CHAPTER - VII

THE CONSTITUTION (FORTY SECOND AMENDMENT) ACT: A DETAILED STUDY OF ITS CONTENT AND CHARACTER.

I. I N T R O D U C T I O N.

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."(1)

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 loop-holes 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."(2) On November 2, 1976, the Lok Sabha, by 366 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-Consti-tution."(3) 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 Courts, 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 Art. 227 over the administrative tribunals has been taken away. Lastly, "education" has been transferred to the Concurrent 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 authority (4) 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." (5)

In a similar way, Justice Story observed '<u>inter alia</u>' (6):

"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 inter-pretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the Preamble.

Importance of a Preamble — the theoretical aspect.

"There does not seem any reason why in a fundamental law or constitution of government, an equal attention should not be given to the intention 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 observed,(7) 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 legiti-mate 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 to-day, 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:

Objectives Resolution as the source of the Indian Preamble.

"(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 a Constitution:

(2) Wherein 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 and make its full and willing contribution of the promotion of 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 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 one of them can survive."(8)

Origin of Socialism and Secularism.

The Congress Socialist Party's statement(9) 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."(10) 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 objective."(11) 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.(12)

In conformity with declaration of the objective of "socialist pattern of society" in the Lok Sabha, the Congress, in its Avadi Session at Madras in January, 1955 passed a resolution which stated that "in order to realize 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."(13)

With the adoption of the principle of 'Socialist Pattern of Society', public sector industries began to play dominant role. On

Government's acceptance of Socialistic Pattern.

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 category were all basic and strategic industries. Specifically, heavy 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." (14)

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 a decentralised cottage industry sector to eradicate the problem of unemployment and provide a satisfactory flow of consumer 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:(15) "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 conservation 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.(16) 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:(17) "The difference between Nehru and the other three members of the Oligarchy was

The Socialistic ideal and the Constituent Assembly

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:(18)

"What was of gratest 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."(19)

The problem of Indian as a secular state is as complex as anything. The existence of a number of religions, dominant place of Hinduism,

communalism and vigorious 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 learning 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." (20)

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." (21) 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."(22) 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 region 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, practise 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."(23) 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 practice his religion, subject to public order and morality."(24)

Origin of the provisions for Secularism

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:(25)

"Every citizen, subject to the current traditions, shall practise and profess his own religion as handed down from

Secular idea in various Constitutions

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."(26)

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 eccelesiastical authorities upon the rights of citizens and of the State."(27)

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."(28)

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".(29)

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."(30)

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, this 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."(31)

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."(32)

Similarly, Section 2 of the Canadian Bill of Rights, 1960(33) recognises the freedom to 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."(34)

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,(35) Chagla, C.J., in course of delivering his judgment 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(36) 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 declares 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:(37)

"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 organization shall receive any privileges from the State, nor exercise any political authority ...."(38)

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:(39)

"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.

Article 27 of the Indian Constitution

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."(40)

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:

Article 28

(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 promises attached thereto unless such person or, it 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.(41) But if any public school extends opportunity to the students to join the religious classes without force or coercion, there shall be no unconstitutionality.(42)

Art. 44(2) of the Constitution of Eire provides:(43)

"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:(44)

"(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 recognized 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 recognised 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 recognised 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.

Significance of Art. 28

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).(45) 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 importing 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.(46)

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 India makes elaborate provisions which regulate the relationship between the State 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,(47) 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 levelled 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.(48)

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.(49) It was contended that the Bombay Prevention of Hindu Bigambus Marriages Act discriminated between Hindus and Muslims on the ground of religion and applied a measure 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 panalties were provided in the impunged act than in the penal Code applicable to the other two communities for whom monogamy was also the law.

The Bombay Hight 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 neceessary to provide special legislation making bigamous marriages illegal.

But what constitutes a discrimination was sought to be defined in Kathi Raning V. Saurashtra(50) 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 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified."

Significance of Art. 15(1)

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.(51) 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 consideration for the differential treatment besides those prohibited by article, the discrimination will not be unconstitutional.(52)

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 public 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."(53)

There are at least two exceptions to this principle. One is found is 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 profeasing 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 Venkatramana V. State of Madras.(54) The Madras Government had issued a Communal Government Order making reservation of posts for Harijans, backward Hindus, non-Brahmins, Brahamans, 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. 15(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.(55)

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 Brahmans who are not adequately represented in the services" are backward communities.

Subsequently in Kesava Ayengar V. State of Mysore,(56) 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."(57)

The principle of non-discrimination is again applicable in relation to admission to state educational institutions. As has already been said,(58) 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 Brahmun 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 Champakam Dorairajan V. The State of Madras,(59) 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." (60) In its Objects and Reasons, 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.

Constitution (First Amendment) Act, 1951.

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.(61)

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(62) in which the Court upheld the election of Scheduled Tribes candidates to both the reserved and the general seats.(63) In 1961, Parliament enacted legislation providing for the division of two member Constituencies. Although it helped in eliminating certain problems, at the sametime 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."(64)

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.(65) 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 weakers 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.

Observation and estimate

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 in (66) 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 practice 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. In the words of Jafferson, the clause against establishment of religion by law was intended to enact a wall of separation between church and the State." (67)

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.

VIII. 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 life-time, 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:(68)

"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 sametime, we must be careful to see that in this land of ours we donot 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:(69)

"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:(70)

"We are pledged to make the State a secular one. I donot, 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 has come into force since 1st June, 1955 and "extends to the whole of India".(71) Moreover, it has declared in one section of the said Act 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 cases of default are dealt with by the Commissioner for the Scheduled Castes and Scheduled Tribes.(72) 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.(73) Mr. Fulsinghji B. Dabhi wanted in his Bill ~~was~~ 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 Castes 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."(74)

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."(75)

A new Art. 39A was inserted which aims at giving all citizens opportunity in connection with legal aid. The article provides:(76) "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. To make workers' participation in the management possible, a new Art. 43A was inserted which provides:(77)

"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 organizations 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 wild-life of the country."(78)

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, stall inform all the institutions of national life."(79)

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 observed:(80) "If one cannot solve this problem soon, all our paper Constitution 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. Directives under the Indian Constitution -- their evolution and nature -- a study.

Since India was under the domination of the British rule for nearly two centuries, no exact time can be shown in connection with the evolution of the Directives. The evolution was slow but steady, stretching over a period of roughly 25 years, if we accept the year 1925 to be the exact year when attempts were made "to persuade Britain to ensure and declare in some form or the other a set of fundamental rights primarily and essentially with the objective of safeguarding the interests of the minorities."(81) The Commonwealth of India Bill contained Art. 8 which enumerated the following Fundamental Rights:(82)

"8. (a) No person shall be deprived of his property, nor his dwelling or property be entered, sequestered or confiscated save in accordance with law and by duly constituted courts of law.

(b) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, hereby guaranteed to every person.

(c) The right of free expression of opinion, as well as the right to assemble peaceably and without arms, and to form associations or Unions, is hereby guaranteed for purposes not opposed to public order or morality, or the law relating to defamation for the time being.

(d) All persons in the Commonwealth of India have the right to free elementary education, and such right shall be enforceable as soon as due arrangements shall have been made by the competent authority.

(e) All persons have an equal right to the use

of roads, courts of justice, and all other places of business or resort dedicated to the public provided they do not disturb the public order or disobey and lawful notice issued by competent authority.

(f) All persons residing within the Commonwealth, whether permanently or temporarily, are equal before the law, and no distinction of court or judge shall be made between one class of person and another with respect to similar legal matters or offences.

(g) There shall be no disqualification or disability on the ground only of sex".

Further recommendations were made by the All Parties Conference of 1928 to incorporate some fundamental rights of social and economic nature. A Committee, set up by the Conference on 22nd February, 1928, submitted the Supplementary Report (83) which included in Art. 4 the following economic and social rights:

"4. (v) All citizens in the Commonwealth of India have the right to free elementary education without any distinction of caste or creed in the matter of admission into any educational institutions, maintained or aided by the State, and such right shall be enforceable as soon as due arrangements shall have been made by the competent authority.

Provided that adequate provision shall be made by the State for imparting public instruction in primary schools to the children of members of minorities of considerable strength in the population through the medium of their own language and in such script as in vogue among them.

Explanation. This provision will not prevent the State from making

the teaching of the language of the Commonwealth obligatory in the said schools.

(xv) Freedom of combination and association for the maintenance and improvement of labour and economic conditions is guaranteed to every one of all occupation. All agreement and measures tending to restrict or obstruct such freedom are illegal.

(xvii) Parliament shall make suitable laws for the maintenance of health and fitness for work of all citizens, securing a living wage for every worker, the protection of motherhood, informative and unemployment and parliament shall also make laws to ensure fair rent and fixity and permanence of tenure to agricultural tenents."

Subsequently, all the three sessions of the Indian Round Table Conference held in London, contributed greatly in shaping a set of fundamental rights.

