fifth Plan, it is stated: "Removal of poverty and attainment of self-reliance are the two major objectives that the country has set out to accomplish in the Fifth Plan. As necessary corollaries they require higher growth, better distribution of income and a very significant step up in the domestic rate of saving."¹¹⁴

The targets¹¹⁵ of different sectors in the Fifth Plan, are ambitious. It has been estimated that food grains production would increase from 114 million tons in 1973-74 to 140 million tons in 1978-79. The manufacture of cotton cloth would increase from 9800 million metres to 10,000 million metres. Finished mild steel production rise from 5.44 million tonnes to 9.4 million tones. And electricity generation would grow from 72 billion Kilowatts hours to 130 billion Kilowatts hours during the Fifth Five-Year Plan period.

That the Fifth Five-Year Plan was directed to bring about an all round development of the country can be explained from the view point that it had the objective of minimising the country's dependence on foreign aid. The programmes were so arranged that the power sections of the community could be immensely benefited. Moreover, special programmes were undertaken for raising the standard of productivity in areas which were known to be suffering from adverse geographical conditions. Lastly, it was aimed at reducing regional imbalances through incentives and subsidies from the government side.

To conclude the present discussion, it may be submitted that the 42nd Constitution Amendment Act which contains the recommendations of the Swaran Singh Committee, in so far as it relates to the Directive Principles, will ultimately help in bringing about the desired egalitarian society visualised by the framers of the

Constitution in the Chapter on Directive Principles of State Policy. There cannot and should not be a conflict between the Fundamental Rights and the Directive Principles. As has been noticed while discussing the proceedings of the Constituent Assembly that Part III and IV were intended to form an integrated part of the Constitution. The chapter on Fundamental Rights dealing with individual rights should give way to Directive Principles concerned with community interest. "The present Amendment Act (1) added a few more directions' to the existing ones and (2) gave directive principles precedence over fundamental rights. It has been contended by the critics that this addition of the Directives was un-called for and mere addition would not be helpful unless a time-period is fixed for their implementation. But it may be recalled that the fixing of time was against the wishes of the Makers of the Constitution since they hoped that these Directives should contain flexibility in all respects.

Art. 31C provides that no law giving effect to the Directive Principles specified in Clauses (b) or (c) of Art. 39 shall be deemed to be void on the ground that it contravenes articles 14, 19 and 31. It is proposed that the scope of the present Art 31C should be widened so as to cover legislation for the implementation of all or any of the Directive Principles. If there is any conflict between individual rights and the rights of the community, the former must way to the latter. *This is the underlying concept of the Constitution and the Fundamental Rights have, therefore, been defined not in absolute terms but subject to limitations in the interests of the community.* The amendment Act has only sought to remove the impediments from the path of socio-economic reforms for implementing directive principles.

XI. The Constitution (Forty-Second Amendment) Act: Changes with regard to the powers of the Executive and other Organs of the Government.

In this section, an attempt has been made to discuss the changes which are directly or indirectly concerned with the powers of the Executive on the one hand and the Judiciary, on the other.

The most significant change that is to be mentioned in this regard is in the position of the President. The 42nd Constitution Amendment Act amended Art.74 and provided that for clause (1), the following clause would be substituted :

"(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in exercise of his functions, act in accordance with such advice."¹¹⁶

This appears to be an important addition in so far as it intended to make the position of the President clear as the constitutional head. Since the commencement of the Constitution, great debate arose regarding the actual position of the Indian President because of the existence of some constitutional loop-holes.

On the question of the actual position of the President, two opposite and conflicting expert opinions seemed to have dominated the political scene. These two schools are known as legalists and realists. This controversy over the issue found vigorous strength when no less a personality than Dr. Rajendra Prasad, while laying the foundation stone of the Indian Law Institute in New Delhi, on 28th November 1959, observed that there "is no provision in the Constitution which in so many words, lays down that the President shall be bound to act in accordance with the advice of his Council of Ministers."

