“WE THE PEOPLE” AND SOCIAL WELFARE UNDER THE INDIAN CONSTITUTION: A STUDY OF CONSTITUTIONALISM.

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ABBREVIATIONS

AUWP	Accelerated Urban Water Programme
AS	Aganwadi Scheme
BSY	Balika Samriddhi Yojana
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women, 1979
AWCRA	Development of Women and Children in Rural Areas
EAS	Employment Assurance Scheme
FWP	Food for Work Programme
FFPS	Freedom Fighters Pension Scheme
GCS	Growth Center Scheme
ICDS	Integrated Child Development Scheme
JSSK	Janani Shishu Suraksha Karyakram
JSY	Janani Suraksha Yojana
JRY	Jawahar Rozgar Yojana
KSY	Kishori Shakti Yojana
LPG	Liberalisation, Privatisation and Globalisation
L& RS	Liberation and Rehabilitation Scheme
MBS	Maternity Benefits Scheme
MCS	Mega City Scheme

ABBREVIATIONS

MDMS	Mid Day Meal Scheme
MWS	Million Wells Scheme
MHRD	Ministry of Human Resources Development
MNREGA	Mahatma Gandhi National Rural Employment Guarantee Act, 2005
NAPCC	National Action Plan on Climate Change
NBAP	National Bio-diversity Action Plan
NCF	National Creche Fund
NEP	National Environment Policy
NFBS	National Family Benefit Scheme
NOAPS	National Old Age Pension Scheme
NRHM	National Rural Health Mission
NWAP	National Wild- life Action Plan
NPAG	Nutrition Programme for Adolescent Girls
PMRY	Prime Minister's Rozgar Yojana
PDAPS	Prohibition and Drug Abuse Prevention Scheme
RGSEAG	Rajiv Gandhi Scheme for Empowerment of Adolescent Girls
RCH	Reproductive and Child health Programme
REGP	Rural Employment Generation Programme
SGRY	Sampoorna Grameen Rozgar Yojana
SRBL	Scheme for Rehabilitation of Bonded Labourers

ABBREVIATIONS

SGS	Shishu Greh Scheme
STEP	Support to Training and Employment Programme for Women
SGSY	Swarnjayanti Gram Swarozgar Yojana
TRYSEM	Training of Rural Youth for Self- Employment
U.N.O.	United Nations Organisation
GATS	General Agreement on Trade of Service
WTO	World Trade Organisation
ILO	International Labour Organisation
UNCITRAL	United Nation Commission on International Trade Law
AIR	All Indian Reporter
SCC	Supreme Court Cases
JT	Judgment Today
SCR	Supreme Court Reports
CILQ	Central India Law Quaterly
IBR	Indian Bar Review
JILI	Journal of Indian Law Institute.

ABSTRACT

It has been maintained and seen through the years in the light of the Constitution that absolute concepts of liberty and equality are very difficult to achieve in a modern welfare state. The enjoyment of these rights is subjected to the interest of the people and the state may therefore, at times, encroach on the domain of these rights for the common good or common interest, though that would depend upon the conditions and circumstances prevailing at a particular time. For instance, the welfare state attempts to satisfy "basic needs". The word basic implies that over and above certain minima, it is open to some people to enjoy additional amenities, so that there will continue to be 'haves' and 'haves-not'. The tendency sooner or later will be for the later to start insisting that some of the things which they would like, but do not have, are 'basic' and hence 'needs' and due 'as of right'. What is at time a luxury becomes at another time a necessity and need.

For a welfare state to thrive and to maintain its constitutional goal, legislation aimed at social welfare is cardinal for the common good and common interest of the people. Directive Principles of State Policy, and Fundamental rights together constitute the 'conscience' of the Constitution, and represents the basic rights inherent in human beings in this country. There is no inherent conflict between them and both are equally inherent in promoting the aims and objectives of the Constitution. However, in translating them in socio economic reality some degree of compromise is inevitable.

The Directive Principles impose an obligation of the state to take positive action for creating socio-economic condition in which there will be an egalitarian social order with social and economical justice to all, so that individual liberty will become a cherished value and the dignity of an individual a living reality. Thus the Directive Principles enjoy a very high place in the Constitutional scheme and it is only in the frame work of the socio-economic structure envisaged in the Directive Principles that the fundamental rights are intended to operate. Both are in fact equally important and an effort should be made in harmonizing them by importing the Directive Principles in the construction of the fundamental rights. The harmony should be maintained

even by constitutional amendments. The Constitution is founded on the bed rock of the balance between Part III and Part IV, and to tilt the balance by giving supremacy to one over another is to destroy the harmony between the Directive Principles and the fundamental rights which is the essential features of the Constitution.

For the Constitutional scheme of social welfare to get through the tunnel, the State is required to ensure to its people the socio economic right and the Principles of social security by formulating numerous social welfare legislation which cater the common good and common interest of the people like the adequate means of livelihood, equal pay for equal work for both men and women, fair distribution of material resources of the country; protection of child and adult labour; living wages for workers, right to work, free and compulsory education for children upto the age of fourteen, conditions of work ensuring a descent standard of life and full enjoyment of leisure and of social and cultural activities, public assistance in case of unemployment, old age, sickness and disablement, and in other cases of undeserved want, human condition of work, maternity relief, promotion of educational and economic interests of the Schedule Castes, schedule tribes and other weaker section of the society, raising the level of nutrition, improvement of public health etc.

Pandit Jawaharlal Nehru had distinct concept of a Welfare State and gave some vital clarifications in this regard, Apart from the generally accepted stipulations, he said in Parliament, once on February 2, 1953, and again on February 17, the same year that "a Welfare State has no meaning unless every individual is property employed end takes part in-nation-building activities. When there is unemployment, he felt, there could be no Welfare State. In any case the unemployed people and their number runs into millions-are not parties to the Welfare State but "outside its pale". He also affirmed that "to realize the ideal of a Welfare Stale requires hard work, tremendous effort and co-operation". According to his concept India may not become a Welfare State for many decades yet because the unemployment problem was unlikely to be solved for many years to come.

Pandit Nehru also drew a distinction between a Welfare State and the Socialistic pattern of society. It is true that a socialistic economy must provide for a Welfare State but it does not necessarily follow that a Welfare State must also be based on a socialistic pattern. "We cannot have a Welfare State in India", he added "with all the socialism or even communism in the world unless our national income goes up substantially. Socialism or communism might help you to divided. Your existing wealth, if you like, but in India there is no existing wealth for you to divide; there is only poverty to divide.

The people's happiness is the ultimate aim of a Welfare State can be assured only when every one has enough to eat, some shelter in the form of a house, or at least a modest roof over his head, some work to do so as to able to earn a living und some opportunities to contribute to nation building, which implies constructive activity. Besides, everyone must also have the means to satisfy his basic needs, consumer goods etc. Everything, as Pandit Nehru said, has ultimately to be judged in terms of human welfare, and the only worth while yard stick we can employ is the happiness of our people.

Life has been significance since the beginning of human civilization and therefore, it has been the prime concern of the Kings to protect the life of the people. At present times it is one of the most important liberties available to them, which even found mention in the world ancient most text Rig Veda. With the advent of the modern state the protection of life was guaranteed in the Constitution as written or unwritten in different forms as the most important natural right, basic right, human right, fundamental right or constitutional right, the world over. The man requires certain necessaries essential for life as basic things for survival without which his life would be impossible to live, as the basic needs like food, cloth, and shelter being at least the minimum level of livelihood. The minimum level of means becomes essential for life and therefore right to earn livelihood as the means of living becomes as much essential as life itself.

The Constitution of India, seems to be first to have expressly provided for affirmative action. In contrast to prohibition and restrain on the creation of handicaps or hindrances by the State in the development and progress of an

individual, affirmative action envisages positive steps on the part of the State to enable him to develop and progress.

The contrast is akin to the one between the policy and the welfare state. Knowing well that to some section of the society mere grant of freedom from restraint and liberty to pursue their legitimate goal, would not mean much, the Constitution makers along with such grants have imposed obligations on the State to take positive steps to lift these sections to a level from where they can take advantage of their freedom and liberty on reasonably equal footing. The Constitution makers have done this in the political as well as social economical spheres. Although these arrangements are much wider, in common parlance they are known as reservation.

The scheme of social welfare brings about a social order in which justice, social, economic and political, shall inform all the institutions of national life. It directs it to work for an egalitarian society where there is no concentration of wealth, where there is plenty, where there is equal opportunity for all, to education, to work, to livelihood, and where there is social justice. With the economic liberalisation in India, post 1991, vis-a- vis the globalization of the world economy some people entertain serious doubts about the application and efficacy of the directive Principles and the fundamental rights. The doubts have arisen with the increasing role of private enterprise and the decreasing role of the state, the fundamental rights would be violated more by the private enterprise than by the State and secondly the private enterprise itself will claim the fundamental rights as legal persons such as corporations, including the multi-national corporation. Doubts even being serious when provisions of social welfare legislations are being curbed to befit liberalization. Labour laws in the country have started taking the bites in the guise of economic liberalization. In recent times the Supreme Court and the High Courts have played an important role to remind the State the Constitutional objectives and have tried to suggest the State to create a balance between development and the constitutional goals by evolving the concept amongst others of sustainable development. The essence of the Constitution in which Justice, Social, Economic and Political shall inform all the institutions of

national life, seems to have been out of place and proper introspect need to be done to keep intact the welfare approach of our Constitution.

It has been held in many decisions of the Supreme Court that when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble as the guiding star and the directive Principles of State policy as the book of interpretation. The preamble embodies the hopes and aspiration of the people and directive Principles set out the proximate grounds in the governance of the country.

The Hon'ble Supreme Court of India has in a large number of cases held that a beneficial piece of legislation or welfare statues should receive a liberal and wider interpretation and not a narrow and technical one. Social, political, and economic justice has two facets, non-discrimination and affirmative action in favour of downtrodden. The framers of the Indian Constitution were very much conscious and aware of wide spread inequalities and disparity in the social fabric of the country as also of the gulf of the rich and poor. The reason why the goal of justice social , political and economical was given the place of pre-eminence in the preamble and the concept of equality enshrined in Part III and Part IV of the Constitution. The principal of equality cannot be completely taken away so as to leave citizen in the state of lawlessness. But the facet of the principal of equality can always be altered, especially to carry out the directive Principles of State policy. Legislative and affirmative measures taken by the State for providing reservation of seats and posts in the field of education and employment are reflection of affirmative action taken for achieving the goal of real equality. However, implementation and execution of such action have continuously faced road blocks at several stages. Those who have been benefited in the existing system cried foul and created a bogey of violation of their legal and constitutional rights. Almost all the action taken by the State and its agencies for ameliorating conditions of have-nots of the society by providing reservation were subject to periodical judicial scrutiny. By and large the Courts approved the affirmative action of the State but on some occasion the policy of reservation or implementation thereof

was found to be faulty and action taken by the government have been nullified or sliced by judicial intervention.

The right to freedom under Articles 19 has been long recognized as a natural and inalienable right that belong to all citizens. Indeed Independence would mean little without it. Article 14, 19 and 21 can be called as the “Golden Triangle” and are the three fundamental rights that stand above the rest. Without the Golden Triangle, democracy is impossible. The functioning of a modern democratic society would ensure freedom to pursue varied opportunities and options without discrimination on the basis of sex, race, caste or any other like. In fine, there should be a reasonable relationship of proportionality between the means used and the aim pursued. It is to be borne in mind that legislation with pronounced “protective discrimination” aims potentially serves as double edged swords. Strict scrutiny test should be employed while assessing the implications of the variety of legislation. Legislation should not be only assessed on its proposed aim but rather on the implications and the effect.

Ordinarily the legislature represents the will of the people and works for their welfare but there can be an exceptional situation where the legislature though elected by the people may violate the civil liberties and rights of the people. It is the solemn duty of courts to uphold the civil rights and liberties of the citizens against executive or legislative invasion, and the court cannot sit quite in this situation, but must play an activists role in upholding civil liberties and the fundamental rights in Part III. Courts are the guardian of the rights and liberties of the citizens, and they will be failing in their responsibility if they abdicate this solemn duty towards citizens.

The Constitution of India, primarily regarded as a social document. The study of Constitutionalism in the yester years will review how far it has been successful in achieving the goal of establishing a Welfare State. The present research work is aimed at bringing home the conclusion that where our Constitutional system was successful and where it failed and to find out the present direction for the policy makers and the people.

Constitutionalism comes from political philosophy and takes a position that a government, in order to be legitimate, must have legal limits on its powers. Constitutionalism means limited government or limitation on government. It is antithesis of arbitrary powers. Constitutionalism recognizes the need of government with powers but at the same time insists that limitation be placed on the powers. The antithesis of constitutionalism is despotism. It envisages checks and balances by restraining the power of the government organ by not making them uncontrolled and arbitrary. Thus the government's authority ends up depending upon actually staying within those limits. A government which goes beyond its limit loses it authority and legitimacy. The fundamentals of the Indian Constitution are contained in the Preamble which secures its citizens, Justice, social, economic and political, Liberty of thought, expression, belief, faith and worship, Equality of status and opportunity, and to promote among them all Fraternity assuring the dignity of the individual and the unity of the nation. The theme of the objectives permeates throughout the entire constitution. It was to give effect to this objective the Fundamental Rights and the Directive Principles of the State policy was enacted in Part III and Part IV of the Constitution, and through them the dignity of the individual was sought to be achieved and maintained. The constitutionalism or constitutional system of Government abhors absolutism. It is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provision of the Constitution itself. The protection of fundamental constitutional rights through the common law is the main feature of common law constitutionalism. Moreover when our theories have been glorified with such emblazonment why in execution part it is so sterile. The principal of constitutionalism is now a legal principle which requires control over the exercise of the governmental powers to ensure that it does not destroy the democratic principle upon which it is based. These democratic principles include the protection of the fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of power, it requires a diffusion of power, necessitating different independent centers of decision making. The principle of constitutionalism underpins the principle of legality which requires the court to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental

rights. The legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statues.

The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire constitution by the aim of national renascence, the core of the commitment to the social revolution lies in Part III and Part IV, in the Fundamental Rights and in the directive Principles of State Policy. They are the conscience of the Constitution.

The history of India's struggle for independence and the debates of the Constituent Assembly show how deeply our people value their personal liberties and how those liberties are regarded as an indispensable and integral part of our Constitution. People write and adopt a constitution because they want to make a fresh start in their system of governance. The Constitution represents the break from the past, yet it is influenced from the past in what it accepts and what it rejects. The Constitution of India is no exception in that regard. People had a system of governance before the Constitution was written and adopted. The system has very much influenced its contents. Its contents can be appreciated and understood in the light of that system.

In the research work the historical retrospect of the Constitution had been tried to be looked into. We tried to travel in the past to find the basic of our rights as it is today.

The Indian Constitution is based on the philosophy of evolving an egalitarian society free from fear and bias based on promoting individual freedom in shaping the government of their choice. The whole foundation of constitutional democracy is building a system of governance in systematic machinery functioning automatically on the wheels of norms and regulations but not on individual whims and fancies. It is easy to dream such a system of rule of law than framing a mechanism for it. The Indian Constitution is a marathon effort to translate philosophical rule of law into practical set up

divided into three significant estates checking each other exercising parallel sovereignty and non-egoistic supremacy in their own way. Apart from excellent separation of powers to avoid the absolute concentration, the Constitution of India envisages a distinct distribution of powers between two major levels of Governments- central and provincial with a fair scope for a third tier the local bodies. However, the operation of the system came in contrast with men and their manipulations leading to different opinions and indifferent options. Whatever may be the consequential aberrations, the system of rule of law is perfectly reflected in framing of the Constitutional norms codifying the best governing mechanisms tested and trusted in various democratic societies world over.

The research work aims at the study of the constitutional foundation that let to the making of the Constitution. The framework in which the members of the Drafting Committee of the Constituent Assembly have tried to build a Constitution that will remove tears and suffering of the poor and the backward class. A study as to the formation of the Constituent Assembly and the framing of the Constitution are relevant to understand its philosophy and evolution. It embarks to study the Preamble of the Constitution which sets out the aims and aspirations of the people of India which have been translated into the various provisions of the Constitution. The reason why the objectives before the Constituent Assemble were to constitute India into sovereign democratic republic and to secure its citizens, justice equality liberty and fraternity, and what was the reason that led the ultimate aims of the makers of the Constitution to have a welfare State and an egalitarian society projecting the aims and aspiration of the people of India.

Social Justice as a concept is based on equal distribution of Justice. Social Justice as a concept in India is related most specifically with equal distribution of rights without discrimination of gender, caste, creed or economic status. The purpose of social justice is to maintain or to restore equilibrium in the society and to envisage equal treatment of equal persons in equal or essentially equal circumstances. The social solidarity was to be brought about by the concept of social justice. In the Indian Constitution it

finds place significantly in the Preamble, Fundamental Rights and Directive Principles of State Policy. The leaders of India's freedom movement visualized that in the new dispensation following political freedom, the people should have the fullest opportunity for advancement in the social and economic spheres and that the state should make suitable provisions for ensuring such process.

The fundamentals of the Indian Constitution are contained in the Preamble which secures its citizens, Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and opportunity, and to promote among them all Fraternity assuring the dignity of the individual and the unity of the nation. The theme of the objectives permeates throughout the entire constitution. It was to give effect to this objective the Fundamental Rights and the Directive Principles of the State policy was enacted in Part III and Part IV of the Constitution, and through them the dignity of the individual was sought to be achieved and maintained. Only a free society can ensure the all-round progress of its members which ultimately helps the advancement of human welfare. Therefore, every democracy pays special attention to securing this basic objective to the maximum extent without, at the same time, endangering the security of the State itself. The reality of inequality, and its possible solution, is manifest in the Preamble, followed by the Fundamental Rights and Directive Principles. The Preamble makes explicit, the resolve to create a "socialist and democratic republic" in order to secure political justice, equality, liberty and dignity. The principle assertion being that in order to obliterate social injustice, upholding the dignity of the human personality is paramount. The Indian Constitution, as a social document, seeks to foster this by striving to create the requisite social, cultural, political and economic conditions that are required to attain this noble goal. Its ideals are based on the grim experience of colonialism, and India's bitter struggle against that imperial regime, which consistently violated the rights of the people of India, and worked relentlessly to create inequalities within the social strata. There was intense and extensive social and economic discrimination due to irrational prejudices, which resulted in certain sections of society to suffer severe handicaps in practically all walks of life. We resolved

to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice--social, economic and political.

This research is a study of various finding of the Supreme Court as to how the fundamental right and directive principles as envisaged in our Constitution has strengthen the goal in imparting social justice to the citizens.

A good and virtuous constitutionalism having moral foundation protects not only fundamental freedoms but also creates a bridge between conflicting interests and becomes a harbinger to the social needs and produced good legislators and good citizens. The constitutional Courts as sentinel on the qui vive, therefore, function objectively and dispassionately to correct imbalances and keep check on every wing of the State without trespassing upon the field assigned or powers conferred upon the other wings and at the same time maintain a delicate balance on even keel. Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution. The Fundamental Rights and the Directive Principles are the means, as two wheels of the chariot, to achieve the above object of democratic socialism.

Social justice enjoins the Court to uphold government's endeavour to remove economic inequalities, to provide decent standard of living to the poor and to protect the interest of the weaker sections of the society so as to assimilate all the sections of the society in the secular integrated socialist Bharat with dignity of person and equality of status to all.

Justice is an attribute of human conduct. Law, as a social engineering, is to remedy existing imbalances, as a vehicle to establish an egalitarian social order in a Socialist Secular Bharat Republic. All human rights are derived from the dignity of the person and his inherent worth. Fundamental Rights and Directive Principles of the Constitution have fused in them as fundamental human rights as indivisible and inter- dependent. The Constitution has charged the State to provide facilities and opportunities among the people and groups of people to remove social and economic inequality and to improve equality of status.

The Constitution is a living and organic document. It cannot remain static and must grow with the nation. The Constitutional provisions have to be construed broadly and liberally having regard to the changed circumstances and the needs of time and polity. India is a democratic country with a written Constitution. Rule of Law is the basis for governance of the country and all the administrative structures are expected to follow it in both letter and spirit. It is expected that Constitutionalism is a natural corollary to governance in India and a mechanism to enforce social justice.

The research is doctrinaire in nature. The study is on the basis of test books and reference book with regard to the subject, along with the whole Constitution touching various topics under Fundamental Rights and Directive Principles and also on the basis of several legislative initiative, by the governments and the Union and State, government documents, articles, press reports, journals, and foremost the decisions of the Supreme Court of India. The Judicial decisions of the Supreme Court is studied extensively and an initiative is taken to study as to how the Supreme Court had dealt with the fundamental right chapter and the directive principle chapter to impart social justice to the citizen of India. It involve analysis of case laws, arranging ordering, and systematizing legal proposition and study of legal institution and legal reasoning of law. In the research the formulation of legal doctrines through the analysis of legal rules within the common law jurisdiction legal rules are searched within statute and cases, the sources of law and to search a complete statement of law in any given situation. The research is intended for systematic formulation of the law in particular context, to clear ambiguity within rules, place them in logical and coherent structure and describe their relationship to other rules. Since the method is characterized by the study of legal text it is mainly centered at law library. It is the type of academic analysis and legal analysis as undertaken by practicing lawyers or judges. The aim in each case is to answer the question ‘what is the law’ in a particular situation. As for a practicing lawyer this will be a real and a well defined situation requiring an immediate answer to the question. As a legal scholar the study more or less will be considered hypothetical and the purpose is to undertake a more in depth analysis of the constitutionalism of the Constitution of India. The

study is intended to look back and have a revisit to the spirit of the Constitution of India and to analysis whether we are adhering to the spirits and foundations or whether there has been a departure from the ideal in which it was found. If it is in the affirmative than to what extend and whether there is a need to resort to the original ideals. Various case laws effecting the changes in the constitutionalism is gone into details, the ideals of the making of the Constitution and the historical retrospect is included in the study in detail.

As there is no specific work covering the aforesaid area of research. Test books and reference book with regard to the matter has been dealt with in brief, along with the whole Constitution and touching various topics under Fundamental Rights and Directive Principles.

The research intends to find the possible answer.