But the roots of the Directive Principles can be traced to the 1931 Karachi Resolution. It was only within the Constituent Assembly that the Directives were given concrete shape. In order to comprehend the real nature of the Directives, it is necessary to analyse the course of debates that took place in the Constituent Assembly before the final adoption of the Directives.

X. Directives in the Constituent Assembly - intentions of the framers of the Constitution:

It is necessary to mention that the Constituent Assembly devoted only five days in adopting these Directives.(84) Though discussions began on November 18th, but immediately after their beginning,(85) they were abandoned because of the complaint by some members. Their main contention was that since sufficient notice was not given,

they were not prepared to participate in the debate. However, this complaint was not supported by another member (86) who held that:

"Part IV consists of Directive Principles. There are not very many amendments to this Part. Part II relates to citizenship and Part III relates to Fundamental Rights which are of a justiciable nature. A number of amendments have been tabled to these parts. To bring about agreement as to which amendments have to be moved and which need not be moved, takes some time. So far as Part IV is concerned, it does not take much time. They are only Directive Principles; they have been already considered and we have spent long hours over them when we discussed these principles. In these circums-tances, I feel nobody need complain of want of notices so far as Part IV is concerned." (87)

Piloting the discussion, Kazi Syed Karimuddin brought an amendment to the effect that in the heading under Part IV, in the place of the word "Directive", the word "Fundamental" is to be inserted in view of the fact that the principles contained in this part are more important than those contained in Part III. He was of the opinion that these principles should be made mandatory and a specific time limit of the years should be fixed for their implementation. (88)

The same view was expressed by another member (89) who advanced two reasons for changing the heading and replacing the word "Directive" by the word "Fundamental". In the first place, Part III and Part IV were looked upon or regarded as rights which were fundamental and secondly the Advisory Committee on the subject of Fundamental Rights gave the title to those very rights which were embodied in Part IV as "Fundamental Principles of Governance." He was surprised

to see a departure by the Drafting Committee from the proposal made by Sardar Patel in this regard. But these views were strongly opposed by Shri M. Ananthasayanam Ayyangar who was is favour of retaining the word "Directive" as the heading because these principles could not be enforced in a court of law. To classify these principles as Fundamental Rights as in Part III would be to take away the difference between the one set and the other and making all the rights justiciable, which in the nature of things, is impossible. He added, "It is not a court that can enforce these provisions or rights. It is the public opinion that is behind a demand that can enforce these provisions. Once in four years election will take place, and then it is open to the electorate not to send the very same person who are indifferent to public opinion. That is the real sanction and not the sanction of any court of law."(90)

Amendments moved by members

Mr. Naziruddin Ahmed who supported the amendments moved by other Members with regard to the heading, held the view that the entire chapter on Directive Principles was "misconceived."(91) He held the opinion the pious principles (as contained in Part IV) should have the support of law. He quoted in support of his statement, Dr. Ambedkar's opinion that pious expressions were not proper things to be embodied in a Constitution as the Constitution were a mere mechanism in which political principles or policies had no place. Since these were pious wishes, so obvious in nature that they need not be enunciated at all.(92)

Dr. Ambedkar, on behalf of the Drafting Committee did not accept the amendments.(93) He opined that the word "fundamental"

had already been used in Art. 29. The word "Directive" was necessary in view of the fact that the Constituent Assembly was giving certain directions to the future legislature and the executive to show in what manner they were to exercise their powers. The omission of the word "Directive" would ultimately fail to bring the desired results (94) Dr. Ambedkar further observed that it was the intention of the Constituent Assembly that in future both the legislature and the executive should not merely pay lip-service "to these principles enacted in this Part", but they should be made the basis of all executive and legislative action that might be taken subsequently in connection with the governance of the country. (95)

Ambedkar's reply

Before Art. 28 was finally adopted, Shri Naziruddin Ahemed moved three verbal amendments but were subsequently rejected by Dr. Ambedkar. (97)

With regard Art. 29, Prof. K.T. Shah proposed that the following be substituted, namely -

"The provisions contained in this part shall be treated as the obligations of the State towards the citizens shall be enforceable in such manner and by such authority as may be deemed appropriate in or under the respective law relating to each such obligation. It shall be the duty of the State to apply these principles in making the necessary and appropriate laws." (98)

Art. 29

He observed that Art. 29 as it stood made in effective the entire part because of its non enforceable character and held that "the only authority that we are going to set up in the Constitution, to give effect to whatever hopes and aspirations, ambitions and

K.T. Shah's amendment proposal

desires, we may have in making these laws and in laying down this Constitution, is from the very start exempted, exornerated and excused from giving effect to one of the most cardinal important and creative chapters in this Constitution."(99) He characterised these principles to "a cheque payable whenable."(100) He requested the House to regard these principles as obligatory on the part of the State and observed: "Every citizen should have the right to compel the State to enforce these obligations by whatever means may be found practicable and effective, and conversely the State should also have the right to see that every citizen fulfils obligations to the State."(101)

But Prof. Shibanlal Saksena did not agree with Prof. Shah in making these principles obligatory.(102) However, he thought that every legislature would be bound to respect the Directive and therefore any act violating any of the Directives would be ipso facto ultra-vires.(103) He concluded by observing: "A perusal of Art. 34 will show that very many high ideals have been enunciated here and I hope Prof. Shah will also admit that if these principles were acted upon in both the Union legislature and the State legislatures, we shall have a State which will almost be acting as if these principles were fundamental rights which were enforceable by a court of law."(105) But ultimately the proposed article to be substituted was negatived and the motion to include Art. 29 in the Constitution was adopted.

S.L. Saksena's opposition

When the Assembly was ready to consider Art. 30, one member, Shri Damoder Swarup Seth moved that for Art. 30, the following should be substituted, namely(105).

Art. 30

"The State shall endeavour to promote the welfare, prosperity and progress of the people by establishing and maintaining socialist order and for the purpose the State shall direct its policy towards securing:

D. S. Seth's proposal

(a) The transfer to public ownership of important means of communication, credit and exchange, mineral resources and the resources of natural power and such other large economic enterprise as are matured for socialisation;

(b) the municipalisation of public utilities;

(c) the encouragement of the organisation of agriculture, credit and industries on co-operative basis.

But the proposal advanced by Shri Seth was vehemently opposed by another member, Mahboob Ali Baig Sahib Bahadur (107) on the ground that it would bring in a particular schools of political thought which, he considered, was contrary to the principles of parliamentary democracy. He opined that the Directives were not fundamental but only were State Policy. (107) He held the view that since these Directives were not enforceable, they should better be deleted. (108)

Shri K. Hanumanthaiya (109) also opposed the amendment put forward by Shri Seth. But he supported ~~te~~ the Article itself. He was of the opinion that the Article had been so beautifully worded that even the Communists, if they could come into power, could implement their ideology. (110) But Mr. Hussain Imam supported the amendment and observed that it was necessary that some kind of provision should be laid down in Constitution. (111) Shri Mahavir Tyagi

Opposition by members

declared that since this was the pivotal clause in the Constitution, its language should be "very strong and unequivocal".(112) Before Dr. Ambedkar delivered his concluding remarks two other amendments were moved by Shri Nazirruddin Ahmed to the effect that the words "strive to" in the Article should be omitted and secondly by Shri H.V. Kamath that the word "national life" be omitted.(113)

Replying to the debate, Dr. Ambedkar said that the framers had deliberately used the language in an elastic manner. This would help the future rulers to the country to adjust themselves with the requirements of the Directives in the changed situations. The Directives were intended, he said, to achieve economic democracy. He pointed to the fact that the object in framing this Constitution was two-fold; (1) to lay down the form of political democracy; and (2) to lay down that India's ideal was economic democracy with the prescription that every Government would try to bring about economic democracy.(114) With Dr. Ambedkar's remarks, the amendments moved were negatived, and the Article was adopted.

Ambedkar's reply

When Art. 30 was finally adopted, Kazi Syed Karimuddin(115) moved a new Art. 30A to be inserted after Art. 30. The Article ran like this:

"30A. The State shall strive to secure prohibition of manufacture, sale or transportation or consumption of intoxicating liquors for beverage purposes."

Emphasizing the importance of prohibition he added:

"In the Directive Principles of the State, which

according to Dr. Ambedkar have no sanction, they ought to have been embodied because the State would have tried their utmost to secure prohibition of liquors. The rejection of this additional clause will be the rejection of the wishes of Mahatma Gandhi."(116) Several other members like Prof. Shibanlal Saksena,(117) Seth Govind Das,(118) Mr. Mahammed Ismail Sahib,(119) Shri Biswanath Das,(120) Shri Mahavir Tyagi,(121) B. Pocker Sahib Bahadur(122) acknowledged the necessity of incorporating restrictive clause on intoxicating liquors but most of them were opposed to the inclusion of a separate clause as had been proposed by Kazi Syed Karimuddin. Ultimately an amendment was moved by Shri H.V. Kamath.(123) It provided: "The State shall endeavour to promote the healthy development of Gram Panchayats with a view to ultimately constituting them as basic units of administration." Dr. Ambedkar opined that the amendment of Shri Kamath "could stand over."(124)

Importance of prohibition

When the House took up Art. 31 for consideration, Prof. K.T. Shah suggested three amendments, namely:

1. "That in clause (1) of Art. 31 for the words that the citizens, men and women equally have the right to an adequate the words "every citizen has the right to an adequate" be substituted;

Art. 31

2. in (ii) substitute for the clause, a new one as follows: "that the ownership, control and management of the natural resources of the country in the shape of mines and mineral wealth, forests, rivers and flowing waters as well as in the shape of the seas along the coast of the country shall be vested in belong to the country

collectively and shall be exploited and developed on behalf of the community by the State as represented by the Central or Provincial Governments or local governing authorities, statutory Corporation as may be provided for in each case by Act of Parliament."