This view was subsequently supported by K. M. Munshi who observed : "we did not make the President just a mere figure - head like the French President.... In adopting the relevant provisions, the

Constituent Assembly did not understand that they were creating a powerless President".¹¹⁷ The central theme of Munshi's doctrine was to impress the President with his role as an independent officer to "defend the Constitution against inroads from whatever quarters it may come."¹¹⁸

These observations and expressions gave birth to the doctrine of independent President which found prominence during the time of the fourth Presidential election in 1967. Mr. K. Subba Rao, the then Chief Justice of India, who relinquished his assignment for offering himself as an opposition candidate, declared that, if elected, he would act like an independent and strong President.¹¹⁹ But the election results proved otherwise. But, again after two years, during the time when Mr. V. V. Giri sought to contest the Presidential election, he declared that he would never like to be "a rubber stamp even of God" and he would be an active partner "within the four corners of the Constitution."¹²⁰

The doctrine of independent President did not escape the attention of Justice P. B. Mukherjee when he observed that the Indian President "is an independent institution with independent authority and independent functions."¹²¹ But a close analysis of the proceedings of the Constituent Assembly will show that this doctrine of independent President is based on very misleading premises and dangerous presumptions. The debates in the Constituent Assembly will establish the fact that there was full agreement on the proposal of having a parliamentary form of government that would find in the President 'the Indian version of King George VI.'¹²² The office of the Independent President points to one dangerous conclusion : if the President throws himself in the quarrels between the Government and the opposition, the result "may be a grave constitutional crisis which may well culminate in the impeachment of the President and perhaps the amendment of the Constitution to set the President in his place."¹²³ Considering this dangerous aspect, a veteran statesmen like Pandit

Hriday Nath Kunzru warned that any idea of implementing such a doctrine would mean "the end of responsible government."¹²⁴

Side by side with the idea of an independent President, runs the doctrine of active and critical President. The underlying philosophy of this doctrine is that the President should act like a 'friend philosopher and guide' of the Government. While explaining the position of the President of the Indian Republic. K. Santhanam observed.¹²⁵ "If at any time, the President feels that any particular decision of the Union Cabinet is likely to undermine seriously the Constitution, I think he is fully within his powers to reject the advice. Naturally, before such rejection, he will discuss the matter with the Prime Minister and refer it back to the Council of Ministers. If the latter persists in the advice, he will ascertain the opinion of the opposition parties in the Parliament through their leaders. Ultimately, if he is still convinced that, if he accepted the advice, he would be breaking his oath, he will reject it and take all the consequences."

It may not be out of place here to mention that the successive Presidents of India did not strictly adhere to the doctrine of independent President. Of course, it may be recalled that on very many occasions, sharp differences arose between Nehru and Prasad, but that did never lead to any constitutional crisis. This is evident from the high tributes paid to Prasad on the eve of his retirement. The address presented to him on 8th May, 1962 said: "By your qualities of unostentatious grace, your utter simplicity, clarity of outlook, deep humility and broad humanity, you invested a special meaning and significance in your choice as president. As the first President of India you have enriched and embellished the office and are leaving behind inspiring traditions."¹²⁶

But there are instances when the President at different times did not hesitate to warn the Government about any dangerous consequence. The most important instance of the active and critical

role of the President found place in the broadcast of Mr. Radhakrishnan on the eve of Republic Day in 1967 wherein he criticised the Union Government for "widespread incompetence and gross mismanagement of our resources." President Giri went a step further when, on the occasion of inaugurating the Gandhi Bhawan in Lucknow on July 28, 1973, he observed: "To-day what is the position of this country? Corruption, nepotism, favouritism, communalism - these things are destroying the vitals of the country."¹²⁷

Actual position of the Indian President in the Constitutional Framework.