1. Whether the Indian Constitution is a social document?
2. Whether the preambular promises are the goals of the Constitution?
3. Whether the fundamental rights are means to achieve the goal?
4. Whether the directive Principles are means to achieve the goal?
5. Whether equality embodies social justice?
6. Whether the judiciary has strengthened the idea of social justice?
7. Whether the present directives is in furtherance of the Constitutional goals?
8. Whether post liberalization policy in India has made an impact on the social welfare concept of the Indian Constitution?
9. Whether the Constitutionalism of the Indian Constitution have undergone a change?
10. Whether the Constitution needs a change?

In the end upon completion of the research work, an attempt is made to the answers to the questions posed.

Upon analysis of the facts certain suggestion have also been attempted to have been given to the legislature and the policy maker so that the constitutional goal of the Indian Constitutional philosophy which envisage the methodology for removal of historic injustice and inequalities either inherited or artificially created and social and economic disparity and ultimately for achieving an egalitarian society in terms of the basic structure of our Constitution as spelt out by the preamble are achieved.

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NAVIN BARIK

SELECT BIBLIOGRAPHY

PRIMARY SOURCES

STATUTES/ACTS

1. The Constitution of India.
2. National Rural Employment Guarantee Act, 2005
3. Prohibition of Child Marriage Act, 2006
4. Maternity Benefit (Amendment) Act, 2008
5. Advocates' Welfare Fund Act, 2001
6. Bonded Labour System (Abolition) Act, 1976
7. Child Labour (Prohibition and Regulation) Act, 1986
8. Children (Pledging of Labour) Act, 1933
9. Child Marriage Restrain Act, 1929
10. Commission of Sati (Prevention) Act, 1987
11. Contract Labour (Regulation and Abolition) Act, 1970
12. Dowry Prohibition Act, 1961
13. Employees' Provident Fund and Miscellaneous Provision Act, 1952
14. Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959
15. Environment (Protection) Act, 1986
16. Equal Remuneration Act, 1976
17. Essential Commodities Act, 1955
18. Factories Act, 1948
19. Industrial Dispute Act, 1947
20. Insurance Act 1938 as amended till date
21. Juvenile Justice (Care and Protection of Children) Act, 2000
22. Land Acquisition Act, 1894 as amended till date
23. Life Insurance Corporation Act, 1956
24. Minimum Wages Act, 1948 as amended till date
25. Muslim Women (Protection of Rights on Divorce) Act, 1986
26. Women Act, 1990

27. Minorities Act, 1992
28. Backward Classes Act, 1993
29. Safai Karamcharis Act, 1993
30. National Commission for Minority Educational Institution Act, 2004
31. Payment of Bonus Act, 1965
32. Payment of Gratuity Act, 1972
33. Payment of Wages (Amendment) Act, 2005
34. National Commission for Minority Act, 1992
35. Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995
36. National Trust for Welfare of Persons with Disabilities Act, 1999
37. Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994
38. Protection of Civil Rights Act, 1955
39. Protection of Human Rights Act, 1993
40. Protection of Women from Domestic Violence act, 2005
41. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989
42. Seeds Act, 1966 as amended till date
43. Special Marriage Act, 1954 as amended till date
44. Urban Land (Ceiling and Regulation) Act, 1976
45. Workmen Compensation Act, 1923 as amended till date

SECONDARY SOURCES

BOOKS REFERRED TO:

Constituent Assembly Debates', (Proceedings) Volume I – XI, Lok Sabha Secretariat, New Delhi.

SELECT BIBLIOGRAPHY

B. Shiva Rao, '*The Framing of India's Constitution -Select Documents'*, Vol. I-IV,

B.Shiva Rao, *'The Framing of India's Constitution'*, A Study, Tripathi.

Basu, D.D. '*Introduction to the Constitution of India*', 18th Edn.,

Blackstone-'*Commentaries on the Laws of England'*, Vol. I, Oxford.

Basu, D.D., *Commentaries on the Constitution of India*, 2005.

Granville Austin, *"The Indian Constitution: Cornerstone of a Nation"*,

Cambridge History of India *"The Mughal Period"*, Vol. IV

Caramani, Daniele, *Comparative Politics*, Oxford Univeristy Press (eds) (2008).

D.D. Basu, *Shorter Constitution of India* ,14th Edition,

Dias, '*Jurisprudence'*, 5th Ed.

Dicey on '*Constitutional Law*', 9th Edn., pp.207-08

Dr. J.N. Pandey, *"Constitutional Law of India"*, 40th Edition, Central Law Agency.

Dr. Justice Gajendra Gadkar, *The Constitution of India, its philosophy and postulates'* of 1969 Edn.

Dr. L.M. Singhvi, *"Constitution of India"*, 2nd Ed., Vol. 1, Modern Law Publications, New Delhi,

Friedman, *'Legal Theory and Social Evolution*'.2nd Ed.

Ganganath Jha's English translation, *'Tantravartika'*, Vol.3.

Dr. P. Sitaramaya, "*The History of the Indian Congress"*, Vol. I,.

H. Beveridge, "*History of India"*, Vol. I,.

H.M Seervai. *Constitutional Law of India*, Vol. I-II, 4th Edn, 1993.

Mahatma Gandhi , '*My philosophy of Life*' edited by A.T. Hingorani, 1961 Edn. at p. 146.

SELECT BIBLIOGRAPHY

Ishwara Bhatt, *"Fundamental Rights: A Study of their interrelationship"*, 2004, Eastern Law House, New Delhi, p. 57.

Jain, M.P., *Indian Constitution Law*, 2006.

Jennings – *'Some Characteristics of the Indian Constitution'*, 1953.

Jawaharlal Nehru, '*Discovery of India*', Signet Press, 1956,

Justice H. R. Khanna, *'H R, Making of India's Constitution'*,

Justice K.K. Mathew, *'Democracy, Equality and Freedom'*

Justice M. Rama Jois, *"Legal and Constitutional History of India"*, Vol. I,

K.L. Sarkar , *'Mimansa Rules of Interpretation'*

K.P. Jayaswal in "Manu and Yajnavalkya"-*A Basic History of Hindu Law*, 1930 Edn.

K.P. Jayaswal, '*Manu and Yajnavalkya, A comparison and a Contrast, A Treatise on the Basic Hindu Law*',

M. Rama Jois, '*Seeds of Modern Public Law in Ancient Indian Jurisprudence'*,

M.B. Ahmad, *"The Administration of Justice in Medieval India"*,

Mayne's Treatise on '*Hindu law and Usage*', 1953 Edition,.

Montesquieu in his book `*The Spirit of Laws*'

P.V. Kane's `*History of the Dharmashastra'*, Vol. V, Pt. II, Ch. XXIX and Ch.XXX,

Parrick Olivelle, '*Manu's Code of Law- A Critical Edition and Translation of the Manave Dharmastra'*, Oxford.

Prof. Om Prakash, *"Religion and Society in Ancient India"*, 1985 Edition

Prof. Upendra Baxi, *'The Struggle for the Re-definition of Secularism in India'*, Social Action, Vol. 44, 1994.

SELECT BIBLIOGRAPHY

Rawls, *"Theory of Justice"* .

Richard A. Epstein, *"The Protection of Liberty, Property and Equality"*, Oxford University Press, London, p. 342.

Robert Ernest Hume "*The Thirteen Principal Upanishads*".

Romila Thapar, '*The History of India*', Vol. I, Penguin Books.

Roscoe Pound , *'The Development of Constitutional Guarantee of Liberty'*.

Sandra Fredman, *"Human Rights Transformed – Positive Rights and Positive Duties"* (New Delhi: Oxford University Press, 2008),

Sandra Fredman, *"Public Law, "Human Rights Transformed: Positive Duties and Positive Rights"*, 2006 Autumn/

Seervai, H.M., *Constitutional Law of India*, 2006.

Social and Economic Development in India, a Reassessment edited by Dilip K. Basu and Richard Sision, Sage Publication, New Delhi, 1986 Edition.

Subhash C. Kashyap, *"Blueprint of Political Reforms"*, Shipra Publications, Delhi,

The Complete Works of Swami Vivekananda, Vol. V, New Delhi.

V.D. Mahajan, *"Ancient India"*, 5th edi.

V.N. Shukla, *'Constitution of India'*, 10th ed., Eastern Book Company.

Wade and Phillips – '*Constitutional Law'*, 14th Edn.,

ARTICLES

M.S. Swaminathan, '*The Media and the Farm Sector*', The Hindu, November 11, 2009, p-10, quoted in Calcutta Law Times, 2011, Vol. II, June, Part III.

Indian National Congress Resolutions on Economic Policy, Programme and Allied Matters', 1924-1969, .

Annual Report of the National Human Rights Commission' -1997-98.

SELECT BIBLIOGRAPHY

Annual Survey of Indian Law', 2007, The Indian Law Institute, New Delhi, Vol. XLIII.

Dharma - a Legal Discipline" - Select Speeches and Writings of Dr. Shankar Dayal Sharma, the present President of India [Indian Bar Review Vol.XX (3&4) 1993 Special Issue] in his Centenary Speech of Swami Vivekananda in the Parliament of Religions,

Annual Survey of Indian Law, 2002.

Business Standard, '*Financial Inclusion Imperative to Reap Demographic Dividend'*, January 24, 2011.

C. Narasimha Rao, "*Globalisation, Justice, and Development"* , Serials Publication, New Delhi 2007

Dr. B.R. Ambedkar, "*The untouchables*", Calcutta Law Times

Era Sezhiyan, '*Globe for Rich- Zero for Poor: Globalisation of Indian Economy*' (2007) XLV(20) Mainstream Weekly

G.D.H. Cole, '*The Growth of Socialism"*, 'Law and Opinion in England in the 20th Century'.

Giovanni Sartori, *"Constitutionalism: A Preliminary Discussion"*, (1962) 56 Am. Pol. SC Rev. 853.

'Harijans' dated October 9,1937

Ludu Rocher, '*Lawyers in Classic Hindu Law*', Indian Bar Review, Vol-XIII (3 and 4), 1986,

MID-DAY (Mumbai), 2004, "Student puts her virginity on sale to highest bidder", January 28.

NUJS Law, Review, Vol. IV, No.3, 2011.

Nyaya Deep, Vol-VIII, Issue 3, July 2007.

Praful Bidwai, *'Shining and Starving'* (2011) 28(17) Frontline,

Praful Bidwai, '*The Question of Inequality'* (2007) 24(21) Frontline,

SELECT BIBLIOGRAPHY

Prof. Kishori Lal Sarkar, *`The Mimansa Rules of Interpretation'* published in the Tagore Law Lecture Series.

R Mishra, *"Globalization and the Welfare State"*, Macmillan, 2000.

Shankar Dayal Sharma, "*Secularism in the Indian Ethos in Dharma- A Legal Discourse*", (I.B.R.), vol. XX (3 &4), 1993 Supp, .

The Hindu,

The Times of India, Virginity on Sale, "*The Telegraph"*, dated 26.10.2012, at page 2.

Arun Shourie *"Religion in Politics"*, 1986.

Professor Upendra Baxi- The Little Done, the Vast Undone

B. Sivaramayya- "Reflection of the Preamble of the Constitution", XVII, Indian Bar Review 32 (1990)

Dr. B Errabbi- "The Right to Health Care"- Need for its conversion into Statutorily Enforceable Basic Need- An Indian perspective.

REPORTS

Nehru Report, 1928

Mandal Commission Report, 1979

WEB SITES

http://en.wikipedia.org/wiki/Chola_government accessed on 10.11.2009

http://en.wikipedia.org/wiki/Rajendra_Chola_II accessed on 10.11.2009

http://orissa.gov.in accessed on 17.07.2010

http://wcd.nic.in/icds.htm accessed on 12.02.2013.

SELECT BIBLIOGRAPHY

http://www.answers.com/topic/welfare-state accessed on 21.03.2010.

http://www.gatewayforindia.com/history/british_history, accessed on 21.03.2012

http://www.hrdiap.gov.in accessed on 30.11.2012.

http://www.indiaandindians.com/india_history/cholas.php accessed on 09.11.2009

http://www.legalserviceindia.com/article/html accessed on 12.02.2011.

http://www.preservearticles.com accessed on 14.03.2010.

www. supremecourtofindia.nic.in/

www.liiofinia.org/in/cases/cen/INSC

indiakanoon.org/

www.google.com

advocatekhoj.com/

www.vifindia.org accessed on 25.11.2012.

INTERNATIONAL INSTRUMENTS

1. The Universal Declaration of Human Rights, 1948.
2. The International Covenant on Civil and Political Rights, 1966.
3. The European Convention on Human Rights, 1954
4. The American Convention on Human Rights, 1948
5. The African Convention on Human and Peoples Right, 1961
6. The International Convention on Economic, Social and Cultural Rights.
7. The International Convention on Right to Development.

DECLARATION

I, hereby declare that the thesis entitled “WE THE PEOPLE” AND SOCIAL WELFARE UNDER THE INDIAN CONSTITUTION: A STUDY OF CONSTITUTIONALISM. has been prepared by me under the guidance of Professor (Dr.) B.P. Dwivedi, Department of Law, University of North Bengal, Raja Rammohunpur, District Darjeeling.

No part of the thesis has formed the basis for the award of any degree of fellowship previously.

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Dated:

PREFACE

A Welfare State, is committed to welfare and development. It should thrive to build an egalitarian society projecting the aims and aspiration of the people of India who made the extreme sacrifice for attainment of the country's freedom. For the Constitutional scheme of social welfare to get through the tunnel, the State is required to ensure to its people the socio economic right and the Principles of social security by formulating numerous social welfare legislation which cater the common good and common interest of the people like the adequate means of livelihood, equal pay for equal work for both men and women, fair distribution of material resources of the country, protection of child and adult labour, living wages for workers, right to work, free and compulsory education for children upto the age of fourteen, conditions of work ensuring a descent standard of life and full enjoyment of leisure and of social and cultural activities, public assistance in case of unemployment, old age, sickness and disablement, and in other cases of undeserved want, human condition of work, maternity relief, promotion of educational and economic interests of the Schedule Castes, schedule tribes and other weaker section of the society, raising the level of nutrition; improvement of public health etc. An honest endeavor is taken up to revisit the spirit of the Constitution of India and to analysis whether we are adhering to the spirits and foundations or whether there has been a departure from the ideal in which the Constitution of India was found.

I myself finding as Ph.D scholar is quite exhilarating, for the trembles in life was to throw me at high seas, but I still find myself grounded in firm ground. Reaching here was just not easy and would have been impossible without the valuable contributions of certain people who had been part of my life at stages, so I take the opportunity to acknowledge them.

On this august note I firstly remember my late father Sri. Hem Chandra Baraik, who had been a tremendous support to me and my family. Being a school teacher and just with a living salary, and with a family of six, had tried and given

us the best available education and basic amenities of life. He was a man of high integrity bestowed with impeachable virtue and wisdom. He is the one being missed as he in fact would have been the proudest and the happiest person seeing me submitting the thesis. May he rest in peace.

I would further express my deepest love and gratitude to my mother Smt. Gauri Barik, who had all through the years as a home maker taken the best care for our studies and living. She had all years worked tirelessly to keep the home in shape. A God loving women with great sense of responsibility she, definitely has been a great inspiration for me and my family. I wish her good health and long life.

It is indeed a pleasure to express my deep and profound respect to my supervisor Prof. Dr. B.P. Dwivedi, for bestowing his cherished knowledge and worthy time in the research work. Inspite of he not being in good health, have always given me time smiling and have listened to all my observations with great details and would bestow valuable suggestion. His analytical proposition of law is amazing and worthy. His knowledge in the subject is outstanding and it is always a pleasure being with him. He has been a source of immense encouragement to me in completing the work. It has been a privilege to have done my research under his guidance. I from the core of my heart wish him good health and long life.

I would take this opportunity to extend my gratitude and respect to all the learned teaching faculty of the Department of Law, North Bengal University.

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PREFACE

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I would like to thank my younger brother Anurag Kasyap for his tremendous support in the family. Without him it would have been impossible for me to pursue this work. He has taken the entire responsibility of the family all these years thus making myself free to endeavor in this academic research.

I am thankful to my two sisters Sabita Roy and Namita Srivastava and their husbands who have been of immense source of encouragement and motivation. My family is blessed with our niece Nistha Roy, and nephew Saraswat Srivastava who have brought cheers to our life. My brother Siddhart and sister Salini have been a source of inspiration. I wish the all success.

I am grateful to my friend Mr. Deepak Gupta who had always been on my side in dire straits from my early days. Without him I would not have been the way I am. I am thankful to all members in his family for supporting and encouraging me. I am grateful to his late mother Shiv Kumari Devi, who always from the core of her heart wished me good. May she rest in peace.

I am also grateful to my friends Mr. Sanjay Agarwala and Mr. Shankar Ghosh, who has been on my side and has been a source of great inspiration to me. Their valuable suggestion have been of great help. My have has been enriched by their friendship.

PREFACE

I am thankful to my friend Kaushik Goswami, for his support and cooperation since my LLM days. Indeed it is he who encouraged me to pursue this programme. Of late my brother friend Partha Pratim Saha has been a source of encouragement.

To organization namely North Bengal Explorers' Club, Siliguri, and Siliguri Welfare Organisation needs to be thanked for their contribution and giving me an opportunity to be part of them in their work and for shaping me being a better man. I am grateful to all the members for their contributions.

I profoundly express my gratitude to all the non-teaching staffs of the Department of Law, University of North Bengal for providing me assistance and support during my work. Special reference to the members in the office and the law library for their continuous support. I thank Mr. Amal Kumar Dhar, and Smt. Sati Dey for bearing me for long hours in the library.

Last but not the least I thank all the members of my family, my friends, my well wishers whose names could not be included for space constrains for extending their kind guidance and continuous motivations.

I thank the All Mighty for giving me courage and wisdom in my life to cruise all difficulties and move ahead. Hopefully I will keep awake, arise and stop not till the goal is reached.

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CERTIFICATE

This is to certify that Mr. Navin Barik, has prepared the thesis entitled "WE THE PEOPLE" AND SOCIAL WELFARE UNDER THE INDIAN CONSTITUTION: A STUDY OF CONSTITUTIONALISM., for the award of Ph.D degree of the University of North Bengal under my guidance and supervision. He has carried out the work at the Department of Law, University of North Bengal.

He has fulfilled all the requirements under the 'UGC Regulations on Minimum Standards and Procedures for the Award of M.Phil/ Ph.D Degree, Regulations 2009'. Now his Ph.D thesis is ready for submission. It is an original piece of work and it has not been submitted anywhere for the award of any decree. It may hence be submitted for evaluation before examiners for the award of the degree of Doctor of Philosophy (Law) of the University of West Bengal.

Professor (Dr.) B.P. Dwivedi

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CHAPTER 1.

INTRODUCTION

As a welfare State, India is committed to the welfare and development.

The Preamble to the constitution states,

"WE THE PEOPLE OF INDIA, having resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC to secure to all citizens;

JUSTICE, Social, Economic & Political;

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

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

FRATERNITY, assuring the dignity of individual and the unity and integrity of the nation;

IN OUR CONSTITUENT ASSEMBLY this twenty six day of November, 1949, do hereby ADOPT, ENACT AND GIVE OURSELVES THIS CONSTITUTION.

The Preamble of the Constitution sets out the aims and aspirations of the people of India and these have been translated into the various provisions of the Constitution. The objectives before the Constituent Assemble were to constitute India into sovereign democratic republic and to secure its citizens, justice equality liberty and fraternity. The ultimate aims of the makers of the Constitution was to have a welfare State and an egalitarian society projecting the aims and aspiration of the people of India who made the extreme sacrifice for attainment of the country's freedom. It is worthwhile to note that the Preamble was adopted by the Constituent Assembly after the draft Constitution has been approved.

The idea was that the Preamble should be in conformity with the provisions of the Constitution and express in a few words the philosophy of the Constitution. After the transfer of power, the Constituent Assembly became sovereign, which it reflected in its words "give to ourselves this Constitution" in the Preamble. It is also implied that the Preamble emanated from the people of India and sovereignty lies with them.

The fundamentals of the Indian Constitution are contained in the Preamble which secures its citizens, Justice, social, economic and political, Liberty of thought, expression, belief, faith and worship, Equality of status and opportunity, and to promote among them all Fraternity assuring the dignity of the individual and the unity of the nation. The theme of the objectives permeates throughout the entire constitution. It was to give effect to this objective the Fundamental Rights and the Directive Principles of the State policy was enacted in Part III and Part IV of the Constitution, and through them the dignity of the individual was sought to be achieved and maintained.

Life has been significance since the beginning of human civilization and therefore, it has been the prime concern of the Kings to protect the life of the people. At present times it is one of the most important liberties available to them, which even found mention in the world ancient most text Rig Veda. With the advent of the modern state the protection of life was guaranteed in the Constitution as written or unwritten in different forms as the most important natural right, basic right, human right, fundamental right or constitutional right, the world over. The man requires certain necessaries essential for life as basic things for survival without which his life would be impossible to live, as the basic needs like food, cloth, and shelter being at least the minimum level of livelihood. The minimum level of means becomes essential for life and therefore right to earn livelihood as the means of living becomes as much essential as life itself.

The leaders of the Indian freedom movement visualized that in the new dispensation following political freedom, the people should have the fullest opportunity of advancement in the social and economical spheres and that the State should make suitable provisions for ensuring such process. Among the Fundamental Rights adopted by the All Party Conference in 1928, was a provision entitling every citizen to free elementary education, and another which required the enactment of suitable law for the maintenance of health and fitness for work of all citizens, a living wage for every worker, the protection of motherhood, the welfare of children and provision of assistance in old age, infirmity and unemployment.[1]

[1] Nehru Report, '*The Framing of India's Constitution- A Study*', B. Shiva Rao, p-320

The India National Congress declared in 1931 in its resolution that "in order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions' and that the Organisation of economic life must conform to the principles of justice". The founding father of the Constitution, therefore, while making the Constitution on behalf of the people, declared through "WE THE PEOPLE OF INDIA" in the Preamble, which is part of the Constitution, to secure to every citizen justice, social, economic and political, equality of status and of opportunity with stated liberties to promote among them fraternity and dignity of the individual in a united and integrated Bharat. Chapter III of Fundamental Rights and Chapter IV of the Directive Principles have been evolved to accord socio-economic justice while securing political justice and laid the foundation in these Chapters to achieve egalitarian social order in Sovereign Democratic Republic which later was amended by Constitution 42nd (Amendment) Act as Sovereign Socialist Secular Democratic Republic.