3. in (iii) the following changes be effected: "that there shall be no private monopolies in any form of production of material wealth, social service, or public utilities nor shall there be any concentration of means of production and distribution in private hands and the State shall adopt every means to prevent such concentration or accumulation."

The amendments moved by K.T. Shah were supported by Prof. Shibanlal Saksena, Shri S. Nagappa and Shri Jadubana Sahava.(125) But ultimately, Dr. Ambedkar did not accept any of the amendments of K.T. Shah.(126)

Shri K. Santhanam(127) then proposed that after Art. 31, the following new Article should be added:

"31A. The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-Government." He added: "Sir, I need not elaborate the necessity for this clause. Many Hon'ble Members had given similar amendments for village panchayats, but they had also attached to it conditions like self-sufficiency and other matters, which many of us did not consider desirable to be put into the directives. What powers should be given to a village panchayat, what its area should be and what its functions should be will vary from province to province and from State to State, and it is not desirable

K. Santhanam's proposal

that any hard and fast direction should be given in the Constitution. There may be very small hamlets which are so isolated that even for fifty families we require a panchayat; in other places, it may be desirable to group them together so that they may form small townships and run efficient almost municipal administrations. I think these must be left to the provincial legislatures. What is attempted to do here is to give a definite and unequivocal direction that the State shall take steps to organise panchayats and shall endow them with necessary powers and authority to enable them to function as units of self-Government. That the entire structure of self-Government of independence in the country, should be based on organised village community life is the common factor of all the amendments tabled and that factor has been made the principal basis of this amendment. I hope it will meet with unanimous acceptance."(128) Dr. Ambedkar then accepted the amendment(129) which was supported by members like Shri T. Prakasam(130), Shri Surendra Mohan Ghose(131), Seth Govind Das(132). Other members(133) of whom Shri V.I. Muniswami Pillai, Dr. V. Subraniam and Shri L. Krishneswami Bharati were important, also supported the motion.

Regarding Art. 32, when the House took it up for discussion on 23rd Nov. 1948, it was found only three amendments(134) of verbal nature were made. Since, Dr. Ambedkar did not accept them, the Article was included in the Constitution in its original form. Similarly Art. 33 was adopted without any discussion.(135)

Arts. 32 & 33

The House then began to consider Art. 34. At the beginning of the discussion, Shri Mahavir Tyagi moved(136) "that Art. 34 be

numbered as 34(1) and the following new clause be inserted after Clause (1) so renumbered: (2) The State shall encourage the use of Swadeshi articles and promote cottage industries, especially in the rural areas, with a view to making as far as possible those areas self-sufficient." In presenting this proposal for amendment, he depicted the bad condition of village life. He considered it the primary responsibility of the State to uplift the condition of village if economic democracy was to be achieved in the country.(137)

Art. 34

At this point, Shri T.A. Ramalingam Chettair(138) moved that at the end of Art. 34, the following shall be added:

"And in particular the State shall endeavour to promote cottage industries on co-operative lines in rural areas."

Shri Nagappa proposed an amendment that after the words "to all workers, industrial" the word "agricultural" must be added.(139) Shri Amiyo Kumar Ghosh and Shri H.V. Kamath also wanted to add similar provision.(140)

Summing up the debate, Dr. Ambedkar(141) accepted the amendment of Mr. Ramlingam Chettiar. But he proposed that after the words "Cottage industries on" the words "individual or" should be added and the word "basis" should be substituted for "lines". Justifying his amendments, Dr. Ambedkar said:(142)

"I find among the members who are interested in the subject, there are two divisions, one division believes in cottage industries solely on a co-operative basis; the other division believes that there should be cottage industries without any such limitation. In order to satisfy both sides, I have used this phraseology deliberately, which,

I am sure, will satisfy both views that have been expressed."

After the amendments were accepted, Art. 34 in its amended form, was added to the Constitution.

Subsequently, Chaudhuri Ranbir Singh proposed a new Art. 34A to be added which read as follows:(143)

"34-A. (a) The State shall endeavour to secure by suitable legislation or economic organisation or in any other way the minimum economic price of the agriculture produce to the agriculturists.

(b) The State shall give material assistance to national co-operative organisation of the producers and consumers.

(c) Agricultural insurance shall be regulated by special legislation.

(d) Usury in every form is prohibited."

But he added that as many members thought that his amendment was covered by previous article, he did not move it.

Then, instead of Art. 35, the House began to consider Art. 36, when Pandit Laksmi Kanta Misra suggested that in Art. 36, the words

Art. 36

"Every citizen is entitled to free primary education and" be deleted, so that Article would read as :(144)

"The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years." He opined that this change would bring Art. 36 into the line with the preceding and subsequent articles.(145) According to him, "Part IV deals with directive principles of state policy and the provisions in it indicate the policy that is to be pursued by the future

Governments of the country. Unfortunately, in Art. 36, this directive principles of State Policy is coupled with a sort of fundamental right (i.e.) "that every citizen is entitled ... etc." This cannot fit in with the others. Here a directive principle is combined with a fundamental right. Therefore, I submit that the portion which I have indicated, should be deleted .... There is another point .... that education need not be confined to the primary but it may go upto the secondary stage, so long as the person is upto the age of 14. Therefore, the marginal note should be amended accordingly."

Then, Mr. Naziruddin Ahmed[146], in his amendment, sought to substitute the words "primary education" for "education". Shri B. Das[147] expressed his pleasure for the inclusion of primary education within Art. 36, but at the sametime declared that he was not statified from the speeches what free and compulsory education would be like. When Dr. Ambedkar[148] accepted the amendment of Shri Maitra, suggesting the deletion of the words "every citizen is entitled to free primary education and", the Article in its amended form was accepted.

Most of the Muslim Members vehemently opposed Art. 35 relating to uniform civil code because they thought, it would interfere with their personal laws. Mr. Mohd. Ismail Sahib[149] brought an amendment to Art. 35 in the following manner: "provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law." Similarly, Mr. Naziruddin Ahemed wanted to add the following proviso to the Article: "Provided

Opposition of ~~medium~~ members

that the personal law of any community has been guaranteed by the Statute shall not be changed except with the previous approval of the community ascertained in such a manner as the Union Legisture may determine by law."(150) In a similar way, Mahboob Ali Baig Sahib Bahadur(151) moved an amendment as follows: Provided that nothing in this Article shall affect the personal law of the citizen. Following Mr. Mahboob Ali Baig, B. Pocker Sahib Bahadur(152) wanted to add to the Article: Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law."

Three prominent members like Shri K.M.Munshi(153), Sir Alladi Krishnaswami Ayar(154) and Dr. Ambedkar(155) answered all these criticisms advanced by the Muslim Members as to whether it was possible to have uniform civil code, pointed out that a uniform code of laws in the form of criminal code, the law of transfer of a property had already in existence, covering almost every aspect of human relationship. Of course, he did not forget to mention that only in two areas, namely Marriage and Succession, uniform civil code did not operate.(156) After Dr. Ambedkar's speech for motion for the adoption of Art. 35 was passed, it was included in the Constitution.

Ambedkar's reply

Regarding Art. 37, two amendments were brought by Sardar Hukum Singh and Shri A. V. Thakkar(157). Sardar Hukum Singh wanted the substitution for the words "Scheduled Castes" the words "Backward communities of whatever class or religion", while Shri Thakkar desired the inclusion of backward classes among Hindus and

Art. 37

Muslims. But Dr. Ambedkar considered it would be wise for the House to discuss the matter when debates would take place with regard to the question of adoption of Schedule and hence he wanted the discussion to be postponed.(158) The Article was then adopted.

Art. 38 evoked much discussion in the House since the Article was directly concerned with the question of prohibition. The first amendment was brought by Shri Mahabir Tyagi(159) who said that at the end of the Article the words "and shall endeavour to bring about the prohibition of the consumption of intoxicating drinks and drugs which are injurious to health", be inserted. Prof. Shibbanlal Seksena(160) was in favour of including the words "except for medicinal purposes" after Shri Tyagi's proposed amendment.