The actual position of the Indian President as the nominal head of the state can best be explained with reference to the observations made by the framers of the Constitution in the Constituent Assembly. It became crystal clear when Dr. Ambedkar declared: "The President occupies the same position as the King in the British Constitution."¹²⁸ Even Shri K. M. Munshi, who later became a supporter of 'Independent President, 'observed in the Constituent Assembly that from the very beginning, it "was decided that the Central Government should be based on English model."¹²⁹ T. T. Krishnamachari held the view : "So far as the relationship between the President and the Cabinet is concerned, we have completely copied the system of responsible government that is functioning in Britain to-day."¹³⁰ In a similar way, Sir Alladi said: "After weighing the pros and cons of the Parliamentary Executives as they obtain in Great Britain and in some continental countries and the Presidential type of government as it obtains in the United States of America. The Indian Constitution has adopted the institution of Parliamentary executive."¹³¹ Commenting upon the whole approach of the Founding Fathers to this issue, Nehru said: "We did not give him any real powers, but we made his position one of authority and dignity."¹³²

Despite the declarations of the Founding Fathers regarding the actual position of the Indian President, there are at least three cases where the Indian pattern deviates from the English model. In the first place, the Constitution does not prescribe that the President shall be competent to act only upon the counter signature of a Minister responsible to the Parliament. Art. 66 (2) authorises the President himself to make rules as to the manner in which his orders shall be authenticated.¹³³ Secondly, in India, the Ministers shall have no legal responsibility for acts of the President.¹³⁴ Thirdly, while under the English system the decision of the offices or the portfolios amongst other colleagues is the business of the Prime Minister including the task of choosing them, the India Constitution, under Art. 77 (3) provides that it is the President who shall make rules in this respect. "Of course, if he makes these rules or revises them under the advice of each new Prime Minister, this provision would not affect the position of the Prime Minister. So, this also does not necessarily imply that the President shall have absolute power in this respect."¹³⁵

Some extra-ordinary important powers have been granted to the Legislature - balance of powers between the Executive, Legislature and the Judiciary affected to a great extent.

Thus, the 42nd Constitution Amendment Act seeks to remove any segment of ambiguity in the original Art. 74 with regard to the position of the President in relation to the Council of Ministers. But the Bill contains some other articles which seek to grant special power to the Legislature in certain circumstances. One such important clause under the proposed 44th Constitution Amendment Bill deals with the issue of presenting anti-national activities. 'It has been provided in section 5 of the Bill that –

After Art.31C of the Constitution and before the heading "Right to Constitutional Remedies", the following article shall be inserted, namely, Art. 31B. It provides:

"(1) Notwithstanding anything contained in Art. 13 no law providing for (A) the prevention or prohibition of anti-national activities or (B) the prevention or formation of or the prohibition of anti-national associations, shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Art. 14, Art. 19 or Art. 31.

(2) Notwithstanding anything in this Constitution, Parliament shall have and the legislature of a State shall not have, power to make laws with respect to any of the matters referred to in sub-clause (A) or Sub-clause (B) of Clause (1).

(3) Any law with respect to any matter referred to in sub-clause (A) or sub-clause (B) of Clause (1) which is in force immediately before the commencement of Section 5 of the Constitution (44th Amendment) Act, 1976, shall continue in force until altered or repealed or amended by Parliament.

(4) In this Article (A) "Association" means an association of persons; (B) "Anti-national activity" in relation to an individual or association, means any action taken by such individual or association—

(i) which is intended or which supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India or which incites any association to bring about such cession or secession.