It has been maintained and seen through the years in the light of the Constitution that absolute concepts of liberty and equality are very difficult to achieve in a modern welfare state. The enjoyment of these rights is subjected to the interest of the people and the state may therefore, at times, encroach on the domain of these rights for the common good or common interest, though that would depend upon the conditions and circumstances prevailing at a particular time. For instance, the welfare state attempts to satisfy “basic needs”. The word basic implies that over and above certain minima, it is open to some people to enjoy additional amenities, so that there will continue to be ‘haves’ and ‘haves-not’. The tendency sooner or later will be for the later to start insisting that some of the things which they would like, but do not have, are ‘basic’ and hence ‘needs’ and due ‘as of right’. What is at time a luxury becomes at another time a necessity and need.

For a welfare state to thrive and to maintain its constitutional goal, legislation aimed at social welfare is cardinal for the common good and common interest of the people. Directive Principles of State Policy, and Fundamental rights together constitute the ‘conscience’ of the Constitution, and represents the basic rights inherent in human beings in this country. There is no inherent conflict

between them and both are equally inherent in promoting the aims and objectives of the Constitution. However, in translating them in socio economic reality some degree of compromise is inevitable in a democracy.

Dias[2], in his Jurisprudence, has stated that "Democracy is workable as long as there is a substantial area of shared values and aspirations among the people and where they have the maturity to rise above differences."

The Directive Principles impose an obligation of the state to take positive action for creating socio-economic condition in which there will be an egalitarian social order with social and economical justice to all, so that individual liberty will become a cherished value and the dignity of an individual a living reality. Thus the Directive Principles enjoy a very high place in the Constitutional scheme and it is only in the frame work of the socio-economic structure envisaged in the Directive Principles that the fundamental rights are intended to operate. Both are in fact equally important and an effort should be made in harmonizing them by importing the Directive Principles in the construction of the fundamental rights. The harmony should be maintained even by constitutional amendments. The Constitution is founded on the bed rock of the balance between Part III and Part IV, and to tilt the balance by giving supremacy to one over another is to destroy the harmony between the Directive Principles and the fundamental rights which is the essential features of the Constitution.

The Constitution of India, seems to be first to have expressly provided for affirmative action. In contrast to prohibition and restrain on the creation of handicaps or hindrances by the State in the development and progress of an individual, affirmative action envisages positive steps on the part of the State to enable him to develop and progress.

The contrast is akin to the one between the policy and the welfare state. Knowing well that to some section of the society mere grant of freedom from restraint and liberty to pursue their legitimate goal, would not mean much, the Constitution makers along with such grants have imposed obligations on the State to take positive steps to lift these sections to a level from where they can take

[2] Dias, *'Jurisprudence'*, 5th Ed. at p.85.

advantage of their freedom and liberty on reasonably equal footing. The Constitution makers have done this in the political as well as social economical spheres. Although these arrangements are much wider, in common parlance they are known as reservation.

For the Constitutional scheme of social welfare to get through the tunnel, the State is required to ensure to its people the socio economic right and the Principles of social security by formulating numerous social welfare legislation which cater the common good and common interest of the people like the adequate means of livelihood, equal pay for equal work for both men and women, fair distribution of material resources of the country, protection of child and adult labour, living wages for workers, right to work, free and compulsory education for children upto the age of fourteen, conditions of work ensuring a descent standard of life and full enjoyment of leisure and of social and cultural activities, public assistance in case of unemployment, old age, sickness and disablement, and in other cases of undeserved want, human condition of work, maternity relief, promotion of educational and economic interests of the Schedule Castes, schedule tribes and other weaker section of the society, raising the level of nutrition; improvement of public health etc.

The scheme of social welfare brings about a social order in which justice, social, economic and political, shall inform all the institutions of national life. It directs it to work for an egalitarian society where there is no concentration of wealth, where there is plenty, where there is equal opportunity for all, to education, to work, to livelihood, and where there is social justice.

With the economic liberalisation in India, post 1991, vis-a- vis the globalization of the world economy some people entertain serious doubts about the application and efficacy of the directive Principles and the fundamental rights. The doubts have arisen with the increasing role of private enterprise and the decreasing role of the state, the fundamental rights would be violated more by the private enterprise than by the State and secondly the private enterprise itself will claim the fundamental rights as legal persons such as corporations, including the multi-national corporation. Doubts even being serious when provisions of social welfare

legislations are being curbed to befit liberalization. Labour laws in the country have started taking the bites in the guise of economic liberalization.

In recent times the Supreme Court and the High Courts have played an important role to remind the State the Constitutional objectives and have tried to suggest the State to create a balance between development and the constitutional goals by evolving the concept amongst others of sustainable development. The essence of the Constitution in which Justice, Social, Economic and Political shall inform all the institutions of national life, seems to have been out of place and proper introspect need to be done to keep intact the welfare approach of our Constitution.

It has been held in many decisions of the Supreme Court that when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble as the guiding star and the Directive Principles of State policy as the book of interpretation. The preamble embodies the hopes and aspiration of the people and directive Principles set out the proximate grounds in the governance of the country.

The Hon'ble Supreme Court of India has in a large number of cases held that a beneficial piece of legislation or welfare statues should receive a liberal and wider interpretation and not a narrow and technical one. Social, political, and economic justice has two facets, non-discrimination and affirmative action in favour of downtrodden. The framers of the Indian Constitution were very much conscious and aware of wide spread inequalities and disparity in the social fabric of the country as also of the gulf of the rich and poor. The reason why the goal of justice social, political and economical was given the place of pre-eminence in the preamble and the concept of equality enshrined in Part III and Part IV of the Constitution. The principal of equality cannot be completely taken away so as to leave citizen in the state of lawlessness. But the facet of the principal of equality can always be altered, especially to carry out the directive Principles of State policy. Legislative and affirmative measures taken by the State for providing reservation of seats and posts in the field of education and employment are reflection of affirmative action taken for achieving the goal of real equality. However, implementation and execution of such action have continuously faced road blocks at several stages. Those who have been benefited in the existing

system cried foul and created a bogey of violation of their legal and constitutional rights. Almost all the action taken by the State and its agencies for ameliorating conditions of have-nots of the society by providing reservation were subject to periodical judicial scrutiny. By and large the Courts approved the affirmative action of the State but on some occasion the policy of reservation or implementation thereof was found to be faulty and action taken by the government have been nullified or sliced by judicial intervention.

The purpose of the welfare state is to create economic equality or to assure equitable standards of living for all. The welfare states provides education, housing, sustenance, healthcare, pensions, unemployment insurance and care for old age people and are available to them as a matter of 'Right'. It also provides for public transportation, childcare, social amenities such as public parks and libraries, as well as many other goods and services. A fundamental feature of the welfare state is social insurance, a provision common to most advanced industrialized countries. Antipoverty programs and the system of personal taxation may also be regarded as aspects of the welfare state. In socialist countries the welfare state also covers employment and administration of consumer prices. Most advanced nations are not true welfare states, although many provide at least some social services or entitlement programs.

In Indian context, 'Welfare State' denotes establishment of political democracy, provision of social and economic justice and minimizing inequalities in income, status, facilities and opportunities. The concept is embodied in Part IV of the Indian Constitution, Directive Principal of State Policy. According to the Constitution, it is the duty of the government to follow these principles while making laws and thereby set the path towards a welfare State. The uniqueness about the concept in the Indian context is the Directive Principles containing the instructions to the government to establish a welfare State, is non justiciable and citizens cannot claim it as a right. This is because, India being developing and over populated country and it may not possible for welfare activities of the state reach every citizen of our country.

In later part of the 20th century, the wave of privatization and globalization came into existence in many countries. According to some the market

fundamentalists an argument is forwarded that the welfare state is a source of trouble and an anomaly that should be stopped. However some other market fundamentalists and economist argues, that the supremacy of the market which is proclaimed with ideological fervour is a dangerous mistake. It is stressed upon that the role of the state and it's regulating activities to be essential and believes that market mechanisms are unsuitable means for the solution of social problem. It demands some rethinking and reform of various Welfare institutions which is more essential in the developing country like India where dispararities exist between different segments of the population and different regions of the country, for shortening these gaps and moving towards a more balanced development of the nation.

However the welfare State is the greatest achievement of the 20th century and should be suitably adapted to the existing global condition as well as the peculiar situation of a particular country in order to lead toward overall prosperity of mankind.

"The Welfare State, Rule of Law and Natural Justice" in "democracy Equality and Freedom," "substantial agreement is in justice thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege.

Today the Government, is a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs contracts, licences, quotas, mineral rights etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which

derive from relationship to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare.[3]

The preamble to the Constitution envisages the establishment of a socialist republic. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave.

The Constitution declares the fundamental rights of a citizen and lays down that all laws made abridging or taking away such rights shall be void. That is a clear indication that the makers of the Constitution did not think fit to give our Parliament the same powers which the Parliament of England has. While the Constitution contemplates a welfare State, it also provides that it should be brought about by the legislature subject to the limitations imposed on its power. If the makers of the Constitution intended to confer unbridled power on the Parliament to make any law it liked to bring about the welfare State, they would not have provided for the fundamental rights. The Constitution gives every scope for ordered progress of society towards a welfare State. The State is expected to bring about a welfare State within the framework of the Constitution, for it is authorized to impose reasonable restrictions, in the interests of the general public.

Providing adequate means of livelihood for all the citizens and distribution of the material resources of the community for common welfare, enable the poor, the Dalits and tribes, to fulfill the basic needs to bring about a fundamental change in the structure of the Indian society which was divided by erecting impregnable walls of separation between the people on grounds of cast, sub-caste, creed, religion, race, language and sex. Equality of opportunity and status thereby would become the bed-rocks for social integration. Economic empowerment thereby is the foundation to make equality of status, dignity of person and equal opportunity a truism. The core of the commitment of the Constitution to the social revolution through rule of law lies in effectuation of the fundamental rights and directive principles as supplementary and complimentary to each other. The Preamble, fundamental rights and directive principles the trinity arc the conscience of the Constitution. Political democracy has to be stable. Socio-economic democracy

[3] '*Ramana Dayaram Shetty v. The International Airport* Authority of India', AIR 1979 SC 1628.

must take strong roots and should become a way of life. The State, therefore, is enjoined to provide adequate means of livelihood to the poor, weaker sections of the society the Dalits and tribes and to distribute material resources of the community to them for common welfare etc.

India could not be truly democratic unless the social revolution has established the just society. Without national unity, little progress could be made towards as a social and economic reform or democracy. Equally, without democracy and reform, India was unlikely either to preserve or to enhance its unity. Judicial system has particular important role to play. In a welfare state, liberty, equality and fraternity as the trinity and social welfare are close companions. They are complimentary and supplementary means to each other to create conditions for self expression and balanced growth so that every citizen becomes responsible and responsive for successful working of democracy.

The welfare state is not alien to Indian soil. In Kautilya's, Arthashastra, it was specifically provided that "In the happiness of the people lies the happiness of the king. What is good to the people is good (for the king). What is pleasant to the king is not good for him. What is good for the people alone is good for him." In Vedas and Epics, the duties of the king have diversely been mentioned that the king acts more than paternal and paternalistic in attitude. King Ashoka, Maurya, Akbar Srikrishna Devaraya and Kakatiyas etc. worked for the welfare of the people.

Dr. B.R. Ambedkar, while winding up the debates on the Draft Constitution, stated on the floor of the Constituent Assembly that the real reason and Justification for inclusion of the Directive Principles in the Constitution is that the party in power disregard of its political ideologies, will not sway away by its ideological influence but "should have due regard to the ideal of economic democracy which is the foundation and the aspiration of the Constitution." "Whoever may capture the governmental power will not be free to do what he likes to do in the exercise of the power. He cannot ignore them. He may not have to answer for the breach in a court of law, but he will certainly have to answer for them before the electorate when the next election comes." Dr. Ambedkar further stated that: "We must make our political democracy a social democracy as well.

Political democracy, cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. In politics we will be recognising the principles of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one vote one value. If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up".

The question involved bears wider constitutional dimensions Mahatma Gandhiji[4], the Father of the Nation, stated that: "Every human being has a right to live and, therefore, to find the wherewithal to feed himself and, where necessary, to clothe and house himself In a well ordered society the securing of one's livelihood should be, and is found to be, the easiest thing in the world. , the test of orderliness in a country is not the number of millionaires it owns, but the absence of starvation among its masses." "Working for economic equality means abolishing the eternal conflict between capital and labour. It means the levelling down of the few rich in whose hands is concentrated the bulk of the nation's wealth on the one hand, and the levelling up of the semi-starved, naked millions on the other A violent and bloody revolution is a certainty one day, unless there is a voluntary abdica- tion of riches and the power that riches give and sharing them for the common good."

Rabindranath Tagore poetically portrayed the plight of a poor farmer thus: "Bowed by the weight of centuries he leans, Upon his hoe and gazes on the ground, The emptiness of ages on his face, And on his back the burden of the world."

[4] Mahatma Gandhiji, '*Socialism of My Conception*', at p. 82-83

As quoted by B.K. Roy in his book[5] quoting Swami Vivekananda, speaking on social and spiritual justice, has said:

"I do not believe in a God who cannot give me bread here, giving me eternal bliss in heaven. Pooh, India is to be raised, die poor are to be fed, education is to be spread, and the evil of priest craft is to be removed more bread, more opportunity for every body It is well to remember what Vivekanand said about poor: "Feel, my children, feel, feet for the poor, the ignorant, the downtrodden, feel till the heart stops, the brain reals and you think you will go mad.

Robson[6] has stated: "The ideas underlying the welfare state are derived from many different sources. From the French Revolution came notions of liberty, equality and fraternity. From the utilitarian philosophy of Bentham and his disciples came the idea of the greatest number. From Bismarck and Beveridge came the concepts of social insurance and social security. From the Fabian Socialists came the principles of the public ownership of basic industries and essential services. From Tawney came a renewed emphasis on equality and rejection of avarice as the mainspring of social activity. From the Webbs came proposals for abolishing the causes of poverty and cleaning up the base of society."

"The basic aims of the welfare state are the attainment of a substantial degree of social, economic and political equalities and to achieve self-expression in his work as a citizen, leisure and social justice". It implies a redistribution of incomes for the achievement of basic standard of living for all.

In Encyclopedia Britannica[7], social welfare has been defined as "System of laws and institutions through which a government attempts to protect and promote the economic and social welfare of its citizens are usually based on various forms of social insurance against unemployment, accident, illness and old age."

[5] B.K. Roy, "Socio- Political Views of Vivekananda", at p. 52.
[6] Robson , '*Welfare State and Welfare Society'* , at p. 11
[7] *'Encyclopedia Britannica*', Vol.23, p.389,

Robert McNamara, President of the World Bank, quoted[8] “that society has the moral obligation to raise above the absolute poverty level those who are in absolute poverty."

Universal Declaration of Human Rights, 1948, assures in Article 1 that "All human beings arc born free and equal in dignity and rights."

Article 3 assures that "Everyone has the right to life, liberty and security of person".

Article 17 declares that "Everyone has the right to own property alone as well as in association with others."

Article 22 envisages that "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and resources of each State of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

Article 25 assures that "Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

Similarly are the social, civil, economic and cultural rights given in European Convention.

The Declaration on the Right to Development to which India is a signatory recognising that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from.

Article 1 assures that "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to

[8] Peter Singer, ‘*Practical Ethics*’, 1979,

participate in, contribute to, and enjoy economic, social cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

Article 2 assures right to active participation and benefit-of his right to development.

Article 3 enjoins the state as its duty to formulate proper national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there- from.

Article 3(1) states that it is a primary responsibility of the State to create conditions favourable to the realisation of the right to development.

Article 4(1) directs the State as its duty to take steps individually and collectively for providing facilities for full realisation of right to development.

Article 8(1) enjoins that the State should undertake nec- essary measures for the realisation of the right to development.

Article 10 says that steps should be taken to ensure the full exercise and progressive enhancement of the night to development, including the formulation, adoption and implementation of policy, legislative and other measures for legislative and executive measures."

Article 38 of the Constitution of India provides that "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. In particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but amongst groups of people residing in different areas or engaged in different vocations."

Article 39(b) directs the State "that the ownership and control of the material resources of the community are so distributed as best to subserve the common good".

All human rights derive from dignity and worth in man. Democracy blossoms the person's full freedom to achieve excellence. The socioeconomic content in directive principles is all pervasive to make the right to life meaningful to all Indian citizens.

The founding fathers of the Constitution raised three grand goals for India in the Constitution : (i) Achieving a more equitable society through a transformation they called a social revolution; (ii) Preserving and enhancing national unity and integrity; and (iii) Establishing the spirit as well as the institutions of democracy. India could not be truly democratic unless the social revolution has established the just society. Without national unity, little progress could be made towards as a social and economic reform or democracy. Equally, without democracy and reform, India was unlikely either to preserve or to enhance its unity. Judicial system has particular important role to play. In a welfare state, liberty, equality and fraternity as the trinity and social welfare are close companions. They are complimentary and supplementary means to each other to create conditions for self expression and balanced growth so that every citizen becomes responsible and responsive for successful working of democracy.[9]

The framers of our Constitution did not, however, want to frame for the Sovereign Democratic Republic which was to emerge from their labours a Constitution in the strict legal sense. They were aware that there were other Constitutions which had given expression to certain ideals as the goal towards which the country should strive and which had defined the principles considered fundamental to the governance of the country. They were aware of the events that had culminated in the Charter of the United Nations. They were aware that the Universal Declaration of Human Rights had been adopted by the General Assembly of the United Nations, for India was a signatory to it. They were aware

[9] *Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde*, 1995 SCC, Supl. (2) 549.

that the Universal Declaration of Human Rights contained certain basic and fundamental rights appertaining to all men. They were aware that these rights were born of the philosophical speculations of the Greek and Roman Stoics and nurtured by the jurists of ancient Rome. They were aware that these rights had found expression in a limited form in the accords entered into between the rulers and their powerful nobles, as for instance, the accord of 1188 entered into between King Alfonso IX and the Cortes of Leon, the Magna Carta of 1215 wrested from King John of England by his barons on the Meadow of Runnymede and to which he was compelled to affix his Great Seal on a small island in the Thames in Buckinghamshire - still called Magna Carta Island, and the guarantees which King Andrew II of Hungary was forced to give by his Golden Bull of 1822. They were aware of the international treaties of the midseventeenth century for safeguarding the right of religious freedom and the rights of aliens. They were aware of the full blossoming of the concept of Human Rights in the writings of the "philosophes" such as Voltaire, Rousseau, Diderot, Rayal, d'Alembert and others, and of the concrete expression given to it in the various Declarations of Rights of the American Colonies (particularly Virginia) and in the American Declaration of Independence. They were aware that in 1789, during the early years of the French Revolution, the French National Assembly had in "The Declaration of the Rights of Man and of the Citizen" proclaimed these rights in lofty words and that Revolutionary France had translated them into practice with bloody deeds. They were aware of the treaties entered into between various States in the nineteenth century providing protection for religious and other minorities. They were aware that these rights had at last found universal recognition in the Universal Declaration of Human Rights. They were aware that the first ten Amendments to the Constitution of the United States of America contained certain rights akin to Human Rights. They knew that the Constitution of Eire contained a chapter headed "Fundamental Rights" and another headed "Directive Principles of State Policy". They were aware that the Constitution of Japan also contained a chapter headed "Rights and Duties of the People". They were aware that the major traditional functions of the State have been the defence of its territory and its inhabitants against external aggression, the maintenance of law and order; the administration of justice, the levying of taxes and the collection of revenue. They were also aware that increasingly, and particularly in modern times, several States have assumed

numerous and wide ranging functions, especially in the fields of education, health, social security, control and maintenance of natural resources and natural assets, transport and communication services and operation of certain industries considered basic to the economy and growth of the nation. They were also aware that section 8 of Article 1 of the Constitution of the United States of America contained "a welfare clause" empowering the federal government to enact laws for the overall general welfare of the people. They were aware that countries such as the United States, the United Kingdom and Germany had passed social welfare legislation.[10]

The framers of our Constitution were men of vision and ideals, and many of them had suffered in the cause of freedom. They wanted an idealistic and philosphic base upon which to raise the administrative superstructure of the Constitution. They, therefore, headed our Constitution with a preamble which declared India's goal and inserted Parts III and IV in the Constitution.

Ordinarily the legislature represents the will of the people and works for their welfare but there can be an exceptional situation where the legislature though elected by the people may violate the civil liberties and rights of the people. It is the solemn duty of courts to uphold the civil rights and liberties of the citizens against executive or legislative invasion, and the court cannot sit quite in this situation, but must play an activists role in upholding civil liberties and the fundamental rights in Part III. Courts are the guardian of the rights and liberties of the citizens, and they will be failing in their responsibility if they abdicate this solemn duty towards citizens.

Constitution of India, primarily regarded as a social document. The study of Constitutionalism in the yester years will review how far it has been successful in achieving the goal of establishing a Welfare State. The present research work is aimed at bringing home the conclusion that where our Constitutional system was successful and where it failed and to find out the present direction for the policy makers and the people.

[10] *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*, AIR 1986 SC 1571.

Constitutionalism comes from political philosophy and takes a position that a government, in order to be legitimate, must have legal limits on its powers. Constitutionalism means limited government or limitation on government. It is antithesis of arbitrary powers. Constitutionalism recognizes the need of government with powers but at the same time insists that limitation be placed on the powers. The antithesis of constitutionalism is despotism. It envisages checks and balances by restraining the power of the government organ by not making them uncontrolled and arbitrary. Thus the government's authority ends up depending upon actually staying within those limits. A government which goes beyond its limit loses it authority and legitimacy.

The principal of constitutionalism is now a legal principle which requires control over the exercise of the governmental powers to ensure that it does not destroy the democratic principle upon which it is based. These democratic principles include the protection of the fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of power, it requires a diffusion of power, necessitating different independent centers of decision making. The principle of constitutionalism underpins the principle of legality which requires the court to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statues.

The constitutionalism or constitutional system of Government abhors absolutism. It is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provision of the Constitution itself. The protection of fundamental constitutional rights through the common law is the main feature of common law constitutionalism. Moreover when our theories have been glorified with such emblazonment why in execution part it is so sterile.