Art. 38 -- the question of prohibition

Two members, Shri B.H. Khardekar and Shri Jaipal Singh spoke vehemently against prohibition. Citing examples of the United State Constitution, Shri Khardekar(161) asked the Congress to try "to make the lot of the teeming millions of India economically and several other aspects better."(162) He said that the Parsis and the Christians did not favour prohibition; so the argument that all communities were in favour of prohibition could not be accepted.(163) With regard to Gandhian ideals, he held the view that the basic foundations of Gandhian philosophy were non-violence and search for truth. He expressed; "unfortunately, the followings of Gandhiji, some of them, have been giving more importance to the outward trappings of Gandhism than to the essence of it."(164) He said that importance should be placed on first the war-front in Kashmir and Hyderabad and second, the education front. According to him, prohi-

bition could wait, but these two could not.(165) Peculiarly enough, he cited Prof. Laski's book "Liberty in the Modern State" in support of his contention. He thought that prohibition would go against the very essence of personal liberty. He even went to the length of citing Greek philosophy which did not want to impose taboos.(166) Commenting on this issue, he brought statistics to show that only one percent people seemed to be incorrigible drunkards and it would be unwise to spent lots of money for this one percent people.(167) He even cited examples from religious tales and held that even Gods used to have 'Sura' or wine.(168)

The arguments advanced by Shri Jaipal Singh(169) seemed to be more scientific since introduction of prohibition, he thought, would go against religious beliefs to many tribal people. He wanted the postponement of the discussion till the recommendations of the Advisory Committee in respect of Tribal areas were available. He was so annoyed with the amendment that he did not hesitate to add: "whether you put it in the Constitution or not, I am not prepared to give up my religious privileges."(170)

Shri V.I. Muniswami Pillai(171) and Shri B.G. Kher(172) supported the amendment. Sardar Bhupinder Singh Man(173) wanted to include 'tobacco' as he considered tobacco ~~as he considered tobacco~~ to be more injurious to health than liquor.(174) Shri A. V. Thakkar did not agree to the proposal of Shri Jaipal Singh for the postponement of the discussion and held that many Adivasis in different States did not want to drink. So, the argument that introduction of prohibition would constitute an infringement on religious beliefs of the Adivasis, according to him, would not be tenable.(175) Shri Lakshmi-

narayan Sahu (176) thought that in the changed circumstances it would not be difficult to introduce prohibition as were possible in relation to the systems of 'Sati' and human sacrifices. While accepting the amendment with the addition of the word "particular", Dr. Ambedkar held the view that prohibition was only a directive and not binding on the State to introduce it. (177) All amendments moved by Shri Tyagi, Prof. Saksena and Dr. Ambedkar were accepted and that of Sardar Bhopinder Singh Man was negatived. Art. 38 was thus adopted and added to the Constitution.

Pandit Thakur Das Bhargava moved Art. 38A for the consideration of the House. (178) The Article read as follows:

"The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds of cattle, specially milch and draught cattle and their young stock."

Moving this amendment, he said that the agricultural and food problem of the country could not be solved satisfactorily unless the problem of the improvement of the cow and her breed could be made. He held the view that even in Muslim communities protection of cow got high priorities. He quoted from Gandhiji who said: "I hold that the question of cow slaughter is of great-moment in certain respects of even greater moment that of Swaraj. Cow-slaughter and man-slaughter are in my opinion, two sides of the same coin." Concluding his speech, he remarked: "I attach very great importance to this amendment, so much so that if one side of the scale you were to put this amendment and on the other all these 315 clauses of the Draft, I would prefer the former." (179)

Seth Govind Das (180) wanted to include the words, "The word 'cow' includes bulls, bullocks, young stock of genus cow" in the place of "and other useful cattle, specially milch cattle and of child bearing age, young stock and draught cattle." Prof. Shibbanlal Saksena, Dr. Reghu Vira and Shri R. V. Dhulekar - all supported the amendment (181) Mr. Z.H.Lari wented to place the amendment in the chapter on Fundamental Rights rather than in the Directive Principles to make them clear. (182) But Syed. Mohd. Sa'adulla said that he would support it from economic points of view but added that he would not oppose it if it was argued from the religious stand-point.

Dr. Ambedkar accepted the amendment of Pandit Thakar Das Bhargava and the motion was adopted. But motion of Seth Govind Das was negatived and Art. 38A was added to the Constitution. (183)

Art. 38A adopted

Art. 39 relating to the preservation of archaeological monuments were adopted with certain verbal changes and no serious discussion was held with regard to this Article. (184)

Art. 39

After Art. 39 was adopted, Dr. Ambedkar himself moved Art. 39A to be included in the Constitution which read as follows: (185)

"39A. The State shall take steps to secure that, within a period of three years from the commencement of this Constitution, there is separation of the judiciary from the executive in the public services of the State."

Art. 39A

Moving this amendment, Dr. Ambedkar expressed that although the State will not be under any obligation to implement the provision, but the fixation of the time limit would certainly influence the

State to take steps in this direction within the stipulated time.

But Shri T.T. Krishnamachari (186) was in favour of removing the time limit for he thought that it was meaningless. He dubbed this move as an "afterthought" of Dr. Ambedkar and expressed his surprise as to why it was not included in the Chapter on Fundamental Rights. Shri B. Das did not find any justification for including the clause in the changed circumstances which emerged after the attainment of independence. (187)

On the next day, Dr. Ambedkar moved an Amendment to the effect that (188) "the State shall take steps to separate the judiciary from the executive in the public services of the State." Commenting on the amendment for removing the time limit, Dr. Ambedkar said: "It is, therefore, thought this Article would serve the purpose which we all of us have in view. If the Article merely contained a mandatory provision, giving a direction to the State, both in provinces as well as in the Indian States, that this Constitution imposes, so to say, an obligation to separate the judiciary from the executive in the public services of the State, the intention being that where it is possible, it shall be done immediately without any delay, and where immediate operation of this principle is not possible, it shall, none-the-less, be acceptable as an imperative obligation, the procrastination of which is not tolerated by the principle underlying this Constitution." (189)

Shri R. K. Sidhwa (190) supported the separation for impartial justice, but Pandit Hriday Nath Kunzru was in favour of fixing a time limit. (191)

Pandit Jawaharlal Nehru intervening in the debate, supported the amendment of Dr. Ambedkar. He was not in favour of

(192)

making the directive rigid. Elaborating this, he said:

"I may say straight off so far as the Government is concerned, it is entirely in favour of the separation of judicial and executive functions. I may further say that the sooner it is brought about, the better and I am told that some of our Provincial Governments have actually taken steps to that end now. If anyone asked me, if any one suggested the period of three years and some other period, my first reaction would have been that this period is too long. Why should we wait so long for this? It might be brought about, if not all over India, in a large part of India, much sooner than that. At the sametime, it is obvious that India at the present moment, specially during the transitional period is a very mixed country politically, judicially, economically and in many ways, and any fixed rule of thumb to be applied to every area may be disadvantageous and difficult in regard to certain areas. On the other hand, that rule will really prevent progress in one area and on the other hand, it may upset the apple cart in some other area. Therefore, a certain flexibility is desirable. Generally speaking, I would have said that in any such directive of policy, it may not be legal but any directive of policy in a Constitution must have a powerful effect. In any such directive, there should not be any detail or time-limit etc. It is a directive of what the State wants and your putting in any kind of time-limit therefore rather lowers it from high status of a State policy and brings it down to the level of legislative measure, which it is not in that sense. I would have preferred no time-limit to be there, but speaking more practically any time-limit in this, as Dr. Ambedkar pointed out, is apt on the

Nehru's intervention in the debate

one hand to delay this very process in large parts of the country, probably the greater part of the country; on the otherhand, in some parts where, practically speaking, it may be very difficult to bring about, it may produce enormous confusion. I think, therefore, that Dr. Ambedkar's amendment, far from lessening the significance or the importance of this highly desirable change that we wish to bring about, places it on a high level before the country. And I donot see myself how any Provincial or other Government can forget this Directive or delay it much."(193)

Dr. Bakshi Tek Chand,(194) tracing the history of the movement for the separation, did not want to put any time-limit in the Article. But Shri Loknath Misra did not at all support of the idea of separation.(195)

Art. 40

After the motion was adopted, Mr. Mohd. Tahir(196) moved that after Art. 39, the following new Art. 40 should be inserted, namely:

"40. It shall be the duty of the State to protect, safeguard and preserve the places of worship such as Gurdwars, Churches, Temples, Mosques, including graveyards and burning ghats."

But the motion was opposed by Shri Ananthasayanam Ayyangar on the ground that similar provision had already been made in the Fundamental Rights and in general Criminal Law in this regard. Hence it would be a mere repeatation, if adopted. Ultimately, the Bill was negatived.(197)

Taking up Art. 40 for discussion, Dr. Ambedkar moved that for the existing Art. 40, the following should be substituted, namely:-

"Article 40" : The State shall:

(a) promote international peace and security,

(b) seek to maintain just and honourable relations between nations; and

(c) endeavour to sustain respect for international law and treaty obligations in the dealings of organised people with one another.