(ii) which disclaims, questions, threatens, disrupts or is intended to threaten or disrupt the sovereignty and integrity of India or the security of the State or the unity of the nation ;

(iii) which is intended or which is a part of a scheme which is intended to overthrow by force the Government as by law established ;

(iv) which is intended, or which is a party of a scheme which is intended, to create internal disturbance or the disruption of public services :

(v) which is intended or which is a part of a scheme which is intended, to threaten or disrupt harmony between different religious, racial, language or regional groups or castes or communities ;

(c) "Anti-national association" means an association - (i) which has for its object any anti-national activity ; (ii) which encourages or aids persons to undertake or engage in any antinational activity ; (iii) the members whereof undertake or engage in any anti-national activity."¹³⁶

This article¹³⁷ is so widely phrased that Parliament has been given the power for (a) the prevention or prohibition of anti-national activities or (b) the prevention of formation of anti-national association. Not only that, the new article proposed to be incorporated in the Constitution makes it explicit that no such prevention or prohibition "shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges the rights conferred by Art. 14, Art.19 or Art.31.

That the ambit of the Art. 31D has been extended to a very great extent can be seen from the definition of the "anti-national activities" embodied in this article. Anything "which is intended, or which is a part of a scheme which is intended to overthrow by force the Government as by law established" is anti-national activity. This definition is so wide and loosely phrased that any activity, even an election campaign can be brought under it. Of course, the words "by force" indicate the nature of activities to be included in this category. So the apprehension of some of the opposition parties that this power will be misused against them seems to be baseless.

Again, "which is intended, or which is part of a scheme which is intended to create internal disturbances or the disruption of public

services" is an "anti-national activity." Thus it can be safely concluded that a country-wide general strike of the employees of public services can be brought under this provision. The Amendment Act sought to empower the Parliament to interpret anti-national activities as defined in Art. 31D. For there is no authority which can interpret these concepts, superseding the power of the Parliament.

At this point, it is necessary to find out the reasons for incorporating such a provision in the Constitution. It is not a matter of the past that the democratic institutions provided in the Constitution have been subjected to "considerable stresses and strains" and it is equally true that "vested interests have been trying to promote their selfish ends to the great detriment of public good" as the Statement of Objects and Reasons explains. Here arise two questions the explanation of which will make things clear. The questions are :

(a) Why have the vested interests been able to try to promote their selfish ends?

(b) Where from have these stresses and strains arisen?

The foregoing chapters have been devoted to answer these questions and to repeat them in a nutshell, it is the longstanding conflict between the Executive - Legislature on the one hand and the Judiciary on the other which seems to be the root of all troubles. The Founding Fathers, while framing the Constitution, did not envisage such a conflict. But the course of our political and constitutional history has proved that it is because of the wavering attitude of the Judiciary which enabled the vested interests "to promote their selfish ends." Things came to such a height in the 1967 Golaknath case that the whole question of amendability of the Constitution came before the Judiciary; but the stand taken by the Judiciary, cannot, in any measure, be termed as "progressive". Not only that it sought to explain the total constitutional scheme relating to Fundamental Rights from a

narrow, legalistic and restrictive sense, but it also sought to assume the role of a "third chamber."

That the Supreme Court took a wrong step came to be understood when they changed their outlook in the *Keshavananda Bharati* case. But in this case also, the Supreme Court did not give blanket power to the Parliament to amend the Constitution. The Court in this case enunciated their own "basic structure theory" by which some sort of restriction was sought to be imposed upon the Parliament. This doctrine subsequently came to be vehemently criticised since the Constitution nowhere in the total scheme confers such powers on the Judiciary to explain such a theory of "basic structure" of the Constitution.

To remove such difficulties and to keep constitutional amendments outside the purview of judicial scrutiny, the 42nd Amendment Act suitably amended Art. 368 by inserting a new Clause (4).¹³⁸

The 42nd Amendment Act, therefore, wanted to restrict the scope of judicial review by adopting two devices: (a) by excluding certain matters from Court's jurisdiction and (b) by giving Directive Principles precedence over Fundamental Rights. Not only that the Act provided for the setting up of administrative tribunals to adjudicate upon disputes relating to certain specified matters, namely, service matters, labour disputes, import, export and foreign exchange, land reforms, ceiling on urban property and procurement and distribution of essential commodities.