The Constitution bears the imprint of the philosophy of our National Movement for Swaraj. That philosophy was shaped by two pre-eminent leaders of the Movement- Mahatma Gandhi and Jawaharlal Nehru. Mahatma Gandhi gave to the Movement the philosophy of Ahimsa. Two essential elements of his Ahimsa are : (1) equality; and (2) absence of the desire of self-acquisition (Aparigrah). He

declared that "to live above the means befitting a poor country is to live on stolen food." [11]

Mahatma Gandhi also said : "I consider it a sin and injustice to use machinery for the purpose of concentration of power and riches in the hands of the few. Today the machinery is used in this way."[12]

While Mahatma Gandhi laid stress on the ethics of the Movement, Jawaharlal Nehru enriched its economic content. In his presidential address to the Lahore Congress Session of 1929 he said : "The philosophy of socialism has gradually permeated the entire structure of the society the world over and almost the only point in dispute is the phase and methods of advance to its full realisation. India will have to go that way too if she seeks to end her poverty and inequality though she may evove her own methods and may adopt the ideal to the genius of her race."[13]

Emphasising the intimate and inseverable connection between national liberation and social liberation, he said : "(I)f an indigenous Government took place of the foreign government and kept all the vested interests in tact, this would not be even the shadow of freedom. India's immediate goal can only be considered in terms of the ending of the exploitation of her people. Politically it must mean independence and cession of the British connection; economically and socially it must mean the ending of all special class privileges and vested interests. [14]

The philosophy of Mahatma Gandhi was rooted in our ancient tradition; the philosophy of Jawaharlal Nehru was influenced by modern progressive thinking. But the common denominator in their philosophies was humanism. The humanism of the Western Enlightenment comprehended mere poltical equality, the humanism of Mahatama Gandhi and Jawaharlal Nehru was instinct with social and economic

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[11] Dr. P. Sitaramaya, "*The History of the Indian Congress"*, Vol. I, p- 386.
[12] Jawaharlal Nehru, '*Discovery of India*', Signet Press, 1956, p- 432.

[13] R.D. Agarwala, '*Economic Aspect of a Welfare State in India*', page 32.

[14] Ibid.

equality. The former made man a political citizen, the latter aims to make him a 'perfect' citizen. This new humanist philosophy became the catalyst of the National Movement for Swaraj. In 1929 the All India Congress Committee resolved that the great poverty and misery of the Indian people was due also "to the economic structure of the society."[15]

The Karachi Congress resolution, on fundamental rights and economic programme revised in the All India Congress Session of Bombay in 1931 declare that in order to end the exploitation of the masses political freedom must include economic freedom of the starving millions. [16]

It provided that "property was not to be sequestered or confiscated "save in accordance with law" It also provided that the State shall own or control the key industries and services, mining resources, railways waterways, shipping and other means of public transport." According to the Congress Election Manifesto of 1945, "the most vital and urgent of India's problems is how to remove the curse of poverty and raise the standard of masses. It declared that for that purpose it was "necessary...to prevent the concentration of wealth and power in the hands of individuals and groups, and to prevent vested interests inimical to society from growing." [17]

It proposed acquisition of the land of intermediaries on payment of equitable compensation. In November 1947 the All India Congress Committee Session at Delhi passed a resolution to the effect that the object of the Congress should be to secure "an economic structure which would yield maximum production without the creation of private monopolies and the concentration of wealth." It was thought that such "social structure can provide an alternative to the acquisition of economic and political equality."[18]

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[15]' *Indian National Congress Resolutions on Economic Policy, Programme and Allied Matters'*, 1924-1969, p. 3.
[16] Supra.
[17] Supra.
[18] Supra.

The Constituent Assembly finalized the Constitution on November 26, 1949. The Constitution of India came into force on January 26, 1950.

Looking back at the working of the Constitution of India in the last 62 years as a law student certain question comes into the mind as to whether the Indian Constitution is a social document, or for the matter of fact that whether the preambular promises are the goals of the Constitution, whether the fundamental rights are means to achieve the goal, whether the directive Principles are means to achieve the goal, whether equality embodies social justice, whether the judiciary has strengthened the idea of social justice, whether the present directives is in furtherance of the Constitutional goals, and also that in the age of globalization liberalization and privatization, whether post liberalization policy in India has made an impact on the social welfare concept of the Indian Constitution. A question further arises that whether the Constitutionalism of the Indian Constitution have undergone a change, and whether the Constitution needs a change.

The work in the forgoing chapters in the research is an attempt to find for answers.

The research is doctrinaire in nature. The study is made on the basis of test books and reference book with regard to the subject, along with the whole Constitution touching various topics under Fundamental Rights and Directive Principles and also on the basis legislative initiative, by the governments and the Union and State, government documents, articles, press reports, journals, and various reports of committees and commissions, set up relating to the subject. The main study is with reference with the judicial decisions of the Supreme Court as to how the Supreme Court has dealt with the situation relating to social justice and the preambular promises through the days. The ideals of the making of the Constitution and the historical retrospect are studied in detail. Various case laws effecting the changes in the constitutionalism is to be gone into details. It will be the type of academic analysis and legal analysis as undertaken by practicing

lawyers or judges. As for a practicing lawyer this will be a real and a well defined situation requiring an immediate answer to the question. As a legal scholar the study more or less will be considered hypothetical and the purpose is to undertake a more in depth analysis of the constitutionalism of the Constitution of India.

The study is intended to look back and have a revisit to the spirit of the Constitution of India and to analysis whether we are adhering to the spirits and foundations or whether there has been a departure from the ideal in which the Constitution of India was found. If it is in the affirmative than to what extend and whether there is a need to resort to the original ideals.

CHAPTER 2.

HISTORICAL RETROSPECT.

People write and adopt a constitution because they want to make a fresh start in their system of governance. The Constitution represents the break from the past, yet it is influenced from the past in what it accepts and what it rejects. The Constitution of India is no exception in that regard. People had a system of governance before the Constitution was written and adopted. The system has very much influenced its contents. Its contents can be appreciated and understood in the light of that system.

All Constitutions are the heirs of the past as well as the testator of the future. The very fact that the Constitution of the Indian Republic is a product not of a political revolution but of the research and deliberation of a body of eminent representatives of the people who sought to improve upon the existing systems of administrations, makes a retrospect of the constitutional development indispensable for a proper understanding of this Constitution.[1] No one will deny the truth of the above statement that if any one seeks to study the law, constitutional or other, of a country, a knowledge of the historical process which led to the present form is indispensible for correct insight and understanding of the subject.

But how far we should go into the background of the system? Perhaps as far as the origin and history of the people themselves. That would of course be a useful exercise to understand the relationship of the people to their laws and the Constitution. But that is an enormously difficult, almost impossible exercise in India because of its long history associated with foreign invasions and rules of which all links are not even available.

[1] D.D. Basu-*"Introduction to the Constitution of India"*, p.3 (3rd ed. 1946)

2.1.CONCEPT OF RIGHTS IN ANCIENT INDIA.

Religion has played a very important role in the human civilization. The Upanishads teach us that India has sought in religion not an absolute or finished dogma to believe in, but a method and means to pierce the veil that hides every present meaning and mystery of existence. "The earnestness of the search for truth is one of the delightful and commendable features of the Upanishads".[2]

Our earliest literary source is the Rig Veda, part of which were originally composed prior to 1000 BC. The remaining Vedic Literature, The Sama Veda, The Yajur Veda and The Atharva Veda is of later date. The historical reconstruction of Arian Life and institution is based on this literature. The two epics, The Ramayana and The Mahabharata are concerned with events which took place between 1000 and 700 BC.

During the earlier Vedic period instructions remained entirely orally. However the method of memorizing was highly systematic. There were no regular legal institution at this stage. Custom was law and the arbiters were the kings and the chief priest, perhaps advised by certain elders of the community. Variety of theft, particularly cattle-stealing, was the commonest offences. Punishment for homisidewas based on wergild, and the usual payment for killing a man was a hundred cows. Capital punishment was a latter idea. Trial by ordeal was practiced, the culprit having to prove his innocence by placing his tounge on a heated axe-head. In later Vedic sources there are reference to problems relating to land dispute and inheritance. A tendency towards primogeniture can be noticed, but it did not survive. It was also at this stage that caste consideration entered into legal practice, the higher caste became more lightly punished. [3]

[2] Robert Ernest Hume "*The Thirteen Principal Upanishads*" at p.30

[3] Romila Thapar, '*The History of India*', Vol. I, Penguin Books.

The concept that an entitlement to rights comes from proper performance of duties towards the society was at the centrality of ancient Indian jurisprudence. If everyone performs his duty, everybody's rights would be automatically protected.

"The source of right is duty. If we all discharge our duties, rights will not be far to seek. If leaving duties unperformed we run after rights, they will escape us like will-o'-the-wisp, the more we pursue them, the farther they will fly".[4]

As specifically declared in Ishopanishad, "Desire to live for hundred years, doing selfless work to wipe other's tears. There is no better way to gain freedom". The shastrik charter of equality was accommodating welfare rights and policies. Rig Veda entailed, "No one is superior or inferior. All are brothers. All should progress collectively". "Let us protect each other; let us dine together; let us do illustrious needs together".[5]

In Mahabharatha, it is stated, "The king should look after the welfare of the helpless, the aged, the blind, the lunatics, widows, orphans, those suffering from diseases and calamities, pregnant women, by giving them food, lodging, clothing and medicine according to their needs". Vasishta has prescribed that the soldiers' wives who have no other means of livelihood, shall be given subsistence. Not only the State but the individuals were also addressed with the duty to do good to others and eschew harms to them.

Saraswati Vilasa ordains that the king shall take cognizance of only those offences classified as aparadhas. According to Narada, arrest of any person should be under an express or implied authority of the ruler. Unauthorized arrests could be broken without penalty. Kautilya permitted arrest of persons on reasonable

[4] Subhash C. Kashyap, *"Blueprint of Political Reforms"*, Shipra Publications, Delhi, p. 80.

[5] Ishwara Bhatt, *"Fundamental Rights: A Study of their interrelationship"*, 2004, Eastern Law House, New Delhi, p. 57.

suspicion of high crimes. Immunity against self-incrimination was the general principle. The above- mentioned text corresponds explicitly to present days Fundamental Right provided under Article 20 of the Constitution.

Rama Jois opines that after careful examination of the ancient legal and constitutional system, it is evident that India has established a duty based society.[6]

Religion was an all- pervasive phenomenon in ancient India. It was believed that multitudes of religion were like the beads adorning the necklace of God; all were equally important because God existed in every spirit and force of human welfare.[7]

An attitude of objectivity, logic and humanity and an approach of understanding, co-existence and tolerance permeated the secular spirit of ancient Indian thoughts.[8]

Professional lawyers exist at least from the time of Manusmriti and perhaps even earlier according to Jayswal. He says "Manu, VIII, 169" shows that professional lawyers were already in time of Manava Code. The verse says that the person who suffers for the sake of others are witnesses, sureties and the judges, but those who are benefited by the legislation are the kings (who get court fees) the creditor (who gets the decree), the merchant (the speculator who supplies money for defense to the defendant and acquire his property in return) and the Brahmin. This Brahmin is the Brahmin who advised each party on law.

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[6] M. Rama Jois, '*Seeds of Modern Public Law in Ancient Indian Jurisprudence'*, p-1

[7] Romila Thapar, *"A History of India"*, Vol. 1, 1996 Rep. 1991, Penguin Books, pp. 44-45.

[8] Shankar Dayal Sharma, *"Secularism in the Indian Ethos in Dharma- A Legal Discourse*", (I.B.R.), vol. XX (3 &4), 1993 Supp, p. 107.

There seems to be a controversy as to whether there were lawyer in Ancient India. According to Rocher, There can be no doubt that parties to a law suit in ancient Hindu law had a right to be represented by other party.[9]

This definition of Vidya-Dharna with its history going back to the Dharma Sutras, pre supposes the existence of the profession much earlier.[10]

All these sources are clear evidence of the fact that since times immemorial, the concept of equality and prohibition of any kind of discrimination existed in India which has now been granted as the status of Rights under various provisions respectively, under the Indian Constitution. This chapter is an effort to peek into the past period and to assert the rights prevailing at that period and the process in which they were guaranteed.

2.1.1. DHARMA.

The word `Dharma' or `Hindu Dharma' denotes upholding, supporting, nourishing that which upholds, nourishes or supports the stability of the society, maintaining social order and general well-being and progress of man kind; whatever conduces to the fulfillment of these objects is Dharma, it is Hindu Dharma and ultimately `Sarva Dharma Sambhava'.

In contra distinction, Dharma is that which approves oneself or good consciousness or springs from due deliberation for one's own happiness and also for welfare of all beings free from fear, desire, disease, cherishing good feelings and sense of brotherhood, unity and friendship for integration of Bharat. This is the

[9] Ludu Rocher, '*Lawyers in Classic Hindu Law*', Indian Bar Review, Vol-XIII (3 and 4), 1986, p-353.

[10] K.P. Jayaswal, '*Manu and Yajnavalkya, A comparison and a Contrast, A Treatise on the Basic Hindu Law*', p-288

core religion which the Constitution accords protection. Dharma, according to the old concept, is a purely secular institution. Dharma is that which sustains the society.

V.D. Mahajan[11], in Chapter on "Secularism, its impact on law and life in India" it is stated that presonal law is a secular institution and has to be based on rational and secular considerations. This position is consistent with the real, ancient, pristine view of Hindu law. Dharma, according to the old concept, is a purely secular institution. Dharma is that which sustains the society. Dharma is that by which people at large are held together.

It is this stress on the identification of Dharma with Truth and social well being, Duty and Service that impelled Yudhisthira to express his own ambition, as Dharmaraja, in the words: “I seek no kingdoms nor heavenly pleasure nor personal salvation, since to relieve humanity from its manifold pains and distresses is the supreme objective of mankind”.

The Brhadaranyakopanisad identified Dharma with Truth, and declared its Supreme status: "There is nothing higher than dharma. Even a very weak man hopes to prevail over a very strong man on the strength of dharma, just as (he prevails over a wrong-does) with the help of the King. So what is called Dharma is really Truth. Therefore, people say about a man who declares the truth that he is declaring dharma and about one who declares dharma they say he speaks the truth. These two (dharma and truth) are this".

A similar thought is expressed in the Ayodhya-kanda of the Valmiki Ramayana, in verse-10. “From the ancient times the constitutional system depends on the foundantion of Truth and social sympathy. Truth is the fundamental basis of the State, indeed the whole universe rests on Truth”.

The Rig Veda states that the Law and Truth are eternal - born of sacrifice and sublimation: “The Sruti, the Smriti, the approved usages, that which is

[11] *"Chief Justice Gajendragadkar" - his life, ideas, papers and addresses”* by V.D. Mahajan

agreeable to one's in most self or good conscience, and has sprung from due deliberation, are ordained as the foundation of Dharma".

Taittiriya Samhita states: "Dharma constitutes the foundation of all affairs in the world. People respect one who adheres to Dharma. Dharma insulates (man) against sinful thoughts and actions. Everything in this world is founded on Dharma". Dharma, therefore, is considered supreme.

Jaimini states: Dharma is that which is indicated by the vedas as conducive to the highest good.

In the Vana Parva of the Mahabharata, Dharma is for the stability of society, the maintenance of social order and the general well-being and progress of humankind. Whatever conduces to the fulfillment of these object is Dharma, that is definite.

Therefore, Dharma embraces every type of righteous conduct covering every aspect of life essential for the sustenance and welfare of the individual and the society and includes those rules which guide and enable those who believe in God and heaven to attain moksha (eternal bliss). Rules of Dharma are meant to regulate the individual conduct, in such a way as to restrict the rights, liberty, interest and desires of an individual as regards all matters to the extent necessary in the interest of other individuals, i.e., the society and at the same time making it obligatory for the society to safeguard and protect the individual in all respects through its social and political institutions. Shortly put, Dharma regulates the mutual obligations of individual and the society. Therefore, it was stressed that protection of Dharma was in the interest of both the individual and the society. A `State of Dharma' was required to be always maintained for peaceful co-existence and prosperity of all. Though Dharma is a word of wide meaning as to cover the rules concerning all matters such as spiritual, moral and personal as also civil, criminal and constitutional law, it gives the precise meaning depending upon the context in which it is used. When Dharma is used in the context of duties of the individual and powers of the King (the State), it means constitutional law [Rajadharma]. Likewise when it is said that Dharmarajya is necessary for the peace

and prosperity of the people and for establishing an egalitarian society, the word Dharma in the context of the word Rajya only means law, and Dharmarajya means Rule of Law and not rule of religion or a theocratic State. Dharma in the context of legal and constitutional history only means Vyavahara-dharma and Rajadharma evolved by the society though the ages which is binding both on the king [the ruler] and the people [the ruled].[12]

The concept of `dharma' has been explained by Justice M. Rama Jois in his book[13] as: "Mahabharata contains a discussion of this topic. On being questioned by Yudhistira about the meaning and scope of Dharma, Bhishma stated: It is most difficult to define Dharma. Dharma has been explained to be that which helps the upliftment of living beings. Therefore that which ensures welfare (of living beings) is surely Dharma. The learned rishis have declared that which sustains is Dharma.

Prof. Om Prakash[14] has stated that the concept of dharma aims to maintain orderly society regarding every human being as the creation of God and treating him on a footing of equality. The last rehyme of the Rig Veda throws light on the Rig Veda concept of dharma laying down "that all human beings should move together, speak together and their minds be of one accord". Samgachhdhwam Sambaddwam Sambo Manasi Sanatnam Deva Bhagan Yathaturbe Sanjananam Upasate - Rv.X, 191, 2.] At page 5, he states that the concept of dharma was not static. Its content changes with the changing contexts of time, place and social environment. Dharma is that which holds together all living beings in a harmonious order. Virtuous conduct contribute to social welfare and vice is its bane. In the Sutra literature both these aspects of dharma are discussed under four sections which he elaborated in his book. At page 8, the author states that "the above discussion makes it clear that dharma in India does not force men into virtue but trains them for it. It is not a fixed Code of mechanical rules but a living spirit which grows and moves in response to the development of the society. Even the

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[12] The Concept of *"Dharma"* as quoted by the Supreme Court in *Shri A.S. Narayana Deekshitulu v. State Of Andhra Pradesh,* AIR 1996 SC 1765,

[13] Justice M. Rama Jois, *"Legal and Constitutional History of India"*, Vol. I, at pages 1 to 4

[14] Prof. Om Prakash, *"Religion and Society in Ancient India"*, 1985 Edition

State in India is a swervant of dharma. It was not above morality. Its function is not to alter or annul dharma but only to administer it. Dharma is essential because it promotes individual security and happiness as well as the stability of the social order".

Dr. Shankar Dayal Sharma,[15] in his Centenary Speech of Swami Vivekananda in the Parliament of Religions, he emphasised "time-honoured philosophy of oneness and harmony within pluralism, the recognition of, respect for, and acceptance of different paths of logical and intuitive access to Absolute Truth". He reiterated what Swami Vivekananda had said one century ago at Chicago: "We believe not only in universal toleration, but we accept all religions as true" and concluded that "if India is to grow to her full potential as a strong, united, prosperous nation, a nation attuned to the highest moral and ethical values, true to the genius of her cultural and spiritual heritage, we shall all have to strive each day to build harmony, justice and creative endeavour. Indeed, in a very real way, it is our duty so to strive". He exhorted the youth of the country to be the vanguard of that mission.

The word `Dharma' or `Hindu Dharma' denotes upholding, supporting, nourishing that which upholds, nourishes or supports the stability of the society, maintaining social order and general well-being and progress of man kind; whatever conduces to the fulfillment of these objects is Dharma, it is Hindu Dharma and ultimately `Sarva Dharma Sambhava'.

In contra distinction, Dharma is that which approves oneself or good consciousness or springs from due deliberation for one's own happiness and also for welfare of all beings free from fear, desire, disease, cherishing good feelings and sense of brotherhood, unity and friendship for integration of Bharat. This is the core religion which the Constitution accords protection.

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[15] *"Dharma - a Legal Discipline"* - Select Speeches and Writings of Dr. Shankar Dayal Sharma, the present President of India [Indian Bar Review Vol.XX (3&4) 1993 Special Issue] in his Centenary Speech of Swami Vivekananda in the Parliament of Religions,

In a concurring judgment[16] Justice Hansaria aptly pointed out difference between 'religion' and 'dharma' and observed thus: "Our dharma is said to be 'Sanatana' i.e. one which has eternal values, one which is neither time- bound nor space-bound. It is because of this that Rig Veda has referred to the existence "Sanatan Dharmani". The concept of 'dharma', therefore, has been with us for time immemorial."

The word is derived from the root 'Dh.r' which denotes: 'upholding', 'supporting', 'nourishing' and 'sustaining'. It is because of this that in Karna Parva of the Mahabharata, Verse 58 in Chapter 69 says: "Dharma is for the stability of the society, the maintenance of social order and the general well-being and progress of humankind. Whatever conduces to the fulfilment of these objects is Dharma; that is definite." In Verse 9 of Chapter 5 in the Ashrama Vasika Parva of the Mahabharata, Dhritrashtra states to Yudhisthira: "The State can only be preserved by dharma under the rule of law."

The perennial truths, rules, and laws that help maintain peace and harmony in one's individual and in the community life constitute dharma. It applies for all times and in all places. Social laws and even national constitutions devoid of such a dharma will lead a society towards an inevitable decline. In the practice of dharma, one is advised to shed the veil of ignorance and practise truthfulness in one's thoughts, speech, and actions. How can dharma be secret, having revelation as its source? Withholding nothing, all the great sages in the world shared their knowledge with humanity. In the Bhagavad Gita, the Bible, Koran, and Dhammapada knowledge, like the sun, shines for all.

It is because of the above that if one were to ask "What are the signs and symptoms of dharma?", the answer is: that which has no room for narrow-mindedness, sectarianism, blind faith, and dogma. The purity of dharma, therefore, cannot be compromised with sectarianism. A sectarian religion is open to a limited

[16] *A.S. Narayana Deekshitulu v. State of A.P.*, (1996) 9 SCC 548,

group of people whereas dharma embraces all and excludes none. This is the core of our dharma, our psyche."[17]

Justice M. Rama Jois in his book[18] noticed the Ancient Indian Texts in the following words:

SAMANI PRAPA SAHA VONNBHAGA
SAMANE YOKTRAY SAHA WO YUNISM
ARAH NABHIMIV ABHITE:

"All have equal rights in articles of food and water. The yoke of the chariot of life is placed equally on the shoulder of all. All should live together with armony supporting one another like the spokes of a wheel of the chariot connecting its rim and the hub. (Atharvanaveda-Samjnana Sukta)".