Shri V.S. Sarwate said that before (a) a new clause, namely:

"(a) foster truthfulness, justice and sense of duty in the citizens" should be inserted in order to give Gandhi's ideas a concrete shape.(199) But Shri H. V. Kamath did not accept this suggestion of Shri Sarwate and rejected it as irrelevant.(200)

Prof. K. T. Shah moved that for Art. 40, the following should be substituted, namely:(201)

40. "The Federal Republican Secular State in India shall be pledged to maintain international peace and security and shall to that end adopt every means to promote amicable relations among nations. In particular, the State in India shall endeavour to secure the fullest respect for international law and agreement between States and to maintain justice, respect for treaty rights and obligations in regard to dealings of organised peoples amongst themselves."

He was of the view that this amendment would remove vagueness in the existing article.

Shri Damodar Swarup Seth moved that in Art. 40, the following words should be added at the end:(202)

"It shall also promote political and economic emancipation and cultural advancement of the oppressed and backward peoples and the international regulation of the legal status of workers with a view to ensuring a universal minimum of social rights to the entire working class of the world."

Other members like Prof. B.H. Khardekar, Shri Biswanath Das, Shri B. M. Gupta and Shri Ananthasayanam Ayyangar supported the motion moved by Dr. Ambedkar.(203) Considering this Article to be one of the most important ones, Shri Ayyangar proposed to add Clause (d) which should read as:

"To encourage the settlement of international disputes by arbitration."(204)

But the Article in general and Clause (d) in particular was opposed by Shri Mahavir Tyagi.(205) Dr. P. Subbarayan proposed to substitute the word "foster" for "sustain",(206) which along with the proposals of Shri Kamath and Shri Ayyangar was accepted by Dr. Ambedkar while the rest were negatived.(207) Thus discussion of Part IV came to a close on 25th Nov. 1948 and the Chapter was added to the Constitution.(208)

XI: Nature of the Directive Principles -- Observations of the Members of the Constituent Assembly and also by the Members of the Drafting Committee -- Conflicting views on the nature of the Directives -- An analysis:

In analysing the nature and significance of the Directives, it is necessary to examine the views of the makers of the Constitution. But on an close and penetrating analysis, it will be seen that conflicting views were expressed by the Members on the issue. While some members dubbed these Directives as "pious expressions", others called it "resolutions made on New Years'

Conflicting view of members

day which are broken at the end of January."

It was Mr. Naziruddin Ahmed who did not find any real value in the Directives which, he thought, were mere "pious superfluities." (208) In his own words:

"I think that these are pious expressions. They have no binding force, they are pious superfluities. I think every constitutional principle should have a right, and every right should justiciable in a court of law and in other places. If there is a right, its violation is a wrong, giving rise to the well-known cause of action. I donot think the people would rush to the court for these things. But, if a constitutional right is defined with a considerable amount of ceremony in a considerably important document like the Constitution of India, and if for the violation of the same no legal remedy is provided, it would be absolutely wrong to insert the so-called rights in the statute. I submit Sir, these principles are so well-known that they do not require to be stated formally in a Constitution, at the sametime taking came to see that they are not justiciable in a Court of law. I submit, if these principles of purely directive character without a binding force at all introduced as for instance, 'don't tell a lie', 'don't ill-treat your neighbour' and so on and so forth. The Ten Commandments of the Bible and the other commandments from various religious and from practical life should also be introduced on the same principle. If there is any principle which requires to be mentioned, it must be justiciable, it must be enforceable in a Court of law. Otherwise, it should have no place in the Constitution."

Naziruddin Ahmed's view

In the course of the debate, he again emphatically pleaded

that unless these Principles were not given adequate support of law, they should not be included in the body of the Constitution. Thus, he said:(209)

"I submit these pious principles should not be enunciated unless there is the backing of the law and they are also made justiciable .... I submit that if you introduce pious principles without making them justiciable, it will be something like resolutions made on New Year's Day which are broken on the end of January. I submit that these pious wishes are so obvious that they need not be enunciated at all. If you state them you might also say that people should get up from their bed early and be kind to their neighbours and so forth. Sir, I submit these are not proper things to be embodied in the Constitution."

Almost similar sentiments were expressed by Kazi Syed Karimuddin when he observed:(210)

"What is stated in Part IV is vague. What we want to-day is not mere talk of economic or philosophical ideals. We want an economic pattern of the country in which the lot of the poor masses can be improved. In this Constitution, which is framed, there is neither a promise nor a declaration for the nationalisation of industries. There is no promise for the abolition of Zamindari. It is nothing but a drift. It is nothing but avoiding the whole issue in a Constitution of a Free India. Nothing to have a definite economic pattern in the Constitution of Free India is a great tragedy".

Kazi Syed Karimuddin

Prof. K. T. Shah went a step further and equated it to "a cheque on a bank payable whenable" in view of its non-justiciable character. In a long speech, he observed, inter alia:(211)

"Sir, certainly it would not be in consonance with such a hope as this is to lay down, at the very outset in a Chapter like this, that no Court shall be entitled to give effect to our hopes and aspirations. If I may say so without any offence, it is a kind of provision which encourages the Court and also the Executive not to worry about whatever it is said in the Constitution, but to act only at their own convenience and on their practicability and go on with it. It looks to me like a cheque on a bank payable when able, viz., only if the resources of the Bank permit. I do not think that any authority connected with the drafting of this Constitution would approve of such a provision being incorporated in the Negotiable Instruments Act authorizing the making of a cheque payable whenable. It seems to me unless my amendment is accepted, this chapter would be nothing else, as it stands, but a mere expression of some vague desire on the part of the framers that, if and when circumstances permit, conditions allow, we may do this or that or the third thing. There is nothing mandatory -- with all deference to those who have spoken in support of the retention of the word 'directive' in the title of the Chapter -- or compulsory, include in the various provisions. Sir, in the absence of any such mandatory direction to those who may have the governance of the country hereafter, it is quite possible that all these things for which we have been hoping and striving all these years may never come to pass at any rate within our life-time. This is attitude which no lover of people would care to justify, would dare to justify."

K. T. Shah's views

Further elaborating the necessity of making the directives mandatory, he remarked.

(212)

"It is no use putting down these more pious hopes and aspirations or general directives that may be enforced if and when circumstances permit. It is possible that circumstances will never permit until you compel them to permit you. That is why from the very start I would lay down that these shall be mandatory, compulsory obligations of the state, which every citizen will have the right to demand should be fulfilled, and to-day you think of no sanction, if to-day you can devise no means by which they can be enforced except perhaps by the periodic general election when Ministries may be turned out for not fulfilling these duties, then it is upto you to devise something ...."

Necessity of making directives mandatory obligations

Thus, he invited the House to make these Directives "obligations of the State" and concluded by saying (213) ---

"Hence it is that I would like to invite the House to agree with me that the provisions contained in this Chapter must be regarded as obligations of the State towards every citizen and vice versa. Every citizen should have the right to compel the State to enforce these obligations by whatever means may be found practicable and effective, and conversely the State also should have the right to see that every citizen fulfils his obligations to the State."

Dr. P.S. Deshmukh, while equating these Directives as "election manifesto", (214) observed inter alia.

"The Honourable Dr. Ambedkar was at pains to justify the inclusion of the Directive Principles of administration in the body of the Constitution. He was constrained to admit that if he had the choice he would have relegated them to the Schedule in the Constitution. That

I think is a very clear and explicit admission on his part. Really speaking, there is no place for them in the Constitution. It is a sort of an election manifesto. Moreover, the directive principles themselves are not of a very fundamental nature. I would have understood it if it was provided that it shall be the duty of the State to establish the right of the State to the ownership of all mineral resources, that all industries shall be the property of the nation, that the Government derives all its authority from the people, that no person shall be permitted to be exploited by another etc. If there was something fundamental like that, there would have been more use. It is no use to put them in the Instrument of Instruction also as suggested by Dr. Ambedkar. They should not have in any case found a place in the Constitution itself."

P. S. Deshmukh

But the observations (215) made by Mahboob Ali Baig Sahib Bahadur are interesting in so far as he considered these Directives to be 'undemocratic' and 'opposed to parliamentary democracy'. To quote him:

"Now the question is, in these circumstances, what is the place of these Directive Principles of State Policy in a Parliamentary democracy in which the executive is made responsible to the parliament which has been chosen and elected on the merits of the principles and programmes laid down by that party? That is the most important thing for us to consider. We can conceive of cases where a party which has returned by the people has programmes and principles which are contrary to the principles laid down in this Chapter. Recently we know that in the British Parliament, the Conservatives have moved for the rejection of nationalization of

M. A. Baig Sahib Bahadur

iron and steel. Yesterday we heard there was an uproar. It was no doubt defeated by the Labour Government; that clearly shows that political parties have different and distinctive programmes, and it is on their merits that the parties are returned to parliament in a parliamentary democracy. When that is the position envisaged and embodied in this Constitution, what is the place of these principles in it. They have obviously no place. It is undemocratic, opposed to parliamentary democracy which is envisaged here. Is it the purpose of these principles to bind and tie down the political parties in the country to a certain programme and principles laid down in this? Surely not; that will not be a democracy or at least democracy of the type as envisaged here, viz., parliamentary democracy which is responsible to the people. Therefore, my submission is that these principles are out of place and contrary to the principles of parliamentary democracy."