One of the provisions of the Act authorised the President to remove any difficulty from the path of the implementation of the provisions of the Act. A time-limit of two-years was imposed on the exercise of such power by the President.

The Act empowered the President to declare a state of emergency even for a definite part of the territory of India. Clauses 48, 49 and 53 of the Act empowered the President to make a Proclamation of Emergency in respect of a part of the Country or as the case might be, to restrict a proclamation made in respect of the country as a whole to a part of the country.

Again, Clauses 50 and 51 of the Act made certain changes in Art. 356. Under Art. 356 in its original un-amended form, a Proclamation approved by the Parliament ceased to be in operation after a period of six months unless revoked earlier and could be renewed for a period of six months at a time but in no case beyond a total period of three years. Clause (2) of Art. 357 was substituted by a new clause to the effect that any law made by Parliament or any other authority in exercise of the powers of the State Legislature under Art. 356 would remain in force until altered, repealed or amended by the competent legislature or authority.

Curtailement of Judicial Authority

The 42nd Amendment Act curtailed the authority and powers of the judiciary to a great extent. The Act laid down that the Central laws could be declared unconstitutional only by the Supreme Court and the State laws by the respective High Courts, and for invalidating a law two-thirds majority of the Constitutional Bench was necessary. The Constitution Bench of the Supreme Court was to be constituted of not less than seven Judges and the High Court Bench, of not less than five Judges. In case a High Court had less than five Judges, then the verdict was to be unanimous.

Moreover, the High Court's power of issuing writs at the instance of an Individual 'for any other purpose' was taken away and after the amendment, it was necessary for the High Court to establish an "injury by reason of any illegality in any proceedings" when it wanted to issues

writs. Thus, the very wide jurisdiction of the High Courts to redress the grievances of the citizens against the excesses of legislature or the executive was severely curtailed. Again, the High Court's 'supervisory jurisdiction' under Art. 227 over the administrative tribunals was taken away, though the Supreme Court's special jurisdiction under Art. 136 over the tribunals was not touched.

Inclusion of a List of ten 'Duties' in the Constitution

The 42nd Amendment Act included a list of ten 'duties'. They are a 'mixed bag' containing as many as ten 'duties' covering a wide field from the sovereignty of India to the protection of wild life. The Act, by inserting a new clause 51A, provided that "it shall be the duty of every citizen of India-

(A) to abide by the Constitution and respect its ideals and institutions, the national flag and the national anthem;

(B) to cherish and follow the noble ideals which inspired our national struggle for freedom;

(C) to uphold and protect the sovereignty, unity and integrity of India;

(D) to defend the country and render national service when called upon to do so;

(E) to promote harmony and the spirit of common brotherhood among the people of India, transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

(F) to value and preserve the rich heritage of our composite culture;

(G) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

(H) to develop the scientific temper, humanism and the spirit of enquiry and reform;

(I) to safeguard public property and to abjure violence;

(J) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

It may be recalled that even Gandhiji had such similar Ideas of fundamental duties of the citizens.¹³⁹ He outlined the following essential fundamental duties of the citizens :¹⁴⁰

(1) All citizens shall be faithful to the State specially in times of national emergencies and foreign aggression.

(2) Every citizen shall promote public welfare by contributing to State funds in cash, kind or labour as required by law.

(3) Every citizen shall avoid, check and, if necessary, resist exploitation of man by man.