Thus, the right to equality of all human beings has been declared in the Vedas, which are regarded as inviolable. In order to emphasize the dignity of the individual, it was said that all are brothers as all are the children of God. No one is inferior or superior. Similarly the Atharvanaveda stressed that all have equal right over natural resources and all were equally important like spokes in a wheel. Both the Rigveda and Atharvanaveda declared that co-operation between individuals in necessary for happiness and progress. It is also of utmost importance to note that right to equality and made a part of "Dharma" long before the State came to be established.

This declaration is similar to the declaration of equality made in the Rigveda.

After the establishment of the State, the obligation to protect the right to equality was cast on the Rulers. It was made a part of the Rules of Raja Dharma, the Constitution Law.[19]

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[17] ibid

[18] *'Human Rights and Indian Values'* Justice M. Rama Jois

Our Constitution-makers, who included some of the most eminent jurists in the country, could not have been ignorant of the teachings of our own ancient jurists, Manu and Parashara, who had pointed out that the laws of each age are different. In support of this view, the late Dr. Ganga Nath Jha, in his treatise on Hindu Law, has cited the original passages from Manu and Parashara, the English translation run as follows: "The fundamental laws (imposing fundamental duties or conferring fundamental rights) differ from age to age; they are different in the age known as krita from those in the dvaapara age, the fundamental, laws of the kali age are different from all previous ages, the laws of each age conform to the distinctive character of the age (yuga roopa nusaara tah)".

In other words, even our ancient jurists recognised the principle that one generation has no right to down future generations to its own views or laws even on fundamentals. The fundamentals may be different not merely as between one society and another but also as between one generation and another of the same society or nation. [20]

The theory of a legally sovereign unquestionable authority of the King, based on physical might and victory in battle, appears to have been developed in ancient India as well, by Kautaliya, although the concept of a Dharma, based on the authority of the assemblies of those who were learned in the dharmashastras, also competed for control over exercise of royal secular power. High philosophy and religion, however, often seem to have influenced and affected the actual exercise of sovereign power and such slight Jaw-making as the King may have attempted.

The ideal King, in ancient India, was conceived of primarily as a Judge deciding cases or giving orders to meet specific situations in accordance with the Dharma Shastras. It also appears that the actual exercise of the power to administer justice was often delegated by the King to his judges in ancient India. Indeed,

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[19] ibid

[20] *Kesavananda Bharati v. State of Kerala,* AIR 1973 SC 1461

according to some, the theory of separation of powers appears to have been carried so far that the King could only execute the legal sentence passed by the Judge.[21]

Semetic prophets, as messengers of God, also became rulers wielding both spiritual and political temporal power and authority although to Jesus Christ, who never sought temporal power, is ascribed the saying : "render unto Caesar the things that are Caesar's and to God things that are God's". According to the theory embodied in this saying, spiritual and temporal powers and authorities had to operate in different orbits of power altogether. Another theory, however, was that the messenger of God had been given the sovereign will of God Almighty which governed all matters and this could not be departed from by any human authority or ruler. In the practical administration of justice, we are informed, Muslim caliphs acknowledged and upheld the jurisdiction of their Kazis to give judgment against them personally. There is an account of how the Caliph Omar, being a defendant in a claim brought by a jew for some money borrowed by him for purposes of State, appeared in person in the Court of his own Kazi to answer the claim. The Kazi rose from his seat out of respect for the Caliph who was so displeased with this unbecoming conduct that he dismissed him from office.[22]

2.1.2. VEDAS OR SHRUTIS.

According to Yajnavalkya, the sources of Hindu Dharma are those enumerated in the following text:- *Shruti smritih sadacharah swasya cha priyamatmanah samyakasankalpajah kamo dharmmoolmidang smrittam.* The sources of Dharma are described to be (1) the Vedas, (2) the Smritis, (3) the practices of good men, (4) what is acceptable to one's own soul, and (5) the desire produced by a virtuous resolves.

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[21] K.P. Jayaswal in "Manu and Yajnavalkya"-*A Basic History of Hindu Law,* 1930 Edn. p. 82

[22] Sir A. Rahim's *"Muhammadan Jurisprudence"* 1958 p. 21

While interpreting the Smritis one difficulty which has to be encountered is the uncertainty about their chronology. Another difficulty felt by many jurists while interpreting them is the existence of conflicting texts, sometimes in the same Smriti. This appears to be on account of the successive changes in the views of society, which may have taken place over several centuries. Very often the prevailing practices and customs at a given point of time might be quite different from those obtaining some centuries before that time Maxims which have long ceased to correspond with actual life are reproduced in subsequent treatises, either without comment or with a non-natural interpretation. "Extinct usages are detailed without a suggestion that they have become extinct from an idea that it is sacrilegious to omit anything that has once found a place in the Holy Writ. Another inference is also legitimate that while some Smritis modified their rules to provide for later usages and altered conditions of society, other Smritis repeated the previous rules which had become obsolete, side by side with the later rules. [23]

While interpreting the ancient texts of Smritis and Commentaries on Hindu Dharmasastra, we should bear in mind the dynamic role played by learned commentators who were like Roman Juris Consults. The commentators tried to interpret the texts so as to bring them in conformity with the prevailing conditions in the contemporary society.

" From the high spiritual flights of the Vedanta philosophy, of which the latest discoveries of science seem like eachoes, to the low ideas of idolatry with its multiflavour, mythology, the agnosticism of the Buddists and the atheism of the Jains, each and all have a place in the Hindu's religion. Here it may be said that these laws as laws may be without end, by they must have had a beginning. The Vedas teach us that creation is without beginning or end, Science is said to have

[23] Mayne's Treatise on '*Hindu law and Usage*', 1953 Edition, pp 20-21.

proved that the sum total of cosmis energy is always the same. Then, if there was a time when nothing existed where was all these manifested energy."[24]

The Rig Veda states that the Law and Truth are eternal - born of sacrifice and sublimation: The Sruti, the Smriti, the approved usages, that which is agreeable to one's in most self or good conscience, and has sprung from due deliberation, are ordained as the foundation of Dharma.

The last rehyme of the Rig Veda throws light on the Rig Veda concept of dharma laying down "that all human beings should move together, speak together and their minds be of one accord". [25]

The Rig Veda enjoins : "Behave with others as you would with yourself. Look upon all the living beings as your friends, for in all of them there resides one soul. All are but a part of that universal soul. A person who believes that all are his soulmates and loves them all alike never feels lonely. Divine qualities of such a person such as forgiveness, compassion and service, will make him lovable in the eyes of his associates. He will experience intense joy throughout his life".

The basis of Hindu Dharma is two-fold. The first is the Vedas and the second are the Agamas. Vedas, in turn, consist of four texts, namely, Samhitas, Bramhanas, Aranyakas and Upnishads.

Samhitas are the collections of mantras. Bramhanas explain the practical aspects of the rituals as well as their meanings. They explain the application of the mantras and the deeper meanings of the rituals. Aaranyakas go deeper into the mystic meanings of the rituals, and Upnishads present the philosophy of the Vedas.

From the point of view of content, they are viewed as Karma Kanda (sacrificial portion) and Jnana Kanda which explain the philosophical portion. The major portion of the Vedic literature enunciates the vedic sacrifices or the rituals

[24] Swami Vivekananda, *"Parliament of Religion, Chicago"*, on 19th September, 1893

[25] Prof. Om Prakash ,*"Religion and Society in Ancient India"* 1985 Edition

which inevitably cultivate in the philosophy of the Upanishads. That is why the Upanishads are called Vedantha or culmination of the Vedas.

The essence of the Vedic religion lies in Vedic sacrifices which not only purify the mind and the heart of those who participate in the sacrifices but also reveal the true and unfragmented nature of the Karman (Action). Erroneously, Western scholars explained the Vedic sacrifices in terms of either sympathetic magic or an act of offering the fire to Gods emulating the mundane act of offering gifts. Thus, for them Vedic religion is a primitive religion and Vedic Gods are simply representing insentient departments of Nature; but it is not so. On the contrary, the term used for Vedic Gods is "Deva" which literally means "the shining ones". The adorable ones - bestowing grace on the worshippers. The root `Div' also means that Devas are the embodiment of unfragmented consciousness, which is ultimately one and non dual. Likewise, the Vedic sacrifice is an act of re-enactment of the cosmic creation; in our mundane life, our life of action is simply a life of fragmented act. This is because of Raga Dvesha whereby the perception is limited. The fragmented acts emanate from our deep rooted attraction and hatefulness. The Vedic sacrifice moves towards "Poorna", i.e., plenitude and thus overcoming the problem of fragmented action in our lives. Onwards, the seeker moves towards the knowledge of self or the Brahaman. So many Upasanas are taught in the Vedas but not elaborated. The Agamas have elaborated these Upasanas such as Madhu Vidya and Dahra Vidya.

Upanishads speak of Para Vidya and Apara Vidya. Apara Vidya deals with Jnana through various methods. Agamas explain these Para Vidyas. The Agamic texts contain four parts, namely, Vidya Pada, Kriya Pada, Charya Pada and Yoga Pada.

Each text of the Agamas has the first portion, called `Samhita' which contains the four parts namely the Vidya Pada, Driya Pada, Charya Pada and Yoga Pada. Vidya Psada offers an elaborate enunciation of the philosophy, whereas Kriya Pada deals elaborately with the act of worship. Worship is viewed as Samurta Archana. In other words, the Gods are endowed with form the this form of

worship culminates into Amurta or Nishkala Archana by which one worships and realizes the formless. These are the steps to be treated upon one after another.

The Markadeya Purana expresses the purpose of Dharma as “that all persons may be happy, may express each other's happiness, that there may be welfare of all, all being free from fear and disease; cherish good feelings and sense of brotherhood, unity and friendship”.

The Agamas, thus, are a stream of traditions which have grwon along with the tradition of the Vedas. Many earlier works of Agama literature are fairly ancient in times. They are not anti-Vedic but the worship of God in the form of Idol. In the Vedic tradition, a very limited number of Brahmins were conversant with the ritualistic lore but under Agama they performed rituals visualizing the Deity whom they invoked by Mantras. Vedas deprived others including women and Sudras of the opportunity to participate in the rituals. But Agamas provide opportunity to all to perform worship of the God. Purity, good conduct, devotion and dedication is insisted upon.[26]

However Justice B.K. Mukherjea[27] observed: "The popular Hindu religion of modern times is not the same as a religion of the Vedas though the latter are still held to be the ultimate source and authority of all those held sacred by Hindus. In course of its development, the Hindu religion did undergo several changes, which reacted on the social system and introduced corresponding changes in the social and religious institution. But whatever changes were brought about by time it cannot be disputed that they were sometimes of a revolutionary character – the fundamental, moral and religious ideas of the Hindu which lie at the route of their religion and charitable institution remained substantially the same and the system that we see around us can be said to be a evolutionary product of the spirit and genus of the belief passing through different ways of their cultural development".

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[26] As quoted by the Supreme Court in *Shri A.S. Narayana Deekshitulu v. State Of Andhra Pradesh,* AIR 1996 SC 1765,

[27] Justice B.K. Mukherjea, *“Tagore Law Lectures on Hindu Law of Religious and Charitable Trust”*, at page 1

Manu in his Smriti, Chapter III Verses 55 to 57 stated that where women are honoured and adorned there Gods are pleased, but where women are not honoured no sacred fire yields rewards. What is the status held by women in the Hindu society is a matter of history reflected from Vedic culture, Smrities, the Shastric law.

In Vedic society woman enjoyed equal status economically, socially and culturally with men. He stated that initiation to education upanayanam was performed in Vedic period to the girls as well as boys. Women studied the Vedas, even composed Vedic rhymes. They participated in public life freely. Vishvavara, Apala, Lopamudra and Shashayasi are only few examples in the initial Vedic period. Thereafter Ghosha, Maitrai and Gargi occupied price of place for equality in intellectual excellence and equal status with men. Selfishness and male chauvanism made woman to gradually degrade and were given no voice even in the settlement of their marriages or so on. She was denied participation in public affairs.

Though Yajnavalkya was a proponent to her economic status but ultimately Manu Smriti took firm hold and in Chapter IX Verse 18, Manu stated that woman had no right to study the Vedas. Thereby, denied the right to education, fundamental human right to acquire knowledge and cultural and intellectual excellence. In Chapter IX Verse 149, he stated that woman must not seek. separation from father, husband or son and bondaged her for ever. In Chapter IX Verse 45, the husband was declared to be one with the wife that the wife can seek no divorce but allowed immunity to a male to discard an unwanted wife. All through the ages till Hindu Marriage Act was made a male was allowed polyandry. In Chapter IX Verse 4 16, he stated that a wife, a son and a slave are declared to have no property and if they happened to acquire it would belong to male under whom she is in protection. Thus she was denuded or her right to property or incentive to decent and independent living and made her a dependent only to rare children and bear the burdens. When she becomes a widow, she was declared to have only maintenance and if in possession of her husband's property or coparcenery, to be a widow's estate with reversionery right to the heirs of last male holder. Fidality was a condition precedent to receive maintenance. In Chapter IX

Verse 299, he prescribed corporeal punishment to a wife who commits faults, should be beaten with a rope or a split bamboo. If she was murdered it was declared to be an Upapattaka that is a minor offence vide Chapter XI Verse 67. [28]

Two stanzas (14 and 18) of Eighth Chapter of Manu Samhita deal with role of witnesses. The English translation read as follows: "Stanza 14:

Where in the presence of Judges "dharma" is overcome by "adharma" and "truth" by "unfounded falsehood", at that place they (the Judges) are destroyed by sin.

Stanza 18

In the adharma flowing from wrong decision in a Court of law, one fourth each is attributed to the person committing the adharma, witness, the judges and the ruler".[29]

Manu states that I have described above the splendid rules of action for the social clases outside times of adversity. Listen now to the rules for them in the proper order for times of adversity.[30]

The Indian society has, for many centuries, been aware and conscious of the necessity of protecting environment and ecology. Sages and Saints of India lived in forests. Their preachings about protecting the environment is contained in Vedas, Upanishadas, Smritis etc. and there have been ample evidence of the society's respect for plants, trees, earth, sky, air, water and every form of life. The main moto of social life is to live in harmony with nature. It was regarded as a sacred duty of every one to protect them. In those days, people worshipped trees, rivers and sea which were treated as belonging to all living creatures. The children

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[28] As per Altakar on interpreting Manu," T*he Position of Woman in Hindu Civilization"*, 1955 Edn. vide p. 335,339 and 409

[29] As quoted by Arijit Pasayat, J. in *Zahira Habibullah Sheikh v. State Of Gujarat*, (2006) 3 SCC 374

[30] Parrick Olivelle, '*Manu's Code of Law- A Critical Edition and Translation of the Manave Dharmastra'*, Oxford.

were educated by elders of the society about the necessity of keeping the environment clean and protecting earth, rivers, sea, forests, trees, flora fauna and every species of life.

2.1.3. MIMAMSA.

The process of interpretation is as old as language, it says that the rules of interpretation were evolved at a very early stage of Hindu civilization and culture and the same were given by 'Jaimini', the author of Mimamsat Sutras; originally meant for shrutis, they were employed for the interpretation of Smritis as well.

It may be mentioned that the Mimansa Rules of Interpretation were our traditional principles of interpretation laid down by Jaimini, whose Sutras were explained by Shabar, Kumarila Bhatta, Prabhakar, etc. These Mimansa Principles were regularly used by our great jurists like Vijnaneshwara (author of Mitakshara), Jimutvahana (author of Dayabhaga), Nanda Pandit, etc. whenever they found any conflict between the various Smritis or any ambiguity, incongruity, or casus omissus therein.

The Mimansa principles of interpretation were created for resolving the practical difficulties in performing the yagyas. The rules for performing the various yagyas were given in books called the Brahmanas (all inSanskrit) e.g. Shatapath Brahmana, Aitareya Brahmana, Taitareya Brahmana, etc. There were many ambiguities, obscurities, conflicts etc. in the Brahmana texts, and hence the Mimansa Principles of Interpretation were created for resolving these difficulties.

Although the Mimansa principles were created for religious purpose, they were so rational and logical that they subsequently began to be used in law, grammar, logic, philosophy, etc. i.e. they became of universal application.[31]

[31] Prof. Kishori Lal Sarkar, *`The Mimansa Rules of Interpretation'* published in the Tagore Law Lecture Series

In the Mimansa system there are three ways of dealing with conflicts. [32]Where two texts which are apparently conflicting are capable of being reconciled, then by the Principle of Harmonious Construction (which is called the Samanjasya Principle in Mimansa) they should be reconciled. The Samanjasya Principle has been laid down by Jaimini in Chapter II, Sutra 9 which states : "The inconsistencies asserted are not actually found. The conflicts consist in difference of application. The real intention is not affected by application. Therefore, there is consistency."

The Samanjasya axiom is illustrated in the Dayabhag. Jimutvahana found that there were two apparently conflicting texts of Manu and Yajnavalkya. The first stated "a son born after a division shall alone take the paternal wealth". The second text stated "sons, with whom the father has made a partition, should give a share to the son born after the distribution". Jimutvahana, utilizing the Samanjasya principle of Mimansa, reconciled these two texts by holding that the former applies to the case of property which is the self-acquired property of the father, and the latter applies to the property descended from the grand-father.

One of the illustrations of the Samanjasya principle is the maxim of lost horses and burnt chariot (Nashtashvadaghda Ratha Nyaya). This is based on the story of two men traveling in their respective chariots and one of them losing his horses and the other having his chariot burnt through the outbreak of fire in the village in which they were putting up for the night. The horses that were left were harnessed to the remaining chariot and the two men pursued their journey together. Its teaching is union for mutual advantage, which has been quoted in the 16th Vartika to Panini, and is explained by Patanjali. It is referred to in Kumarila Bhatta's Tantra Vartika.

The second situation is a conflict where it is impossible to reconcile the two conflicting texts despite all efforts. In this situation the Vikalpa principle applies, which says that whichever law is more in consonance with reason and justice

[32]Shabar Swami, in his *"Commentary on Sutra "*, 14, Chapter III, Book III of Jaimini.

should be preferred. However, conflict should not be readily assumed and every effort should be made to reconcile conflicting texts. It is only when all efforts of reconciliation fail that the Vikalpa principle is to be resorted to.

There is a third situation of a conflict and this is where there are two conflicting irreconciliable texts but one overrides the other because of its greater force. This is called a Badha in the Mimansa system (similar to the doctrine of ultra vires). [33]

The great Mimansa scholar Sree Bhatta Sankara in his book[34] has given several illustrations of Badha as follows :

"A Shruti of a doubtful character is barred by a Shruti which is free from doubt. A Linga which is more cogent bars that which is less cogent. Similarly a Shruti bars a Smriti. A Shruti bars Achara (custom) also. An absolute Smriti without reference to any popular reason bars one that is based upon a popular reason. An approved Achara bars an unapproved Achara.

An unobjectionable Achara bars an objectionable Achara. A Smriti of the character of a Vidhi bars one of the character of an Arthavada. A Smriti of a doubtful character is barred by one free from doubts. That which serves a purpose immediately bars that which is of a remote service. That which is multifarious in meaning is barred by that which has a single meaning. The application of a general text is barred by a special text. A rule of procedure is barred by a mandatory rule. A manifest sense bars a sense by context. A primary sense bars a secondary sense. That which has a single indication is preferable to what has many indications. An indication of an inherent nature bars one which is not so. That which indicates an action is to be preferred to what merely indicates a capacity. If you can fill up an ellipse by an expression which occurs in a passage, you cannot go beyond it."

The principle of Badha is discussed by Jaimini in the tenth chapter of his work. Badha primarily means barring a thing owing to inconsistency. Jaimini uses

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[33] supra

[34] Sree Bhatta Sankara `*Mimansa Valaprakasha'*

the principle of Badha mainly with reference to cases where Angas or sub-ceremonies are to be introduced from the Prakriti Yagya (i.e. a yagya whose rules for performance are given in detail in the Brahmanas) into a Vikriti (i.e. a yagya whose rules of performance are not mentioned anywhere, or are incompletely mentioned). In such a case, though the Angas or the sub-ceremonies are to be borrowed from the Prakriti Yagya, those of the sub-ceremonies which prove themselves to be inconsistent with or out of place in the Vikriti Yagya, are to be omitted.

For example, in the Rajsuya Yagya, certain homas are prescribed, for the proper performance of which one must borrow details from the Darshapaurnamasi Yagya. In the Rajsuya Yagya, plain ground is directed to be selected as the Vedi for the homas, while in the case of the Darshapaurnamasi, the Vedi should be erected by digging the ground with spade etc. Such an act would be out of place in constructing the Vedi for the homas in the Rajsuya Yagya. Here, there is a Badha (bar) of the particular rule regarding the erection of the Vedi in the Darshapaurnamasi Yagya, being extended to the Rajsuya Yagya. This is the case of Badha by reason of express text.[35]

There are other instances in which the inconsistency arises incidentally. For example, in the Sadyaska there is no need of cutting the peg with which the animal is to be tied. But, in the Agni-Somiya Yagya which is the Prakriti of the Sadyaska Yagya, reciting of certain Mantras is prescribed in connection with the cutting of the peg. This recital being out of place in the former Yagya is barred in carrying the Atidesha process. Numerous other illustrations can be given. For example, in the Satra Yagya the selection of Rittik is out of place and so omitted, though this is done in the Soma Yagya of which the Satra is the Vikriti. The Krishnala Nyaya (black bean maxim) is another instance. In cases where Atidesha is to be made by implication, it is altogether barred, if there is an express text against making the implication.

[35] supra

When there is a negative ordinance prohibiting a thing, it is to prevail notwithstanding that there is an Atidesha which by implication enjoins the thing. For instance, there is a rule that all sacrifices partake of the character of Darsha and Paurnamasi Yagyas. The result is that all the rules of Darsha and Paurnamasi Yagyas are applicable to the Pasu Yagya also. But there is a text which says that the Aghara and the Ajyabhaga homas need not be made in the Pasu Yagya. Therefore, these homas need not be made in the Pasu Yagya, though in the absence of the prohibitory text they would have to be made on account of the rule which lays down that all Yagyas must partake of the character of Darsha and paurnamasi.[36]

One of the Mimansa principles is the Gunapradhan Axiom, and since we are utilizing it in this judgment (apart from the badha and samanjasya principles) we may describe it in some detail.