Not only this, he vehemently opposed the use of the word "fundamental" in this Chapter and regarded the Directives as mere "State Policy." In his own words:(216)

"Now it is said by some that these are fundamental principles. I submit that if they are so fundamental, they cannot be changed except by amendment of the Constitution, they should not find a place here. In fact, my own view of fundamental rights is that they are those which are taken away from the purview of the legislature; they are so fundamental that no party can veto them. If all those rights that are embodied here are so fundamental, they must be transferred to the Chapter on Fundamental Rights. I consider that most of them are no

Directives need not be included in the Constitution

fundamental rights but only items of programme of certain schools of political thought. Therefore, I submit that these clauses might find no place here at all; and I believe that it is for that reason that Dr. Ambedkar, while opposing a programme of this kind embodied in an amendment of Prof. K.T.Shah with regard to the Panchayat system said that this Constitution is only a mechanism whereby any party which has come into power may utilise it and implement its programme according to its political thoughts, principles and programmes. That is quite right. Now I fail to see how these programmes can come into the Constitution. Either they are fundamental or they are matters of policy. If they are so fundamental that no legislature can interfere with them and have to be placed beyond the purview of the legislature and the executive, they should be placed somewhere else. In my view, however, these are not fundamental but mere State policy. And Dr. Ambedkar was right when he said that this is only a mechanism and any party which comes into power might implement its principles and programmes, ideas and ideologies."

He then proceeded to judge to what extent, these Directives contain the essence of justiciability and said:(217)

"Now, Sir, we next have to see whether there is any enforceability. In a Constitution like this, except where discretion is given to the Governor or the Governor-General or some other authority to act in this way or that way, no clause should find a place which can not be enforced. Supposing a Government which comes into power does not care about these things, neglect then and ignores them because it has a different mandate from the people. The people have accepted its programme and the guidance that you have provided

here is such that it goes against the mandate given to the party by virtue of their having been returned to power; not only that, it neglects them and goes out of the way and does something contrary. What is going to happen? Who is to judge?

It is said by my friend, Mr. Ananthasayanam Ayyangar that the country will judge. The country does not judge these directive principles. It judges the ideals, programmes and then principles of the concerned parties. That is what is called Parliamentary Democracy. Therefore, I submit that not only Art. 31 but all the articles that follow the whole Chapter - has no place. It may be that a certain party thought that unless certain principles are introduced in the Constitution itself by the Constituent Assembly where it has a majority, perhaps in the country political parties might take objection, might canvass support for themselves and against the party at present in power. May be that is the reason. Or, perhaps, they think these are fundamental rights. One of these reasons must be there. I am sure they cannot be called fundamental rights. So it is the anxiety of the party in power to placate the electorate saying we have framed a Constitution in which we have made the provisions which are as good, if not better than the principles and programmes of some other party, say the Socialist Party.

Their non-enforceability make them useless

So, I submit that these principles are wrong. They donot find a place in the Constitution and on account of the fact that they cannot be enforced, they are useless and they had better be deleted.

Almost a similar sentiment was expressed by Pandit Hriday Nath Kunzru (218) when he said:

"Frankly, I attach no value to any of the principles included in the Chapter on Directive Principles, particularly as there is at the commencement of that Chapter an article saying that nothing in that Chapter can be judicially enforced."

H. N. Kunzru

Apart from this group of Members who held that it was useless to include these Directives in the Constitution without proper provision for their enforcement, there was another group of Members who felt that the distinction between justiciable and non-justiciable rights was 'arbitrary' as well as difficult. It was Shri Somnath Lahiri who observed inter alia:(219)

"It is rather difficult to make a distinction between what are justiciable rights and what are not. For instance, when we make a provision that people should have the right to work, that is, unemployment should not be allowed to exist in our country, it would be a social right. If you make it an inalienable provision of our fundamental rights, naturally it will have to be justiciable. Similarly, take the question of nationalisation of land. If one wants to say that the land belongs to the people and to nobody else, that would be a social and fundamental right no doubt. But, nevertheless, it will also be a justiciable right, if that is to be given effect to. Therefore, it is rather arbitrary to make any distinction between what are justiciable and what are social and economic rights."

Somnath Lahiri: distinction between justiciable and non-justiciable arbitrary

Other Members including Shri Pramatha Ranjan Thakur,(220) and

Smt. Renuka Ray (221) expressed similar opinions. But the observations made by Shri Mahavir Tyagi were interesting in so far as he held that the Directives did not contain any Gandhian principle. (222)

P. R. Thakur

There were other Members, like Shriyudas Vishwambhar Dayal Tripathi (223), Krishna Chandra Sharma (224) and Yudhisthir Misra (225), who wanted to enlarge the scope of the Directives so as to include subjects like cow-protection, securing of the right to the poor man to rise to the highest status of life, etc.

Prof. K. T. Shah expressed his apprehension that, in the absence of provisions in the Chapter making it obligatory, none of these provisions would be implemented in their life-time. (226) Similarly, Shri Hussain Imam also observed: (227)

"A political party in power can ignore these directive principles and there is no provision anywhere making it obligatory on the party to see that these directive principles are followed. Not even the President of the Union has been authorised to put his foot down when he sees a state government going against the directive principles. I therefore, suggest that bringing forward this amendment will not prevent a political party from coming to power and there is nothing wrong. These directive principles, as they have been laid down, are singularly inoperative. They merely say that if the people and the Government are good they will observe these directives. I do not think there is any need for having any ineffectual directives at all. It is only when you provide a law or fix a standard that you have to provide for those who are not upto that standard. It is just to prevent transgression. And where is the provision here to prevent this? All the

Hussain Imam

directive principles can be ignored by the State Government and there is no remedy for it. Even where is the provision here to prevent it.

no need for ineffectual directives

Even the President of the Union cannot do anything to see that the directive principles are observed. The Central Legislature cannot bring forward any motion for the Government which ignores these directive principles to be dismissed or some alternative being adopted. In the Instrument of Instructions issued to the Governors under the Government of India Act, there was authority given to the Central Government or Secretary of State to see that those instructions are carried out. But here we have provided nothing like that. At least I donot find anything like that. I shall be obliged if Dr. Ambedkar will point out to us any method by means of which transgression by the Government of the States of the directive principles can be proceeded against. There must be some method of intervention by the Legislatures. The provincial legislatures cannot intervene because the provincial Government are responsible Governments. If there happens to be a going back on the directive principles, it is not the Ministers alone, but the entire legislature that would be responsible for it. So there must be some superior authority to examine whether the directive principles are followed or not. Unless some provision is made on these lines it will only go to prove what one Hon'ble Member suggested, viz., that these principles have been brought in just to silence the cirticism and to have a good sign-board that we have good intentions, without having any intention of following those directions."

But this represents one side of the picture. There were members who considered it "an important chapter embodying the essence

of the Constitution." There were observations in which it was held that these Directive Principles contained the germs of socialist government. Of this group, mention must be made of Prof. Shibbanlal Saksena who held:(228)

Other side of the picture

" ... the very fact that this Chapter forms part of the Constitution gives such a guarantee (i.e. it will not remain a pious wish) and it will surely be open to every legislature to point out when an Act is brought before the Assembly that it is in conflict with the principles laid down in this Chapter. So, the mere fact, that they are being included in the Constitution shows that every legislature will be bound to respect these directive principles in the Constitution and therefore, any act which offends the directive principles shall be ultra-vires. Although every citizen will not be able to go to a court of law for enforcement of these principles, yet the President of every Assembly will be within his rights to rule out any Bill and say that this Bill cannot be moved, because it is against the fundamental directive principles of the Constitution itself. I, therefore, think that this chapter is not merely a chapter of pious wishes, but a chapter containing great principles. This is a very important chapter which lays down the principles which will govern the policy of the State and which, therefore, will ensure to the people of the country the realisation of the great ideals laid down in the Preamble."

S. L. Saksena

It was Pandit Thakur Das Bhargava who regarded the Directive as "essence" of the Constitution and held:(229)

"These directive principles have been spoken of disparagingly by some of the Members. I beg to submit that I regard these

Thakur Das Bhargava

directive principles to be the essence of this Constitution. They give us a target, they place before us our aim and we shall do all that we can to have this aim satisfied."

Another member, Shri S. V. Krishnamurthy Rao found in these Directive Principles, 'the germs of socialist government' and held that in view of the importance of this chapter, it should be placed immediately after the Preamble. In his own words:(230)

S. V. Krishnamurthy Rao -- Germs of Socialistic Government.

"..... this (chapter on Directive Principles of State Policy) contains the germs of a socialistic government. I submit that this chapter should come immediately after the Preamble. As objective principles of the Union, we will be giving it greater sanctity than to others and it will stand as the objective principles of the future Government. With certain modifications they can be adopted as a socialist programme for the future Parliament of India."

Shri V. S. Sarvate stressed on the "fundamental" character of the Directive Principles and observed that "they are basic, and that efforts to implement them to the fullest extent would have to be taken so long as society goes on."(231)

Defending the move to include the Directive Principles in the Constitution, Dr. Ambedkar said:(232)

Ambedkar's reply to criticism

"It is said they are only pious declarations. They have no binding force. This criticism is of course superfluous. The Constitution itself says so in many words.