It is to be noted that in our contemporary world many nations have incorporated fundamental duties in their Constitution.¹⁴¹ It was observed that the present Part IV should be replaced by another and should be renamed as "Fundamental Duties of the Citizens and the State." It has been suggested that the following duties of the citizens should be incorporated : (a) duty to work ; (b) duties to pay taxes, (c) maintain discipline at work and public order, (d) duty to participate in public life, (e) duty not to spread hatred, contempt or provoke strife on account of national, regional, lingual, racial and religious differences, (f) to be vigilant against the enemies of the State, (g) to discharge any public or social life vested in him conscientiously, and (h) duty to receive education.¹⁴²

Besides this, the following important duties of the State may be incorporated : (a) duty to create conditions necessary to make the right

to work an effective one ; (b) to protect labour ; (c) to protect youth against exploitation and moral, intellectual and social abandonment ; (d) to organise free public education ; (e) to protect family ; (f) to ensure health, protection and material security to all, particularly to children, mothers and aged ; (g) to create welfare agencies for the physically handicapped and abandoned children.¹⁴³

Other proposals for amendment of miscellaneous character

As had already been pointed out at the outset of the discussion that the 42nd Constitution Amendment Act may well be termed "a mixed bag".¹⁴⁴ Other amendments of miscellaneous character may be noticed as follows :-

(a) Extension of the term of the Legislature

The 42nd Amendment Act extended the term of the Legislature by one year, i.e., to six years instead of five year term as is prevalent at present. A consequential amendment is made in Art. 371F (c) relating to the Sikkim Legislative Assembly.¹⁴⁵ It may be noted that this change of duration of Legislature was not originally recommended by the Swaran Singh Committee.

(b) Changes in the formation of Quorum

It has been proposed that the matter of quorums for sessions of the Central and State Legislatures shall no longer be a concern of the Constitution. Quorums will be determined by the rules of business of the legislature concerned.¹⁴⁶

(c) Disqualification of members¹⁴⁷

Sub-clause (A) of Clause (1) of Art.102 provides that a person shall be disqualified from being chosen as, and for being, a Member of either House of Parliament, if he holds an office of profit under the Government of India or the Government of any state, other than an

office declared by Parliament by law not to disqualify its holder. The existing proposition had led to a great deal of uncertainty.

The amendment in Clause 20 enlarges the scope of Art. 103. The question as to whether a member has become subject to any disqualification mentioned in Clause (1) of Art. 102 as also the question whether a person is disqualified for being chosen as a member of either House of Parliament, etc., on the ground of being found guilty of a corrupt practice, including the question as to the period of disqualification or as to the removal or the reduction of the period of such disqualification, shall be decided by the President after consulting the Election Commission which is empowered to hold an enquiry in this behalf. Art. 192 has been amended on these lines.

(d) Investing the Supreme Court with exclusive powers in matters of judging validation of Central laws.¹⁴⁸

Previously, the constitutional validity of a Central law could be questioned either before the Supreme Court or the High Court. This scheme has been sought to be altered as it is felt that if a member of High Courts give differing judgments as regards the validity of a Central Law, the implementation of the Central law will become difficult. It has, therefore, been proposed to invest the Supreme Court with exclusive jurisdiction as regards determination of the constitutional validity of Central laws. Where a case involves constitutional validity of both a Central and a State Law, the Supreme Court alone will have jurisdiction to determine the constitutional validity of such laws. Where cases involving the same questions of law of general importance are pending before the Supreme Court and, one or more High Courts or before two or more High Courts, the Attorney General can move the Supreme Court to withdraw the cases pending before the High Court or High Courts to itself and dispose of the same. Further, the Supreme Court has been empowered to transfer cases from one High Court if it is expedient for the ends of justice so to do.

It is also being provided that the minimum number of judges of the Supreme Court who shall sit for determining any question as to the constitutional validity of a Central law or on a Central or State law shall not be declared to be constitutionally invalid.

(e) Deployment of Central forces in States

The Act sought to empower the Centre to send any armed forces or other forces under its authority to deal with the law and order situation in any State. Such forces shall act under the direction of the Central Government and shall not be controlled by the State Government. Provision has been made to empower Parliament to define the powers, functions and liabilities of the members of such force.¹⁴⁹ Since all these changes have been critically analysed in the following chapter, a repetition here will be redundant.

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134. Article 77. (2) provides : "Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in the rules to be made by the President and the validity of an order or instrument which is so

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