`Guna' means subordinate or accessory, while `Pradhan' means principal. The Gunapradhan Axiom states :"If a word or sentence purporting to express a subordinate idea clashes with the principal idea, the former must be adjusted to the latter or must be disregarded altogether."

This principle is also expressed by the popular maxim known as matsya nyaya i.e. `the bigger fish eats the smaller fish'.

According to Jaimini, acts are of two kind, principal and subordinate Kumarila Bhatta, in his work Tantravartika[37] explains this Sutra as follows : "When the Primary and the Accessory belong to two different Vedas, the Vedic characteristic of the Accessory is determined by the Primary, as the Accessory is subservient to the purpose of the primary." It is necessary to explain this Sutra in some detail. The peculiar quality of the Rigveda and Samaveda is that the mantras

[36] ibid

[37] Ganganath Jha's English translation, *'Tantravartika'*, Vol.3 page1141.

belonging to them are read aloud, whereas the mantras in the Yajurveda are read in a low voice. Now the difficulty arose about certain ceremonies, e.g. Agnyadhana, which belong to the Yajurveda but in which verses of the Samveda are to be recited. Are these Samaveda verses to be recited in a low voice or loud voice? The answer, as given in the above Sutra, is that they are to be recited in low voice, for although they are Samavedi verses, yet since they are being recited in a Yajurveda ceremony their attribute must be altered to make it in accordance with the Yajurveda.

Kumarila Bhatta says : "The Siddhanta (principle) laid down by this Sutra is that in a case where there is one qualification pertaining to the Accessory by itself and another pertaining to it through the Primary, the former qualification is always to be taken as set aside by the latter. This is because the proper fulfillment of the Primary is the business of the Accessory also as the latter operates solely for the sake of the former. Consequently if, in consideration of its own qualification it were to deprive the Primary of its natural accomplishment then there would be a disruption of that action (the Primary) for the sake of which it was meant to operate. Though in such a case the proper fulfillment of the Primary with all its accompaniments would mean the deprival of the Accessory of its own natural accompaniment, yet, as the fact of the Accessory being equipped with all its accompaniments is not so very necessary (as that of the primary), there would be nothing incongruous in the said deprival". [38]

Jaimini in Sutra states: "When there is a conflict between the purpose and the material, the purpose is to prevail, because in the absence of the prescribed material a substitute can be used, for the material is subordinate to the purpose".

To explain this it may be mentioned that the Brahmanas state that the prescribed Yupa (sacrificial post for tying the sacrificial animal) must be made of Khadir Wood. However, Khadir wood is weak while the animal tied may be restive. Hence, the Mimansa principle (stated above) permits that the Yupa can be made of Khadar wood which is strong. Now this substitution is being made despite

[38] supra

the fact that the prescribed wood is Khadir, but this prescription is only subordinate or accessory to the performance of the yagya, which is the main object. Hence, if it comes in the way of the yagya being performed, it can be modified or substituted.

In this connection we may also refer to the Wooden Sword Maxim (Sphadi Nyaya), which is a well known Maxim in the Mimansa system. This Maxim states "what is prescribed as a means to an action, is to be taken in a sense suited to the performance of the action". The word ' Spha' in Sanskrit means a sword, which is normally a metallic object for cutting. However, 'Spha' in connection with a Yagya has to be interpreted as a wooden sword, because in a Yagya a small wooden sword called 'Spha' is used which is a pushing instrument (as a Yagya requires no cutting instrument, but only a pushing instrument). Thus, 'Sphadi Nyaya' implies that we have to see the object of the text to correctly interpret it.[39]

In the Mimansa system, the literal rule of interpretation is called the Shruti (or Abhida) principle, and ordinarily it is this principle which is to be applied when interpreting a text. However, there are exceptional situations when we have to depart from the literal rule and then certain other principles have to be resorted to e.g. (1) the Linga (also called Lakshana) principle or the suggestive power of words or expressions, (2) the Vakya principle or syntactical arrngement, (3) the Prakarana principle, which permits construction by referring to other texts in order to make the meaning clear, (4) the Sthana (position) principle which means the relative position of one text with reference to another, (5) the Samakhya (name) principle which means the connection between different passages by the indication accorded by the derivative words of a compound name.[40]

The principle of Linga is illustrated by Jaimini in numerous Sutras and Adhikarnas. Thus the Pranabhrit Adhikarana which is based on Jaimini's Sutra 28, Chapter IV, Book 1 shows how words acquired a wider meaning by the Linga or Lakshana process.

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[39] K.L. Sarkar , *'Mimansa Rules of Interpretation'* at p. 185).

[40] supra

Now what is the meaning of Pranabhrit in the one case and of Ajyani in the other ? The words Pranabhrit and Ajyani are respectively the names of two Mantras or verses which begin with those words. These verses are used in consecrating bricks required for a certain purpose in a yagya. From this fact the bricks consecrated by the Pranabhrit Mantra acquired the name of Pranabhrit. Similarly the bricks consecrated by the Ajyani Mantra acquired the name of Ajyani. But in course of time the whole heap of bricks of a particular kind came to be called Pranabhrit, because one or two bricks of that heap were consecrated as Pranabhrit bricks. Thus the instance of Pranabhrit becomes a maxim for extending the scope of a name in the above manner. In fact, the meaning of the words Pranabhrit and Ajyani in these cases is determined by the peculiar association of the words and by the context of the passages in which they are used. Such a use is called Lingasamabaya (embodiment of the Linga).

Nanda Pandit, in his work 'Dattaka Mimansa', refers to the Pranabhrit maxim to show that although the word `substitute' was at first applied in express term only to six descriptions of sons, later the word by general use became applicable to all the twelve descriptions.

"The peculiar feature of one leading object belonging to a class may give name to the whole class."

Pranabhrit literally means filling with life or inspiring life; but the expression forms the commencement of a Mantra which is used in consecrating certain bricks. Hence the word has come to mean a kind of bricks. This is the way in which the word Ajyani also has come to mean another class of bricks.

The Pranabhrit maxim is often used in the interpretation of a text by treating it as illustrative and not exhaustive. The illustrative rule of interpretation is a departure from the literal rule which normally has to be adopted while construing a text. However, sometimes departures from the literal rule are permissible, and one of such departures is the illustrative rule. To give an example, in Sanskrit there is an oft-quoted statement "Kakebhyo Dadhi Rakshitam" which means "protect the curd from the crows". Now in this sentence the word 'crow' is merely illustrative and not exhaustive. The statement does not mean that one should protect the curd

only from crows but allow it to be eaten up by cats, dogs or to get damaged by dirt or filth etc. It really means that one should protect the curd from all dangers. Hence the word 'crow' in the above statement is only illustrative and not exhaustive.[41]

Whenever there was any conflict between two Smritis, e.g., Manusmriti and Yajnavalkya Smriti, or ambiguity or absurdity in any Smriti these principles were utilized. Thus, the Mimansa Principles were our traditional system of interpretation of legal texts. Although originally they were created for interpreting religious texts pertaining to the Yagya (sacrifice), gradually they came to be utilized for interpreting legal texts also and also for interpreting texts on philosophy, grammar, etc. i.e. they became of universal application. Thus, Shankaracharya has used the Mimansa adhikaranas in his bhashya on the Vedanta sutras.[42]

To give an example the Mimansakas examine the subject of negative Vidhis (negative injunctions such as the one in the proviso to Section 6) very searchingly and exhaustively. First of all, they distinguish between what may be called prohibitions against the whole world, and those against particular persons only. This distinction resembles that between judgments or rights in rem and judgments or rights in personam. The former prohibitions are called Pratishedha and the latter Paryudasa. For example, the prohibitory clause `Do not eat fermented (stale) food (na kalanjam bhakshayet) is a Pratishedha; while the prohibition `those who have taken the Prajapati vow must not see the rising sun' is a Paryudasa. In the second place, Pratishedhas are divided practically into two sub-clauses viz. those which prohibit a thing without any reference to the manner in which it may be used, and those which prohibit it only as regards a particular mode of using. For instance, `Do not eat fermented food' prohibits the use of it under all

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[41] As explained by the Supreme Court in *Surjit Singh v. Mahanagar Telephone Nigam Limited*, JT 2008 (5) SC 325

[42] P.V. Kane's *`History of the Dharmashastra'*, Vol. V, Pt. II, Ch. XXIX and Ch.XXX, pp. 1282-1351

circumstances, while `Do not use the Sorasi vessel at dead of night' forbids the use of the vessel only at the dead of night.

Then Paryudasa is also of two kinds. In one case, it relates to a person performing some special act which is not enjoined by a Vidhi, as in the case of the Prajapati vow. In the other, it relates to a person engaged in performing a Vidhi; as for instance, when one is to do Shradh during the full moon by virtue of a Vidhi but not in the night of the full moon. In this case, the prohibition of doing Shradh in the night is a Paryudasa, which is the same as an exception or proviso as we understand these terms. For, the clause `not in the night' is an exception to the rule `Perform the Shradh during the full moon'. These are the four classes of negative clauses. The first class, of which the Kalanja (fermented food) clause is an example, may well be called a condemnatory prohibition. The second class consists also of absolute prohibitions of things under certain circumstances, as in the case of the Sorasi vessel. The third class consists of prohibitions in relation to persons in a given situation, as in the case of the Prajapati vow. The fourth class restricts the scope of action of persons engaged in fulfilling an injunction, as regards the time, place or manner of carrying out the substantive element of the injunction.[43]

Thus we see that in the Mimansa system as regards negative injunctions (such as the one contained in the proviso to Section 6 of Land Acquisition Act) there is a much deeper discussion on the subject than that done by Western Jurists. The Western writers on the subject of interpretation (like Maxwell, Craies, etc.) only say that ordinarily negative words are mandatory, but there is no deeper discussion on the subject, no classification of the kinds of negative injunctions and their effects.

In the Mimansa system illustrations of many principles of interpretation are given in the form of maxims (nyayas). The negative injunction is illustrated by the Kalanja nyaya or Kalanja maxim. The Kalanja maxim (na kalanjam bhakshayet) states that `a general condemnatory text is to be understood not only as prohibiting

[43] ibid

an act, but also the tendency, including the intention and attempt to do it.' It is thus mandatory.

A plain reading of the proviso to Section 6 of the Land Acquisition Act shows that it is a general prohibition against the whole world and not against a particular person. Hence the Kalanja maxim of the Mimansa system will in our opinion apply to the proviso to Section 6.

Laughakshi Bhaskara, one of the great Mimansa writers, taking the prohibitory text 'one is not to eat Kalanja or fermented/stale food' (na kalanjam bhakshayet), explains the idiomatic force of the phrase (na bhakshayet). He explains that the suffix 'yat' means 'shall', and that the negative particle 'not' is to be taken as attached to the suffix 'yat' (shall), and not to the idea of Kalanja eating. For if it be taken as attached to the latter idea, then the sentence might mean 'you shall eat but not Kalanja'. In this case strictly there would be no prohibition. So he labours to demonstrate that the gist of the sentence is 'shall not' and therefore the object of it is to turn off from eating Kalanja (fermented/stale food). This may appear to be making a hair splitting distinction, but it is of great importance from the Mimansa point of view because it indicates the mandatory nature of the negative injunction (nishedha). The explanation of a Nishedha Vidhi appears more clearly from Jaimini's Sutras on the Kalanja maxim.

The objector says : In a case of prohibition, mentally you entertain the idea of the action prohibited; for you have to discriminate between the prohibited act and the negation of that act. The objector means to say 'what is the good of a prohibition when it invites the imagination to gloat on the action prohibited'. The author answers : 'When an act is enjoined by the Shastra, it is for the purpose of the good of a person; if the good object be divorced from the meaning of the Shastra, then it becomes a case of transgressing it.'

The meaning of this is: 'In a case of prohibition you must take it that not only is the particular external act prohibited, but the very intention of it is also prohibited.'

Roughly speaking, the principle laid down is this : 'In a case of prohibition one should abstain from the very idea of the act prohibited, and there ought to be no evasion of the Vidhi in any way. ' Thus, this class of Nishedha Vidhis is to be interpreted most comprehensively and as mandatory.[44]

It may be mentioned that the Mimansa Rules of Interpretation were our traditional principles of interpretation used for over two and a half thousand years, around 6th Century B.C. laid down by Jaimini whose Sutras were explained by Shabar, Kumarila Bhatta, Prabhakar, etc. These Mimansa Principles were regularly used by our great jurists like Vijnaneshwara (Author of Mitakshara), Jimutvahana (author of Dayabhaga), Nanda Pandit, etc. whenever they found any conflict between the various Smritis or any ambiguity or incongruity therein.

We can also utilize the Mimansa Rules of Interpretation in interpreting Rule. There is no reason why we cannot use these principles on appropriate occasions. However, it is a matter of deep regret that these principles have rarely been used in our law Courts. It is nowhere mentioned in our Constitution or any other law that only Maxwell's Principles of Interpretation can be used by the Court. We can use any system of interpretation which helps us solve a difficulty. In certain situations Maxwell's principles would be more appropriate, while in other situations the Mimansa principles may be more suitable. . It is deeply regrettable that in our Courts of law, lawyers quote Maxwell and Craies but nobody refers to the Mimansa Principles of Interpretation. Today many of our educated people are largely unaware about the great intellectual achievements of our ancestors and the intellectual treasury they have bequeathed us. The Mimansa Principles of Interpretation is part of that intellectual treasury.[45]

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[44] As explained by the Supreme Court in *Vijay Narayan Thatte v. State Of Maharashtra*, (2009) 9 SCC 92

[45] As quoted by the Supreme Court in *Gujarat Urja Vikash Nigam Ltd v. Essar Power Ltd*, (2008) 4 SCC 755

2.2 MEDIEVAL PERIOD.

Medieval era was the most influencing era in the Indian History. Its contents can be appreciated and understood in the light of that system. But how far could we go into the background of the system? Perhaps as far as the origin and history of the people themselves. That would of course be useful exercise to understand the relationship of the people and the laws prevailing then. But that is an enormous difficult, almost difficult exercise in India, because of its long history associated with foreign invasions and unavailability of data, particularly when the most important link of historical studies being burnt at Nalanda. In that case the easier and safer alternative for this work is to have brief study of the Hindu and the Mogul rulers period.

2.2.1. HINDU RULERS PERIOD.

The span began with the Cholas in the power. The Chola kingdom lay on the Coromandel Coast with its capital at Kanjeevaram. The Chola kings had good navy. The administrative machinery was highly organized. The self- government was the most remarkable feature of their administration. The Cholas retained their independence till Malik Kafur defeated the last Chola ruler in 1310.The Chola administration was as efficient as it was integrated. From the inscription of Parantaka I the details about the Chola administration can be found. Under theChola kindom the king had a council of ministers. The kingdom was divided into a number of provinces known as mandalams, The mandalams in turn were divided into valanadu and nadus.The basis of administration was the village. A large village or a group of villages formed *Kurram.*

Every village had arrangement of self- government or the autonomous administration. .Panchayat was the in charge of the administration of the village. A few large villages or *Kurrams* would constitute a district, that is Nadu, and a few nadus would form a division or *Kottam*. The Chola kings developed a powerful navy for the purpose of developing a maritime empire and seaborne trade. Each village had a village assembly known as the *ur* or the sabha. The members of the

sabha were elected by lot, known as kudavolai system. There was a committee to look after the specified departments, such as justice, law and order, irrigation etc., which were called as variyams.[46]

Justice was mostly a local matter in the Chola Empire, where minor disputes were settled at the village level. The punishments or minor crimes were in the form of fines or a direction for the offender to donate to some charitable endowment. Even crimes such as manslaughter or murder were punished by fines.[47]

Crimes of the state such as treason were heard and decided by the king himself and the typical punishment in such cases was either execution or confiscation of property.

Village assemblies exercised large powers in deciding local disputes. Small committees called *Nyayattar* heard matters that did not come under the jurisdiction of the voluntary village committees. The punishments in most cases were in the form of donations to the temples or other endowments. The convicted person would remit their fines at a place called *Darmaasana* .There was no distinction between civil and criminal offences. Sometimes civil disputes were allowed to drag on until time offered the solution. Crimes such as theft, adultery and forgery were considered serious offences. In most cases the punishment was in the order of the offender having to maintain a perpetual lamp at a temple. Even murder was punished with a fine.[48]

In one instance a man had stabbed an army commander. Rajendra Chola II ordered the culprit to endow 96 sheep for a lamp at a neighbouring temple. Capital punishment was uncommon even in the cases of first-degree murder. Only one solitary instance of capital punishment is found in all the records available so far.

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[46] http://www.indiaandindians.com/india_history/cholas.php accessed on 09.11.2009

[47] http://en.wikipedia.org/wiki/Chola_government accessed on 10.11.2009

[48] http://en.wikipedia.org/wiki/Rajendra_Chola_II accessed on 10.11.2009

Mauryan Emperor, Ashoka, was also known to be a great proponent of the rule of law. It is in this context that the phrase Dharm Vijayah `Victory of Dharma' could be understood, as employed by the Mauryan Emperor, Ashoka, in his rock edict at Kalsi which proclaimed his achievement in terms of moral and ethical imperatives of Dharma, and exemplified the ancient dictum Yato Dharmastato Jayah (where there is Law, there is Victory).

Madhavacharya, the Minister to Hakka and Bukka, founder kings of Vijayanager Empire, in his commentary on Parashara Smriti, has briefly and precisely explained the mening of Dharma as follows: Dharma is that which sustains and ensures progress and welfare of all in this world and eternal bliss in the other world. The Dharma is promulgated in the form of commands.

The Mauryan Emperor Ashoka, a Buddhist convert, took a very active step for spread of Buddhism without forceful conversion or persecution. The Satvahanas, Kushanas and the Gupta rulers paid equal patronage to all religions. The emphasis on dhyana in Hindu religion during Gupta period brought Hinduism, Jainism and Buddhism closer. In the South, the Chalukyas, Rastrakutas, Cholas and Hoysala rulers liberally patronised all the religions without discrimination.[49]

The concept of a declaration of policy in regard to social and economic obligation of State cannot be said to be foreign to the genius of India. In the 4th Century B.C, we find in Kautaliya's Arthasastra a specific injunction to that effect that " the King shall provide the orphan, the dying the infirm, the afflicted and the helpless with maintenance, he shall also provide subsistence to the helpless expectant mothers and also to the children they give birth to. [50]

2.2.2. MUGHAL RULERS PERIOD.

Medieval India witnessed emergence of new politico-legal system under various Muslim rulers professing allegiance to Islamic law. Akbar experimented in

[49] V.D. Mahajan, *"Ancient India"*, 5th edi., p. 587.

[50] B. Shiva Rao, '*The Framing of Indian Constitution- A Study*', p-320

synthesis and tolerance of all religions. The dominant note of this awakening was love and liberalism- love that united man to God and therefore to his brethren, and liberalism born of this love that levelled down the barriers of caste, and built on the bedrock of human existence and brotherhood.[51]

The Mughal ruling class were liberal-minded Muslims, although most of the subjects of the Empire were Hindu. Although Babur founded the Empire, the dynasty remained unstable (and was even exiled) until the reign of Akbar, who was not only of liberal disposition but also intimately acquainted, since birth, with the mores and traditions of India. Under Akbar's rule, the court abolished the jizya (the poll-tax on non-Muslims) and abandoned use of the lunar Muslim calendar in favor of a solar calendar more useful for agriculture. One of Akbar's most unusual ideas regarding religion was Din-i-Ilahi ("Faith-of-God" in English), which was an eclectic mix of Hinduism, panthiestic versions of Sufi Islam,Zoroastrianism and Christianity. It was proclaimed the state religion until his death. These actions however met with stiff opposition from the Muslim clergy. However, the orthodoxy regained influence only three generations later, with Aurangzeb, known for upholding doctrines of orthodox Islam; this last of the Great Mughals retracted nearly all the liberal policies of his forbears.

In Medieval India the Sultan, being head of the State, was the supreme authority to adminster justice in his kindom. The administration of justice was one of the important functions of the Sultan which was actually done in his name in three capacities: As arbitrator in the disputes of his subjects he dispensed justice through the *Diwan-i-Qaza*, as head of bureauracy justice through the *Diwan-i-Mazalim* as the Commander-in-Chief of Forces through his military commanders who constituted *Diwan-i-Siyasat* to try the rebels and thosecharged with high treason. It was the Sultan’s sole prerogative to order the execution of a criminal and the courts were required to seek his prior approval before awarding the capital punishment.

[51] Din-e-Ilahi was the product of such synthesis.

The Judicial system under the Sultans was organized on the basis of administrative divisions of the kingdom. A systematic classification and gradation of the courts existed at the seat of the capital, in Provinces, Districts, Parganahs and Villages.[52]

The powers and jurisdiction of each court was clearly defined. i)Central Capital – Six courts which were established at Delhi, Capital of the Sultanate, may be stated as follows:-The King's court, *Diwan-e-Mazalim, Diwan-e-Risalat, Sadre Jehan's* court, Chief Justice's Court and Diwan-e-Siyasat.

The King's Court , presided over the sultan, exercised both appellate jurisdiction on all kinds of cases. It was the highest court of Appeal in the realm.[53] The Sultanwas assisted by two reputed Muftis highly qualified in law.

During the Mughal period, the Emperor was considered the "Fountain of Justice". TheEmperor created a separate department of Justice *(Mahakma-e-Adalat)* to regulate and see that the justice was administered properly. On the basis of the administrative divisions, at the official headquarters in each Province, District, Parganah and Village, separate courts were established to decide civil, criminal and revenue cases.[54]

During the Muslim period Islamic law or Shara was followed by all Sultans and Mughal Emperors. The *Shara* is based on the principles emunciated by *Quran.* Under theMuslim criminal law, which was mostly based on their religion, any violation of public rights was an offence against the State.

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[52] M.B. Ahmad, *"The Administration of Justice in Medieval India"*, pp 104-125.

[53] H. Beveridge, *"History of India"*, Vol. I, p. 239.

[54] M.B. Ahmad, *"The Administration of Justice in Medieval India"*, pp 104-125.

Hadd provided a fixed punishment as laid down in *Shara,* the Islamic law, for crimes like theft, robbery, whoredom *(Zina)* , Apostasy *(Irtidad),* defamation *(Itteham-e-Zina)* and drunkenness *(Shurb).* It was equally applicable to Muslims and Non-Muslims.

Tazir was another form of punishment which meant pr ohibition and it was applicable to all the crimes which were not classified under "*Hadd"*. It included crimes like counterfeiting coins, gambling, minor theft etc.