It is said that the Directive Principles have no legal force behind them, I am prepared to concede that they are useless because they have no binding force in law.

The Directive Principles are like the Instruments of Instructions which were issued to the Governor-General and to the Governors of the Colonies and to those of India by the British Government under the 1935 Act. Under the Draft Constitution it is proposed to issue such Instruments of Instructions which will be found in Schedule IV. of the Constitution. What are called Directive Principles is merely another name for Instruments of Instructions. The only difference is that they are instructions to the Legislature and the Executive. Such a thing is, to my mind, to be welcomed. Wherever there is a grant of power in general terms for peace, order and good government, it is necessary that it should be accompanied by instructions regulating its exercise.

The inclusion of such instructions in a Constitution such as is proposed in the Draft becomes justifiable for another reason. The Draft Constitution as framed only provides a machinery for the government of the country. It is not a contrivance to instal any particular party in power as has been done in some countries. Who should be in power is left to be determined by the people, as it must be, if the system is to satisfy the tests of democracy. But whoever captures power will not be free to do what he likes with it. In the exercise of it he will have to respect these instruments of instructions which are called Directive Principles. He cannot ignore them. He may not have to answer for their breach in a

Justification for inclusion

court of law. But he will certainly have to answer for them before the electorate at election times. What great value these directive principles possess will be realised better when the forces of right contrive to capture power.

That it has no binding force is no argument against their inclusion in the Constitution. There may be a difference of opinion as to the exact place they should be given in the Constitution. I agree that it is somewhat odd that provisions which do not carry positive obligations should be placed in the midst of provisions which do carry positive obligations. In my judgment, their proper place is in Schedules III-A and IV which contain Instrument of Instructions to the President and the Governors. For, as I have said, they are really Instruments of Instructions to the Executive and the Legislatures as to how they should exercise their power. But that is only a matter of arrangement."

Regarding significance, language and importance of the Directive Principles, Dr. Ambedkar further observed:(233)

"I see that there is a great deal of misunderstanding as to the real provisions in the Constitution in the minds of those members of the House who are interested in this kind of directive principles. It is quite possible that the misunderstanding is due to the fact that I myself in my opening speech in support of the motion that I made, did not refer to this aspect of the question. That was because, not that I did not wish to place this matter before the House in a clear cut fashion, but my speech had already become so large that I did not

Significance, language and importance of the directives

venture to make it more tiresome that I had already done; but I think it is desirable that I should take a few minutes of the House in order to explain what I regard as the fundamental position taken in the Constitution. As it is stated, our Constitution as a piece of mechanism lays down what is called parliamentary democracy. By parliamentary democracy we mean one man, one vote. We also mean that every Government shall be on the anvil, both in its daily affairs and also at the end of a certain period when the voters and the electorate will be given an opportunity to assess the work done by the Government. The reason why we have established in this Constitution a political democracy is because we do not want to instal by any means whatsoever a perpetual dictatorship of any particular body of people .... while we have established political democracy, it is also the desire that we should lay down as our ideal economic democracy. We do not want merely to lay down a mechanism to enable people to come and capture power. The Constitution also wishes to lay down an ideal before those who would be forming the Government. That ideal is economic democracy, whereby, so far as I am concerned, I understand to mean, 'One man, one value'. The question is: Have we got any fixed idea as to how we should bring about economic democracy? There are various ways in which people believe that economic democracy can be brought about; there are those who believe in individualism as the best form of economic democracy; there are those who believe in having a socialistic state as the best form of economic democracy; there are those who believe in communistic idea as the most perfect

ideal of Political democracy

ideal of economic democracy

form of economic democracy.

Now, having regard to the fact that there are various ways by which economic democracy may be brought about, we have deliberately introduced in the language that we have used, in the directive principles, something which is not fixed or regid. We have left enough room for people of different ways of thinking, with regard to the reacting of the ideal of economic democracy, to strive in their own way, to persuade the electorate that is the best way of reacting economic democracy, the fullest opportunity to acting the way in which they want to act.

Sir, that is the reason why the language of the articles in Part IV is left in the manner in which this Drafting Committee thought it best to leave it. It is no use giving a fixed, rigid form to something which is not rigid which is fundamentally changing and must, having regard to the circumstances and the times keep on changing. It is, therefore, no use saying that the directive principles have a great value. In my judgement, the directive principles have a great value for they lay down that our ideal is economic democracy. Because we did not want merely a parliamentary form of government to be instituted through the various mechanisms provided in the Constitution, without any direction as to our economic ideal, as to what our social order ought to be, we deliberately included the Directive Principles in our Constitution. I think, if the friends who are agitated over this question bear in mind what I have said just now that our object in framing this Constitution is really two-fold:

Value of the directives

(1) to lay down that our ideal is political democracy, and

(2) to lay down that our ideal is economic democracy and also to prescribe that, every Government whatever it is in power, shall strive to bring about economic democracy, much of the misunderstanding under which most members are labouring will disappear."

The foregoing discussion among the makers of the Constitution leads one to conclude that the debate regarding the nature of Directive Principles mainly centred round the "non-justiciable" character of the Directives. It may be submitted here that most of the Members who opposed the inclusion of the Directives, over-emphasized this "non-justiciable character of the Directives, forgetting completely the other aspect, viz., their 'fundamentalness' in the "governance of the country." Mere over-emphasis on one aspect of a provision, ignoring altogether the other, can neither present the total picture nor the underlying 'essence' of the Constitution. At this point, it will not be out of place to refer to the position, held by the Constitutional conventions in the British Constitutional system. They lack the characteristic of 'enforceability', yet they are regarded as something like binding on the rulers of the country. In a similar way, the importance of the Directive can not, in any way, be underestimated, nor their utility ignored. In our next part of the discussion, it will be seen that the Judiciary in many cases, in course of their interpretation of the Constitution, laid too much emphasis on Fundamental Rights and did not besitate to make the Directives subordinate to Fundamental Rights. This rigid attitude of the Judiciary pushed

Debate centering round non-justiciability, non-enforceability and fundamentalness

the executive in such a tight corner that they were unable to go ahead with any socialistic legislations, intended to be made in pursuance of the Directives; and it is because of the stern attitude of the Judiciary which prompted the legislature to amend the Constitution in such manner as to give the Directives precedence over Fundamental Rights.

XII. 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 Vs. Champakam Dorairajan,(234) 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."

Champakam case -- directives subservient to fundamental rights

This stand taken by the Supreme Court influenced the decisions of the several High Courts in deciding several cases.(235) 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(236) 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 has to be placed upon the Constitution and so interpreted it means that the State should certainly implement the Directive Principles

Quareshi case -- need for harmonious interpretation

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.(237) 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, subserve and not over-ride 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.(238) 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 bearing 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

Subodh Gopal case -- importance of the directives underlined

directive principles, as having no bearing 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 cases (239) the Judiciary interpreted the real nature of the Directive Principles and their relationship with Fundamental Rights. Even the famous case of Golaknath V. State of Punjab (240) 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.

Golaknath case -- an integrated code of directives and fundamental rights

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. 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

Keshavananda case

was also pointed out that the Indian Constitution "does not subscribe to the theory that the end justifies the means adopted."(241)

XIII: 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:(242)

"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

Prime Minister's Policy Statement

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:(243)

"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

the importance of the Directives, observed inter alia.(244)

"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 is 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, men 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 subserve 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 live 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

Planning policy based on the Directives

and scientific lines and to promote cottage industries on individual or co-operative lines.

Briefly, the Directive Principles visualize an economic and social order based on equality of opportunity, social justice, the right to work the right to an adequate wage and a measure of social security for all citizens. They donot 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."

(245)

Similarly, the First Five Year Plan further stated:

"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 subserve 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 <u>inter alia</u>:

(246)

"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."

Socialist pattern of Society

That the socialist patter of society is a flexible concept, adjustable with the changing circumstances found vocal support in the following observation. (247)

"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 organisation 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 patter 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 occasions 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:(248)

"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

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 fulfil the ideals contained in Arts. 39 (e) and (f), 41,42 and 43 -- all related to the economic and social of 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.(249) 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.(250)

Results of planning in terms of goals in the Directives

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 savings."(251)

The targets(252) of different sectors in the Fifth Plan, are ambitious. It has been estimated that foodgrains 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 they it had the objective of minimizing 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 can not 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 uncalled 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 give 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.

XIV: 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." (253)

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 Consitution, 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 vigorious 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

Two conflicting views on the position of President

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."(254) 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."(255)

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.(256) 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."(257)

Doctrine of Independent President.

The doctrine of independent President did not escape the attention of Justice P. B. Mukherjea when he observed that the Indian President "is an independent institution with independent authority and independent functions."(258) 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.(259) 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."(260) Considering this dangerous aspect, a veteran statesman like Pandit Hriday Nath Kunzru warned that any idea of implementing such a doctrine would mean "the end of responsible government."(261)

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 'friends philosopher and guide' of the Government. While explaining the position of the President of the Indian Republic, K. Santhanam observed:(262)

"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

Doctrine of Active and Critical President

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."(263)

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 Dr. 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

the vitals of the country."(264)

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."(265) 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."(266) 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."(267) 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."(268) 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."(269)

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. 77(2) authorises the President himself to make rules as to the manner in which his orders shall be authenticated.(270) Secondly, in India, the Ministers shall have no legal responsibility for acts of the President.(271) 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 Indian 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."(272)

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 antinational 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. 31D. 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.

Art. 31-D

(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 Art. (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 anti-national activity; (iii) the members whereof undertake or engage in any anti-national activity."(273)

This article 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 explicity 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.

Wide powers of Parliament

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 countrywide 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, seperseding 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

Reasons for such a provision

Constitution have been subjected to "considerable stresses and strains" and it is equqlly 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 long-standing 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."

Legislature - Executive conflict

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).(275)

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.

Scope of judicial review restricted

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 48,49,52 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 unamended 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.

Curtailment 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 issue 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 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 wide 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.(276) He outlined the following essential fundamental duties of the citizen:(277)

Gandhian idea of duties

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

(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.(278) 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.(279)

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.(280)

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".(281) Other amendments of miscellaeneus 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.(282) It may noted that this change of duration of the 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.(283)

(c) Disqualification of members:(284) -- Sub-clause (A) of Clause (I) 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: (285)

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 number 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.(286) Since all these changes have been critically analysed in the following chapter, a repetition here will be redundant.

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42. Vide Zorach V. Clauson (1952) 343 U.S. 306 (ref. to Basu, Ibid).

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45. Art. 29 (2) of the Indian Constitution reads as follows:

> "(2) 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."

46. Basu - Commentary on the Constitution of India, op.cit. p. 328.

47. Article 14 provides: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

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64. Smith - India as a Secular State, op. cit. p. 124.

65. A.I.R. 1953 S.C. p. 385.

66. Everson V. Board of Education, 330 U.S. I (1947) - cited in Smith, op. cit. p. 126.

67. Ibid.

68. C.A.D. Vol. VII. p. 831-832.

69. Ibid. p. 825.

70. Ibid. p. 881-882.

71. Section 12 of the Untouchability (Offences) Act, 1955, (cited in D. N. Banerjee - Our Fundamental Rights, 'Appendix D').

72. India : A Reference Annual 1957, Publications Divisions, Govt. of India, Delhi, 1957, pp. 157-159 (cited in Smith, Ibid., p. 312).

73. Lok Sabha Debates, 1955, part 2, Vol. 3, Cols. 5324-5386.

74. Statement of Objects and Reasons appended to the Constitution(Forty-second Amendment) Act, 1976.

75. Text of the Constitution (Forty Second Amendment) Act, 1976.

76. Ibid.

77. Ibid.

78. Op.cit.

79. Article 38 of the Constitution of India.

80. C.A.D. Vol. II, p. 316.

81. K. C. Markandan - Directive Principles in the Indian Constitution. Allied, Bombay, 1966, Chapter II, p. 28.

82. Ibid.

83. The Supplementary Report of the Committee of the All Parties Conference pp. 32-34 (cited in Markandan, p. 30).

84. Discussion were held from 19th Nov. 1948 to 25th (with two-days' break on 20th and 21st Nov. 1948). Ref. to C.A.D. Vol.VII. No.9.

85. Members were: Shri Loknath Misra, Shri Amiya Kumar Ghosh and Kazi syed Karimuddin. Ibid.

86. Shri Ananthasayanam Ayyanger.

87. Incidentally, it may be recalled that Dr. Ambedkar in his booklet "States and Minorities" submitted to the Advisory Committee on Fundamental Rights also fixed ten years for the implementation of the Principles. Ibid. pp. 474-475.

89. Shri H. V. Kamath, Ibid. p. 475.

90. C.A.D. Vol. VII. pp. 475-476.

91. Ibid.

92. Ibid.

93. Ibid.

94. Ibid.

95. C.A.D. Vol. VII. p. 476.

96. Ibid.

97. Ibid.

98. Ibid., pp. 487-480.

99. Ibid.

100. Ibid.

101. Ibid.

102. Ibid., pp. 481-482.

103. Ibid., op.cit.

104. Ibid.

105. Ibid., pp. 486-487.

106. Ibid., pp. 488-489.

107. Ibid.

108. Ibid.

109. Ibid., op.cit. p. 490.

110. Ibid.

111. Ibid. p. 491.

112. Ibid., pp. 492-493.

113. Ibid., p. 493.

114. Ibid., pp. 494-495.

115. Ibid., p. 496.

116. Ibid.

117. Ibid., p. 496.

118. Ibid., p. 497.

119. Ibid., pp. 498-499.

120. Ibid., p. 497.

121. Ibid., pp. 497-498.

122. Ibid., pp. 499-500.

123. Ibid., p. 504.

124. Ibid.

125. Ibid., pp. 515-518.

126. Ibid., pp. 518-519.

127. Ibid., p. 520.

128. Ibid.

129. Ibid., p. 520.

130. Ibid., pp. 521-522.

131. Ibid., p. 523.

132. Ibid., p. 523.

133. Ibid., pp. 523-527.

134. Ibid., pp. 529-530.

135. Ibid., p. 530.

136. Ibid., p. 530.

137. Ibid., pp. 530-531.

138. Ibid., pp. 531-532.

139. Ibid., pp. 534-535.

140. Ibid., pp. 532 and 533-534.

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142. Ibid., p. 535.

143. Ibid., p. 537.

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146. Ibid., p. 538.

147. Ibid., pp. 539-540.

148. Ibid., p. 540.

149. Ibid., pp. 540-541.

150. Ibid., pp. 541-542.

151. Ibid., p. 543.

152. Ibid., pp. 544-545.

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159. Ibid., p. 554.

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163. Ibid.

164. Ibid.

165. Ibid.

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204. Ibid., pp. 603-604.
205. Ibid., pp. 604-650.
206. Ibid., p. 605.
207. Ibid., p. 605.
208. Ibid., p. 606.
209. C.A.D. Vol. VII, p. 225.
210. Ibid., pp. 475-476.
211. Ibid., p. 244.
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213. Ibid.
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219. Ibid., p. 587.

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244. Resolution 15th, March 1950, Gazette of India Extra ordinary March 15, 1950 (cited in Markandan: Directive Principles of State Policy in the Indian Constitution, pp. 268-269).

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253. Ibid.

254. Text of the Constitution (Forty-Second Amendment) Act, 1976.

255. K. M. Munshi - The President under the Indian Constitution, Bombay, 1963, p. 9.

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260. H. M. Jain - The Union Executive, p. 133.

261. Ibid., p. 140.

262. The Statesman (New Delhi) May 2, 1967.

263. K. Santhanam - "The President of India" in the Journal of Constitutional and Parliamentary Studies (New Delhi) Vol. III, No. 3, July-Sept., 1969, p. 1.

264. R. J. Venkateswaran - Cabinet Government in India, London, 1967, p. 106.

265. Full text of President Giri's address was published in National Herald (New Delhi), Aug. 3, 1973.

266. Constituent Assembly Debates, Vol. VII. p. 32.

267. Ibid., p. 984.

268. C. A. D. Vol. X, p. 956.

269. C. A. D. Vol. VII, p. 896.

270. C. A. D. Vol. IV, p. 734.

271. 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 instryment which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President."

272. Basu - Commentary on the Constitution of India, op.cit., Vol. I, p. 471.

273. Ibid., p. 472.

274. Section 5 of the 42nd Amendment Act.

275. Ibid.

276. Details of the changes brought about in Art. 368 has been discussed in Chapter 4.

277. S. N. Agarwal - Gandhian Constitution for Free India, Kitabistan, Allahabad, 1946.

278. Ibid., p. 79.

279. The Constitution of Dahomey (1964); the Constitution of Ethopia (1955); the Constitution of Guinea (1958). The Constitution of Somalia (1960); the Constitution of U. A. R. (1964); the Constitution of Cambodia (1947, as amended to 1964); the Constitution of

279. Contd.....

Peoples Republic of China (1954); the Constitution of the U.S.S.R (1936, as amended to 1965 and 1977); the Constitution of Yugoslavia (1963); the Constitution of Czechoslavakia (1960).

280. Paras Diwan - Abrogation of 42nd Amendment - Does our Constitution need a second look? - op.cit. p. 95.

281. Ibid., pp. 95-96.

282. Dr. L. M. Singri is reported to have used the term while he was participating in the deliberations of the Bar Association of India, in New Delhi while examining the 44th Amendment Bill (vide Statesmen, Octo. 22, 1976).

283. Clauses 17, 30 and 56 of The Act.

284. Clauses 18, 22 and 35 of The Act.

285. Clauses 19, 20, 22 and 23 of The Act.

286. Clauses 23,-25 of The Act.

287. Clause 43 of The Act which provides for the inclusion of a new Art. 257A.