Qisas" or blood-fine was imposed in cases relating to homicide. It was a sort of blood-money paid by the man killed another man if the murderer was convicted but notsentenced to death for his offence. Muslim jurists supported *Qisas* on the basis that "the right of God's creatures should prevail" and only when the aggrieved party has expressed his desire, thestate should intervene. *Qisas* may be compared to the *Weregild* of the contemporary English period.

The Muslim Law considered *"Treason"(Ghadr)* as a crime against God and religion and, therefore, against the State. Persons held responsible for treason by the court were mostly punished with death.[55]

At Delhi, the Imperial capital of India, highest courts of the Empire empowered with original and appellate jurisdictions were established.

The architect of modern India was the great Mughal Emperor Akbar who gave equal respect to people of all communities and appointed them to the highest offices on their merits irrespective of their religion, caste, etc.

The Emperor Akbar held discussions with scholars of all religions and gave respect not only to Muslim scholars, but also to Hindus, Christians, Parsis, Sikhs, etc. Those who came to his court were given respect and the Emperor heard their views, sometimes alone, and sometimes in the Ibadatkhana (Hall of Worship), where people of all religions assembled and discussed their views in a tolerant

[55] M.B. Ahmad, *"The Administration of Justice in Medieval India"*, pp 225.

spirit. The Emperor declared his policy of Suleh-e-Kul, which means universal tolerance of all religions and communities. He abolished Jeziya in 1564 and the pilgrim tax in 1563 on Hindus and permitted his Hindu wife to continue to practise her own religion even after their marriage. This is evident from the Jodha Bai Palace in Fatehpur Sikri which is built on Hindu architectural pattern.

Akbar's empire supported vibrant intellectual and cultural life. The large imperial library included books in Hindi, Persian, Greek, Kashmiri, English, and Arabic, such as the Shahnameh, Bhagavata Purana and the Bible. Akbar regularly sponsored debates and dialogues among religious and intellectual figures with differing views, and he welcomed Jesuit missionaries from Goa to his court. Akbar directed the creation of the Hamzanama, an artistic masterpiece that included 1400 large paintings.

In 1578, the Parsi theologian Dastur Mahyarji Rana was invited to the Emperors court and he had detailed discussions with Emperor Akbar and acquainted him about the Parsi religion. Similarly, the Jesuit Priests Father Antonio Monserrate, Father Rodolfo Acquaviva and Father Francisco Enriques etc. also came to the Emperors court on his request and acquainted him about the Christian religion. The Emperor also became acquainted with Sikhism and came into contact with Guru Amar Das and Guru Ram Das.[56]

As stated in the Cambridge History of India[57] Emperor Akbar conceived the idea of becoming the father of all his subjects, rather than the leader of only the Muslims, and he was far ahead of his times. As mentioned by Pt. Jawahar Lal Nehru,[58] Akbar's success is astonishing, for he created a sense of oneness among the diverse elements of India.

In 1582, the Emperor invited and received a Jain delegation consisting of Hiravijaya Suri, Bhanuchandra Upadhyaya and Vijayasena Suri. Jainism, with its

[56] R.C. Majumdar , *`The Mughal Empire',*

[57] Cambridge History of India *"The Mughal Period",* Vol. IV

[58] Pt. Jawahar Lal Nehru,*"The Discovery of India",*

doctrine of non-violence, made a profound impression on him and influenced his personal life. He curtailed his food and drink and ultimately abstained from flesh diet altogether for several months in the year. He renounced hunting which was his favourite pastime, restricted the practice of fishing and released prisoners and caged birds. Slaughter of animals was prohibited on certain days and ultimately in 1587 for about half the days in the year.

Akbar's contact with Jains began as early as 1568, when Padma Sunder who belonged to the Nagpuri Tapagaccha was honoured by him.

As mentioned in Dr. Ishwari Prasad's `The Mughal Empire, the Jains had a great influence on the Emperor. A disputation was held in Akbar's court between the Jain monks Buddhisagar of Tapgaccha and Suddha Kirti of Khartargaccha on the subject of Jain religious ceremony called Pansadha in which the winner was given the title Jagatguru by Akbar. Having heard of the virtues and learning of Hir Vijaya Suri in 1582 the Emperor sent an invitation to him through the Mughal Viceroy at Ahmedabad. He accepted it in the interests of his religion. He was offered money by the Viceroy to defray the expenses of the journey but he refused. The delegation consisting of Hir Vijaya Suri, Bhanu Chandra Upadhyaya and Vijaya Sen Suri started on their journey and walked on foot to Fatehpur Sikri and were received with great honour befitting imperial guests. Hir Vijaya Suri had discussion with Abul Fazl. He propounded the doctrine of Karma and an impersonal God. When he was introduced to the Emperor he defended true religion and told him that the foundation of faith should be daya (compassion) and that God is one though he is differently named by different faiths.

The Emperor received instruction in Dharma from Suri who explained the Jain doctrines to him. He discussed the existence of God and the qualities of a true Guru and recommended non-killing (Ahinsa). The Emperor was persuaded to forbid the slaughter of animals for six months in Gujarat and to abolish the confiscation of the property of deceased persons, the Sujija Tax (Jeziya) and a Sulka (possibly a tax on pilgrims) and to free caged birds and prisoners. He stayed for four years at Akbar's court and left for Gujarat in 1586. He imparted a knowledge of Jainism to Akbar and obtained various concessions to his religion.

The Emperor is said to have taken a vow to refrain from hunting and expressed a desire to leave off meat- eating for ever as it had become repulsive. The Emperor presented to him Padma Sundar scriptures which were preserved in his palace. He offered them to Suri as a gift and he was pressed by the Emperor to accept them. The killing of animals was forbidden for certain days.

Emperor Akbar was a propagator of Suleh-i-Kul (universal toleration) at a time when Europeans were indulging in religious massacres e.g. the St. Bartholomew Day massacre in 1572 of Protestants, (called Huguenots) in France by the Catholics, the burning at the stake of Protestants by Queen Mary of England, the massacre by the Duke of Alva of millions of people for their resistance to Rome and the burning at the stake of Jews during the Spanish Inquisition. We may also mention the subsequent massacre of the Catholics in Ireland by Cromwell, and the mutual massacre of Catholics and Protestants in Germany during the thirty year war from 1618 to 1648 in which the population of Germany was reduced from 18 million to 12 million. Thus, Emperor Akbar was far ahead of even the Europeans of his times.

Emperor Akbar himself abstained from eating meat on Fridays and Sundays and on some other days, as has been mentioned in the Ain-I-Akbari by Abul Fazl. It was because of the wise policy of toleration of the Great Emperor Akbar that the Mughal empire lasted for so long, and hence the same wise policy of toleration alone can keep our country together despite so much diversity.[59]

We may give another historical illustration of tolerance in our country. In the reign of Nawab Wajid Ali Shah of Avadh, in a certain year Holi and Muharrum coincidentally fell on the same day. Holi is a festival of joy, whereas Muharrum is an occasion for mourning. The Hindus of Lucknow decided that they would not celebrate Holi that year out of respect for the sentiments for their Muslim brethren. On that day, the Nawab joined the Muharrum procession and after burial of the Tazia at Karbala he enquired why Holi is not being celebrated. He was told that it was not being celebrated because the Hindus out of respect for the sentiments of

[59]As quoted by the Supreme Court in *Hinsa Virodhak Sangh vs Mirzapur Moti Kuresh Jamat,* AIR 2008 SC 1892

their Muslim brethren had decided not to play Holi that year because it was a day of mourning for the Muslims. On hearing this, Nawab Wajid Ali Shah declared that since Hindus have respected the sentiments of their Muslim brothers, it is also the duty of the Muslims to respect the sentiments of their Hindu brethren. Hence, he announced that Holi would be celebrated the same day and he himself was the first who started playing Holi on that day and thereafter everyone in Lucknow, including the Muslims, played Holi, although it was Muharrum day also. It is this kind of sentiment of tolerance which alone can keep our country united.[60]

Since India is a country of great diversity, it is absolutely essential if we wish to keep our country united to have tolerance and respect for all communities and sects.

[60] supra

2.3 COLONIAL PERIOD.

The colonial period started with the arrival of British in India with whom our present constitutional system is directly associated. The seeds of the British arrival in India were sown in 1600 which grew into a tree until it perished in 1947 and led to the adoption of our present Constitution. Let us have a brief overview of the period.

2.3.1. THE EAST INDIA COMPANY.

Indian trade links with Europe started in through sea route only after the arrival of Vasco da Gama in Calicut, India on May 20, 1498. The Portuguese had traded in Goa as early as 1510, and later founded three other colonies on the west coast in Diu, Bassein, and Mangalore. In 1601 the East India Company was chartered, and the English began their first inroads into the Indian Ocean. At first they were little interested in India, but rather, like the Portuguese and Dutch before them, with the Spice Islands. But the English were unable to dislodge the Dutch from Spice Islands. In 1610, the British chased away a Portuguese naval squadron, and the East India Company created its own outpost at Surat. This small outpost marked the beginning of a remarkable presence that would last over 300 years and eventually dominate the entire subcontinent. In 1612 British established a trading post in Gujarat.

The British authority in India was established through the agency of a trading corporation. The East India Company, formed in England in 1600 under a Charter of Queen Elizabeth I which gave it the exclusive right of trading in all parts of Asia, Africa and America, beyond the Cape of Good Hope, eastward to the Straits of Magellan. The Company established its trading centers or factories at several places in the country and in the course of time the factories at Bombay, Madras and Calcutta became the chief settlements or presidencies, and exercised supervision and control over subordinate depots and palaces in their vicinities.[61]

[61] V.N. Sukla, *"Constitution of India"*, 10th Edition, Eastern Book Company

During that period except in the case of Bombay which had been ceded with full sovereignty to the British Crown whenever the Britishers setteled they did so with the concent of the Indian rulers. The natural consequence of their position would have been their submission to the law of the place.

The first legislative power to have bestowed upon the east India Company by the British Crown seems to be the Charter of 1601 which granted to the Governor and the company the power to make, ordain and constitute such and so many reasonable law, constitutions, orders and ordinances for the good governance of the company. The legislative power of the company was very limited in its scope and character.

Similar powers were affirmed by the Charters granted by James I and Charles II in 1609 and 1661 respectively. These laws were required to be published, but of them now not a trace remains. Probably they were concerned with the company's monopoly of trade and the repression of interference. The Charter granted by William III in 1698 makes no mention of legislative powers. It may be held that they were withdrawn.[62]

On June 23rd, 1757 at Plassey, between Calcutta and Murshidabad, the forces of the East India Company under Robert Clive met the army of Siraj-ud-Doula, the Nawab of Bengal. The betrayal by aspirant to the Nawab's throne, Mir Jafar, induced to throw in his lot with Clive, and by far the greater number of the Nawab's soldiers were bribed to throw away their weapons, surrender prematurely, and even turn their arms against their own army. Siraj-ud-Doula was defeated. Battle of Plassey marked the first major military success for British East India Company. This victory laid the foundation stone of the British Empire in India. the company later was granted the Diwani, i.e, the responsibility of collection of revenue to the company which automatically involved the administration of civil justice.[63]

[62] ibid

[63] Illbert, *"Government of India"*, Ed. 1915

2.3.2. REGULATING ACT, 1773.

The Regulation Act 1973 is of great constitutional importance because it asserted for the first time the right of Parliament to regulate the affairs of the East India Company. It was the first Parliamentary Act, passed after the company had acquired a de facto sovereignty over the vast territory in the north east of India, for establishing certain regulations for the best management of the affairs of the East India Company. Under the Act The Governor of Bengal was made the Governor General. The first man to be appointed to this post was Warren Hastings. For the assistance of the Governor General an executive Council of four members was created. A Supreme Court was set up at Calcutta, with a Chief Justice and three assistant judges. The number of the Directors of the Company was fixed at 24. The Regulating Act initiated the process of centralization in India. The object of the Act was good but the system that it established was imperfect. It did not define clearly the relationship of the Governor General and his Council and the Supreme Court with each other. It did not make clear as to what law the Supreme Court was to administer. It placed the Governor General at the mercy of his Council.[64]

The Act subjected the legislative authority of the Governor-General and Councils to certain conditions. Firstly, the rules and regulation made by them were not to be repugnant to the laws of England. Secondly, they required, as a conditions to their validity, registration by the Supreme Court. The registration was not intended to be only a method of the promulgation of laws but the Supreme Court had the power to veto the laws submitted to it for registration. Thirdly, an appeal from regulations so registered and approved lay to the King-in Council in England, but the pendency of such an appeal was not allowed to hinder the coming into immediate operation of the laws. Fourthly, the Governor General and Council were under the duty to forward all such regulations to England and the power was reserved to the King-in Council to disapprove them at any time within two years.[65]

[64] Dr. J.N. Pandey, *"Constitutional Law of India"*, 40th Edition, Central Law Agency.

[65] V.N. Sukla, *"Constitution of India"*, 10th Edition, Eastern Book Company.

2.3.3. THE ACT OF SETTLEMENT, 1781.

To remove the defects of the Regulating Act of 1773, Parliament passed the Act of Settlement of 1781. The Act of Settlement of 1781 made changes in the Regulating Act. It exempted the actions of the public servants of the company done in official capacity from the jurisdiction of the Supreme Court. It tried to settle the question of jurisdiction of the Court over servants of the company and native inhabitants. It made clear as to what law is to applied by the Supreme Court. The Act recognized and confirmed the appellate jurisdiction of the Governor-General-in Council in cases decided by the Mufassil Courts. It empowered the Governor-General-in Council to frame regulations for the Provincial Courts and Councils also.[66]

Although the Regulating Act clearly defined the territorial extent of the legislative powers granted in it, it was for second time interpreted to include even the area under the Diwani grant. In respect of the subject matters, the power of the Supreme Court under the Regulating Act were of wide amplitude. It enabled them to make laws for the good order and civil government of the settlement and all factories and places subordinate thereto. The Act of 1781, on the other hand gave power only to legislate for the provincial courts and councils. Literally interpreted, the power was meant only to make rules prescribing procedure and practice of the Courts. But in fact the Supreme Court had made most of the Bengal Regulations, many of which affected the right of property of the subject, under the power conferred by the latter Act. After several years of exercise of the power, Parliament itself seems to have acquiesced in the extended interpretation put on the Act.

2.3.4. PITTS INDIA ACT, 1784.

This Act introduces many important changes in the Constitutional history of India. The number of members of the Governor General's Council was reduced

[66] ibid

to three and the Commander-in-Chief was to be one of them. A special court was established for better trial of the Company's officials in England for offences committed by them in India. By this Act, the real power in India passed from the Directors of the Company to the British Parliament.

The Regulating Act of 1773 made a provision that the Charter of the Company would be reviewed every 20 years. Therefore, from time to time, Acts of 1793, 1813, 1833 and 1853 reviewed the Charter Act of the Company and brought about some changes here and there. The first Law Commission was established after the Charter Act of 1833.[67]

The Rule of the East India Company was terminated when the British Parliament passed the Indian Councils Act of 1858. The power to govern India was transferred from the Company to the Crown and India was to be governed by and in the name of 'Her Majesty'. Again, the Indian Councils Act of 1861 was passed by the British Parliament. This Act is very important in the Constitutional history of India because it has created decentralization system of administration in India. The members the Governor-General's Executive Council was increased from the four to five. The work of administration was also distributed among ts different members. The Legislative members of the Bombay and Madras Government were restored. The British Parliament passed Indian Councils Act of 1892 and the principle of indirect election was introduced. The elected members could ask questions and seek other information from the Government.[68]

2.3.5. THE GOVERNMENT OF INDIA ACT, 1858.

Many historians called this First War of Independence as a 'Sepoy Mutiny' of 1857. For them it was just a bunch of Indian sepoys (soldiers) who had mutinied. They largely failed to recognize the involvement of a vast section of

[67] ibid

[68] Dr. J.N. Pandey, *"Constitutional Law of India"*, 40th Edition, Central Law Agency.

Indian society that took part in this struggle. Peasants and nobles all were involved. Lack of planning and co-ordination amongst people who took part in this struggle resulted in defeat of Indians. Many innocent people were killed on both sides. The first war of Independence gave a death blow to the company's rule. As a result of all this, British Parliament passed the Act for the better government, the Government of India Act, 1858. This Act of 1858 transferred Government of India from the company to the British Crown. The Board of Control and the Court of Directors were abolished and their powers were transferred to one of Her Majesty's Secretary of State.

This Act is very important in the Constitutional history of India because it has created decentralization system of administration in India. The members the Governor-General's Executive Council was increased from the four to five. The work of administration was also distributed among its different members. The Legislative members of the Bombay and Madras Government were restored. The British Parliament passed Indian Councils Act of 1892 and the principle of indirect election was introduced. The elected members could ask questions and seek other information from the Government. The Act of 1858 constituted the Secretary of State in Council as a body corporate, capable of suing and be sued in India and in England.

The transfer of the company's government to the British Crown was announced by a 'Royal Proclamation' made by the Queen in England. The proclamation had great constitutional value as the passing of the Government of India Act, 1858 closed one great period of history and ushered another great era under the direct rule of the Crown.[69]

2.3.6. INDIAN COUNCIL ACT, 1861.

The Indian Council Act of 1861 was of basic importance. It brought about the beginning of the representative institution. It provided India with the framework of Government which lasted up to the resent time. Under this Act

[69] G.N. Singh, *'Landmark in Indian Constitutional and National Development'*, p.73

Indians were for the first time associated with the work of legislation. The Act enlarged the Council of the Governor-General for the purpose of making law and regulations. The Legislative Council was given the power to frame laws and regulations for all person.

The Act is important in the Constitutional history of India for two chief reasons. First because it enable the Governor-General to associate the people of the land with the work of legislation and secondly, by vesting legislative power in the Government of Bombay and Madras and making provision for good government, it laid down the foundation of the policy of the legislative devolution, which resulted in the grant of almost complete internal autonomy to the provinces in 1937.

However The Indian Council Act, 1861, suffered from many defects. It gave unlimited power to the Governor General. The non-official members had no right in the Governor General's Council. They could not ask question and discuss the budget. More over the non-official members were used to be native princes or zamindars. They were not men of intelligence and had absolutely no interest in the legislation for India.

The political situation in India was very explosive. The period period from 1861 to 1892 was the rise of Indian National Movement. The Indian National Congress was formed in 1885 and in its first session passed resolution expressing grave dissatisfaction and the existing system of the Government and demanded reforms and expansion of the legislative councils by admitting a considerable proportion of elected members as well as an increase in their powers. The Viceroy felt that the time had come to accept the demands of the Congress for reforms seriously and the British Crown passed the Indian Council Act, 1892.

The Indian Council Act, 1892 increased the number of members in the Central and Provisional Councils, introduced the election system partially, and enlarged the function of the council. Although the Act of 1892 fell far short of the demand made by the India National Congress, yet it could be said that it was a great advance upon the existing state of things. It certainly paved the way for

future progress by conceding the principals of elections and giving the legislative council some control over the executive.[70]

2.3.7. THE INDIAN COUNCIL ACT OF 1909.

The first attempt at introducing a representative and popular element was made by Morley-Minto Reforms, known by the names of the Secretary of State Lord Morlay and the Viceroy Lord Minto which was implemented by the Indian Councils Act, 1909.

The Indian Council Act of 1909 which is mostly known as Morley-Minto Reforms of 1909 is a significant event in constitutional history of India. The important provisions of this Act is that it enlarged of the size of the Central and Provincial Legislative Councils. The number of members was raised to 60 in central Legislature and the provincial Legislative Councils were to consist of 30 to 50 members, the Powers and functions of the Central and Provincial Councils were also increased, the provision for the appointment of an Indian member in the Executive Council of the Governor General and it introduced the system of Communal representation. The system of Communal representation was draconian and a ploy to divide and rule.

By the Act of 1909 the Councils were empowered to discuss any matter, ask questions and supplementary questions. The Council had also the right of discussing and moving a resolution on the financial statement but they were not given the power of voting.[71]

It is to be noticed that the Morley-Minto reforms failed to satisfy the aspiration of the Indian people as they did not establish Parliamentary system of

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[70] G.N. Singh, *'Landmark in Indian Constitutional and National Development'*, p.108

[71] Dr. J.N. Pandey, *"Constitutional Law of India"*, 40th Edition, Central Law Agency.

government in the country. The module of election based on religion was rejected by the people.

2.3.8. GOVERNMENT OF INDIA ACT OF 1919.

The next landmark in the constitutional development was the Montague-Chelmsford Reforms. Indian National Congress became very active during the time of the 1st World War and pressed for reforms. In response to the popular demands the British Government made a declaration that the future policy was that of increasing association of Indians in every branch of the administration and the gradual development of self governing institution with a view to progressive realization of responsible government in British India as a integral part of British Empire.

The British Parliament passed the Government of India Act of 1919 which is also known as Montague-Chelmsford Reforms. The Act made many important changes in the Central and provincial Government. The Act introduced a bicameral legislature at the centre. The two Houses were- Legislative Assembly (Lower House) and Council of States (Upper House). The term of Legislative Assembly and Council of States were five and three years respectively. But the Governor-General could alter this term. The powers and functions of both the Houses were also increased. The number of Indian members in the Executive Council of the Governor General was raised from one to three. The system of direct election was introduced.

The Act made many changes in the provincial Government too. A system of Dyarchy was introduced in the Provinces. The subjects which were dealt with by the Provincial Government were divided into two sets: Transferred and Reserved Subjects. The Governor administered the Reserved Subjects with the help of the Ministers chosen by him from the elected members of the legislature. The Governor General could shift a subject from Transferred to Reserved Part.

The Act created two lists of Subjects (departments) and divided them into Central and Provincial Governments. The Central List included the subjects such as Defence, Currency, Commerce, Commerce, Communication, Telegraph, Foreign Relations, Customs, Civil and criminal law etc. were given to the Central Government. On the other hand, the Provincial List which were of provincial interest such as Local-Self Government, Education, Public Works, Agriculture, Public Health, Revenue, Irrigation, water Supplies etc. were given to the provincial Government. The Act created a post of a High Commissioner for India. The term of his office was six years. The Act of 1919 was an important landmark in the constitutional development of India which opened a new era of responsible Government. No doubt this was the step which paved the path for Independence of India.[72]

2.3.9. GOVERNMENT OF INDIA ACT OF 1935.

The British Parliament passed the Government of India Act of 1935 which was so valuable and important that most provisions of this Act were taken by the framers of the Indian Constitution. It is regarded as a milestone on the highway leading to a full responsible Government. The Act was a very lengthy written document. The Act proposed to form an All India Federation. All the provinces were to be members of a federation. The Government of India Act of 1935 provided a bicameral legislature at the Centre consisting of Federal assembly (Lower House) and Council of States (Upper House). The total number of members of the Federal Assembly were 375 (250 were elected by the people of British Provinces and 125 from Indian States). The Council of States consisted of 260 members (150 elected from the British Provinces, 104 nominated by the rulers of the States and 6 were nominated by the Governor- General).

The Act introduced Dyarchy system at the Centre. The Central Subjects were divided into the Reserved and the Transferred subjects. The Act provided Division of powers by creating Federal list; Provincial List, Concurrent List and

[72] ibid

also a provision for Residuary Subjects. 59 subjects were included in Federal List consisting of Defense, Currency and Coinage, post and Telegraphs, Foreign Affairs etc. Provincial List included 54 subjects such as Police, Administration of Justice, Education, Agriculture, Industry, Land revenue etc. There were 36 subjects in Concurrent list. These were Newspaper and Printing Press, Marriage and Divorce, registration, Criminal Procedure Code etc. The subjects which were not included in any of the above lists were residuary subjects. They were looked after by the Governor General.

The Act established a Federal Court at Delhi. Federal Court was to decide inter-state disputes and also heard appeals against the decisions of the High Courts.

The system of Dyarchy was replaced by the Provincial autonomy in the Provinces. The Act introduced a bicameral legislature (viz, Legislative Assembly and Legislative Council) in six out of total eleven provinces. These six provinces were-Bengal, Bihar, Bombay, Uttar Pradesh, Madras and Assam. Rest five Provinces Punjab, Central Provinces, Orissa, and North-West Frontier Provinces (N.W.F.P.) and Sind were to have Legislative Assembly only. The Legislative Council was the Upper Chamber and the Legislative Assembly was the Lower Chamber. The Legislative Council was to be a permanent body and one third of its members were to retire every three years. The members of the Legislative Assembly were elected for five years. Governor was the executive head of the Provinces. The India Council of the Secretary of State for India was replaced by an Advisory Council. A Federal Public Service Commission was established.

The Government of India Act 1935 created an All-Indian Federation based on provincial autonomy. The Congress swept 7 out of 11 of the provinces in July 1937. The Muslim League which claimed to represent Indian Muslims, secured less then a quarter of the seats reserved for Muslims. While, political prisoners were released and civil liberties promoted, the limitations on the Act of 1935 few real achievements were made. The Muslim League fared poorly in the elections. Muhammad Ali Jinnah, the permanent president of the Muslim League, began rumors that the Muslim minority was in danger under the Hindu majority

and promoted a two separate nation plan. In 1940, the Muslim League passed a resolution demanding Pakistan after as a separate country after Independence.

The Government of India Act, 1935, was greatly criticized by almost all the parties of India. In some provinces the Act continued to be governed in accordance with the provision of the Government of India Act, 1919 with minor amendments. In 1939 the 2nd World War broke out in Europe. The British government declared India as a belligerent country at war with Germany. This was done without consulting Indian leaders and the Indian legislatures. Consequently the Congress ministers resigned from office on the issue of participation of India in the War.[73]

2.3.10. THE CRIPPS MISSION.

In the year 1942 the British Government realized that it was difficult to remain indifferent towards the Indian problem any longer. The Second World War started in 1939 and Great Britain was fully involved in this war. In 1942, the Cripps Mission was sent to India from Great Britain under the leadership of Sir Stafford Cripps to negotiate with Indian leaders and secure their cooperation in the prosecution of war. The Cripps Mission provided some proposals to Indian people for the settlement of the Indian problem. Some of them are:

i) After the Second World War, dominion status would be granted to India.
ii) For framing a Constitution for India, an elected body would be set up in India, after war.
iii) The Indian states would also participate in the Constitution making body.
iv) The British Government was to accept the Constitution so framed. But a Province or a Princely State may or may not accept it. The Provinces were given a right to finalize their Constitution in consultation with the British Government.
v) The Princely States would have the freedom to join Indian Union.
vi) During the World war and until the new constitution was framed, India would remain under the control of Her Majesty's Government.

[73] Dr. J.N. Pandey, *"Constitutional Law of India"*, 40th Edition, Central Law Agency

But the Cripps proposals were rejected by almost all the Parties and sections in India on different grounds. The Indian leaders found in it the seeds of partition of the country. The main cause for its rejection was inadequacy of the proposal and the insistence of Congress on Cabinet Government. The Indian National Congress, Muslim League, Hindu Mahasabha and Sikhs rejected the Cripps Proposal.

The Labour Party came to power in England. The Labour Government was more sympathetic towards India and wanted to solve the Indian problem. With this end in view a Cabinet Mission was sent to India.[74]

2.3.11. THE CABINET MISSION PLAN, 1946.

After the Labour Party had come to power in England on February 19, 1946, its announced that a mission of three Cabinet minister would be sent to India to explore the possibilities of an immediate settlement of the Indian problem. On March 15, 1946, Mr. Atlee the Labour Prime Minister, declared in the House of Commons " Is it any wonder that India claims, as a nation of 400 millions that has twice send her sons to die for freedom, that she should herself have freedom to decide her own destiny? What form of government is to replace the present regime is to India to decide, but our desire is to help her to set up forthwith the machinery for making that decision". Thus there was a definite change of attitude of the British Government. It was an equivocal acceptance of the claim of Indian to freedom.[75]

The Cabinet Mission came to India on 4th March 1946. The appointment of Cabinet Mission Plan was another important step approved by the British Government in the process of Constitutional development.

The chief proposals of Cabinet Mission Plan were –

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[74] ibid

[75] V.N. Sukla, *"Constitution of India"*, 10th Edition, Eastern Book Company.

i) To form a Union of India consisting of British Provinces and Indian States.
ii) To establish a Constituent Assembly having 389 members.
iii) An interim Government with fourteen representatives of the major Political Parties.

Initially, the proposals were accepted by the Congress but the Muslim League under the leadership of Md. Ali Zinnah rejected the proposals and left the Interim Government. The Muslim League observed 'Direct Action Day' on August 16, 1946. On that Hindu Muslim clashes and riots took place in various parts of the Country.

Disagreement and conflict between the Congress and Muslim League continued. At this juncture, Lord Mountbatten proposed a plan to Divide India into two parts- India and Pakistan. The Congress and Muslim League accepted the plan. The proposal of the Cabinet Mission being accepted elections in July 1946 of the Cabinet Assemble took place.

2.3.12. INDIAN INDEPENDENCE ACT, 1947.

On the basis of Mountbatten plan, the British Parliament passed the Indian Independence Act on July 18, 1947 and ultimately, in August 15, 1947 India became an independent State. According to the proposals of cabinet Mission Plan, a Constituent Assembly was framed as a representative body. It was accepted that the constituent Assembly would act as the Dominion Legislature until the Constitution was framed and India was administered according to the provisions of the Government of India Act, 1935 with some necessary modifications.

The provisions of the Indian Independence Act, 1947 were as follows:

1. The Act provided for the creation of two independent Dominions. India and Pakistan from 15th August 1947.
2. Each Dominion was to have a Governor General who was to be appointed by the King.
3. The Constituent Assembly of both dominions was empowered to frame laws for their respective territories till the new Constitution comes in force.

4. After August 15,1947 the British Government was not to control the Dominions or the provinces.
5. For the time being, till the new Constitution were framed, each of the dominions and the Provinces were to be governed by the Government of India Act, 1935.
6. The post of the Secretary of the State for India was to be abolished and was taken over by Secretary of the Commonwealth of Nations.
7. The Act proclaimed lapse of British paramountcy over Indian States.

The Indian Independence Act, 1947, came into force on August 15,1947, when the British rule in India came to an end.

2.4. INDIAN AWAKENING: THE FREEDOM MOVEMENT.

Nationalism is a feeling of consciousness about race, language, history, culture, tradition, economics, politics and hopes and aspirations of the people. The conditions created by the British rule and many other factors helped in the growth of national consciousness amongst Indian people. We know that Indian society was suffering from various social and religious ills like, blind faith, caste division, child marriage, sati system, purdah system etc. Many reformers like Raja Ram Mohan Rai, Swami Dayananda Saraswati, Swami Vivekananda, Sir Syed Ahmed Khan, Mrs. Annie Besant etc. deserve a special mention who tried to reform the Indian society. They inspired the people with ideas of self respect and self confidence.

By the middle of nineteenth Century most of India was controlled by the British, either directly by the East India Company or through the system of treaties and alliances with the Princely States. During this period certain measures of constitutional reforms were introduced.

The categorical choice made by colonial India, of the values of social justice, secularism and republicanism, not only laid a foundation for a new epoch of human rights system but also gave specific orientation towards realizing the social purpose underlying human rights values. This was but natural because such a development had its roots in the community's experience itself. It was due to the wisdom of our founding fathers that we have a Constitution which is secular in character, and which caters to the tremendous diversity in our country.

Thus it is the Constitution of India which is keeping us together despite all our tremendous diversity, because the Constitution gives equal respect to all communities, sects, lingual and ethnic groups, etc. in the country.

The Independence of India was a product of great struggle of noble men and women who volunteered their life's for a better tomorrow. A tomorrow which shall be free of all misery, where dignity of men and women shall be paramount. Some important events are needed to be incorporated in this study to remember the men and women who brought liberty and Independence to our country. Swami Vivekananda considers that freedom is meaningless unless it is based on the

edifice of equality; equality is the way to freedom and inequality, the way to bondage. [76]

2.4.1. JALIANWALA BAGH MASSACRE.

British responded to the Indian help in World War I by enacting in 1919, The Rowlatt Act. This allowed the government to imprison anyone without a trial or a conviction. There were widespread protests to this law. On April 13, 1919, thousands of people gathered peacefully in protest against this law in Jallianwala Bagh, Amritsar Punjab. British troops marched to the park accompanied by an armored vehicle on which machine guns were mounted. The vehicle was unable to enter the park compound due to the narrow entrance. The troops were under the command of General Reginald Edward Harry Dyer. He ordered his men to open fire on the peaceful gathering. Since there was no other exit but the one already manned by the troops, people desperately tried to exit the park by trying to climb the walls of the park. Some people also jumped into a well to escape the bullets. More than a thousands people including women and children were massacred. The event was condemned worldwide and General Dyer was summoned to London the Hunter Commission in 1920, found him guilty. However, the British Parliament cleared his name and even praised his ruthlessness. Many Britons raised a fund in his honor.

The Jallianwala Bagh Tragedy was condemned by all sections of people. Rabindra Nath Tagore renounced the knighthood conferred by the British Government. started by Maulana brothers brought Hindu-Muslim unity. In 1927, the Simon Commission was appointed by the British Government to inquire into the working of the 1919 Act. One of the important recommendations made by this commission was the development of the Constitution of India in the direction of federalism. But the Congress boycotted it.

[76] Swami Vivekananda, *"The Complete Works"*, Vol. 1, 1965, p. 199.

In 1928 the Congress at Calcutta Session appointed Nehru Committee with Motilal Nehru as its Chairman to draft the future Constitution of India. The Congress adopted the Nehru Report and declared that if the report was not accepted by the British Government the Congress would fight to achieve independence by civil disobedience. When the British rejected its demand the Congress declared complete Independence as the chief goal under the President ship of Jawaharlal Nehru.[77]

2.4.2. CIVIL DISOBEDIENCE OR NON-COOPERATION MOVEMENT.

'Jalianwala Bagh Massacre' catalyzed the militant movement against British rule and paved the way for Gandhi's *Non-Cooperation Movement* against the British in 1920 by violating the salt law. After the end of World War I Turkish Khalifa was removed, which led to a worldwide protest by Muslims. Under the leadership of the Ali Brothers, Maulana Muhammad Ali and Maulana Shaukat Ali, the Muslims of South Asia launched the historic Khilafat Movement. Gandhiji linked the issue of Swaraj with the Khilafat issue to bring Hindus and Muslim together in one movement. The Civil Disobedience or Non-cooperation movement was started. The ensuing movement was the first countrywide popular movement. It began with returning of honorary titles given by the British and then continued to a boycott of the legislatures, elections and government works. Foreign clothes were burned and Khadi (home woven cloth) became a symbol of freedom. By the end of 1921, all of the important leaders, except Gandhi were in jail. In February 1922, at Chaurichaura, Uttar Pradesh, violence erupted.

British adopted a repressive policy of suppressing this movement and also followed a policy of conciliation and called the First Round Table Conference in 1930. But Congress boycotted the Conference. On March 5, 1931 the famous Gandhi-Irwin Pact was signed and the Congress called off the Civil Disobedience Movement and took part in the Second Round Table Conference held in London in 1931. The Conference almost failed and the movement again started when many

[77] A. C. Banerjee: '*The Making of Indian Constitution*'.

leaders along with Gandhi were arrested. When the British Parliament passed the Government of India Act, 1935, Mahatma Gandhi called off the Civil Disobedience Movement.

Gandhiji came to the political scenario with the life message of getting off the backs of Indians, the burden of foreign rule, exploitation and social inequality.[78]

2.4.3. SWARAJ PARTY.

Deshbandhu Chitt Ranjan Das, along with Motilal Nehru, founded the Swaraj Party in 1923 for maintaining of continued participation in legislative councils. The party was soon recognized as the parliamentary wing of the Congress. In Bengal many of the candidates fielded by the Swaraj Party were elected to office. The Governor invited C.R. Das to form a government but he declined. The party came to be a powerful opposition in the Bengal Legislative Council and inflicted defeats on three ministries. The Calcutta Municipal Act of 1923 was a major landmark in the history of local self-government in India. The Swarajists were elected to the Calcutta Corporation in a majority in 1924. Deshbandhu was elected mayor and Subash Chandra Bose was appointed Chief Executive Officer. The leaders of Swaraj Party began to advocate for dominion status to India. Many of the elected deputies soon forgot about obstruction and began cooperating with the government (tariff autonomy bill passed, 1923). In 1924 Gandhi was released from prison due to poor health and was elected President of the Indian National Congress. 1925 saw the first woman becoming the president of Indian National Congress when Sarojini Naidu was elected President for the Kanpur session.

The philosophy of Mahatma Gandhi was rooted in our ancient tradition; the philosophy of Jawaharlal Nehru was influenced by modern progressive thinking. But the common denominator in their philosophies was humanism. The humanism of the Western Enlightenment comprehended mere poltical equality, the humanism of Mahatama Gandhi and Jawaharlal Nehru was instinct with social and economic

[78] J. L. Nehru, *"The Discovery of India"*, p. 358.

equality. The former made man a political citizen, the latter aims to make him a 'perfect' citizen. This new humanist philosophy became the catalyst of the National Movement for Swaraj. In 1929 the All India Congress Committee resolved that the great poverty and misery of the Indian people was due also "to the economic structure of the society." The Karachi Congress resolution, on fundamental rights and economic programme revised in the All India Congress Session of Bombay in 1931 declare that in order to end the exploitation of the masses political freedom must include economic freedom of the starving millions.[79]

2.4.4. REVOLUTIONARY MOVEMENT IN INDIA DURING 1920 - 1930.

The study of the struggle for freedom against the british rule would not be complete if we fail to remember the great revolutionaries during the period of 1920 to 1930.

The revolutionaries in northern India organized under the leadership of the old veterans, Ramprasad Bismil, Jogesh Chatterjee, Chandrashekhar Azad and Sachindranath Sanyal whose 'Bandi Jiwani' served as a textbook to the revolutionary movement. They met in Kanpur in October 1924 and founded the Hindustan Republican Association (HRA) to organize armed revolution to overthrow colonial rule and establish in its place a Federal Republic of the United States of India.

Gopinath Saha in January 1924 tried to assassinate Charles Tegart, the hated Police Commissioner of Calcutta. By an error, another Englishman named Day was killed. Gopinath Saha was arrested and executed despite large-scale protests. The most important action of the HRA was the Kakori train episode. On 9 August. 1925, ten men up the 8-Down train at Kakori, an obscure village near Lucknow, looted its official railway treasury. The Government reaction was quick

[79] *' Indian National Congress Resolutions on Economic Policy, Programme and Allied Matters'*, 1924-1969, p. 3.

and hard. It arrested a large number of young men and tried them in the Kakori case, Ashfaqullah Khan, Ramprasad Bismil, Roshan Singh, Rajendra Lahiri were hanged, four others were sent to the Andaman for life and seventeen others were sentenced to long terms of imprisonment. Chandrashekhar Azad remained at large.

In 1927, the Simon Commission was appointed by the British Government to suggest political reforms in India. Sir John Simon and six other members of the commission were British. At the Congress meeting in Madras in 1927, it was decided to boycott the commission. Formation of Simon Commission led to large-scale protests all over India.

The Kakori case was a major setback to the revolutionaries of northern India. But soon young men such as Bejoy Kumar Sinha, Shiv Varma and Jaidev Kapur in U.P., Bhagat Singh, Bhagwati Charan Vohra and Sukhdev in Punjab set out to reorganize the HRA under the overall leadership of Chandrashekhar Azad. Finally nearly all the major young revolutionaries of northern India met a Ferozeshah Kotla Ground at Delhi on 9 and 10 September 1928, created a new collective leadership adopted socialism as their official goal and changed the name of the party to the Hindustan Socialist Republican Association (HRSA).

Lala Lajpat Rai died, as the result of a brutal lathi-charge when he was leading an anti-Simon Commission demonstration at Lahore on 30 October 1928. The romantic youthful leadership of the HSRA saw the death of this great Punjabi leader, popularly known as Sher-e-Punjab, as a direct challenge.

Bhagat Singh and Batukeshwar Dutt threw a bomb in the Central Legislative Assembly on 8 April 1929 protesting against the passage of the Public Safety Bill and the Trade Disputes Bill that would reduce the civil liberties of citizens. The aim was not to kill, for the bombs were relatively harmless. The leaflet they threw into the Assembly hall said “If the deaf are to hear, the sound has to be very loud’. The objective was to get arrested and to use trial court as a forum for propaganda so that people would become familiar with their movement and ideology. Bhagat Singh and B.K. Dutt were tried in the *Assembly Bomb Case.*

Bhagat Singh, Sukhdev, Rajguru and many other revolutionaries were tried in a series of conspiracy cases. During the trial they said - "When we dropped the bomb, it was not our intention to kill anybody. We have bombed the British Government. The British must quit India and make her free." Their fearless and defiant attitude in the courts and their slogans '*Inquilab Zindabad*,' songs such as '*Sarfaroshi ki tamanna ab hamare dil mein hain*' and '*Mera rang de basanti chola*' became very popular all over India.

Bhagat Singh, Rajguru & Sukhdev became symbols for Indian struggle against British rule. They became an inspiration for many youths who wanted to see India independent. Sukhdev and Rajguru were executed on 23rd March 1931 and Bhagat Singh on 24th March 1931. Millions of people in India wept and refused to eat food, attend schools, or carry on their daily work, when they heard of their hanging.

Chandrashekhar Azad had escaped from getting arrested and he continued to organize the revolutionary youths. But on 27th February 1931 Azad was betrayed by an informer and was encircled by a huge posse of British troops in the Alfred Park, Allahabad. He was asked to surrender but Azad refused. For several hours he alone fought against hundreds of policemen. He kept on fighting till the last bullet. Finding no other alternative, except surrender, Azad shot himself.

A large number of revolutionaries were convicted in the Lahore conspiracy Case and other similar cases and sentenced to long terms of imprisonment many of them were sent to the Andamans. The revolutionary under-trials went on hunger strike protesting against the horrible conditions in jails. They demanded that they be treated as political prisoners and not as criminals. On 13th September, after 64 days of an epic hunger strike Jatin Das, the iron willed young man from Bengal died. The entire nation rallied behind the hunger strikers. Thousands came to pay homage at every station passed by the train carrying his body from Lahore to Calcutta. At Calcutta, a two-mile-long procession of more than half a million people carried his coffin to the cremation ground. [80]

[80] http://www.gatewayforindia.com/history/british_history, accessed on 21.03.2012

2.4.5. SATYAGRAHA MOVEMENT OF GANDHI AND RISE OF SARDAR PATEL AND JAWAHARLAL NEHRU.

Vallabhbhai Patel, qualified as a barrister in 1913 and returned to India to a lucrative practice in Ahmedabad. But soon following Gandhi's footsteps, Vallabhbhai took to spinning the charkha, boycotted foreign goods and clothes and burned his foreign possessions on public bonfires. He even discarded the western dresses he once so coveted. The relationship between Gandhiji and Vallabhbhai was concretely defined when Gandhiji was elected the President of the Gujarat Sabha and Vallabhbhai the Secretary, in 1917. He participated in the Nagpur flag satyagraha from May to August in 1923 in protest against the stopping of a procession which carried the national flag. In 1928, Vallabhbhai once again came to the rescue of the farmers, this time it was in Bardoli, which was then a part of Surat district. The Government increased the tax on the land. Those who were not able to pay the high taxes, their lands were confiscated. Vallabhbhai urged the farmers not to pay, declaring the hike unjust. He prepared the farmers for satyagraha. The Satyagraha continued for six months. Finally the government agreed to hold an inquiry into the justification of the tax hike, released the satyagrahis and returned all confiscated items back to the farmers. So pleased was Gandhiji with Vallabhbhai's effort that he gave him the title of "Sardar" or leader.

In 1929 Lord Irwin promises Dominion Status for India. This year also saw the rise of Jawaharlal Nehru, who was destined to become the first prime minister of free India. Jawaharlal Nehru was son of congress leader Motilal Nehru. Jawaharlal was educated in Britain from where he graduated as a barrister. After the Jalianwala Bagh massacre in 1919, he joined the freedom struggle. In the Lahore session of Congress in 1929, under President Jawaharlal Nehru, the resolution of "Poorna Swaraj", Complete Independence, was adopted. On December 21, 1929, the Trianga (tricolor) flag was unfurled. On January 26, 1930, the first Independence Day was celebrated. The Civil disobedience movement was started as well as the movement to no longer submit to British Rule. Nehru spent most of the period from 1930 to 1936 in jail for conducting civil disobedience campaigns.

On March 12, 1930, Gandhi marched from Sabarmati Ashram to Dandi, to protest against ‘state monopoly on salt’ often called the Dandi march. The march was 375 km and took 26 days. As a result of this march, all of India joined the campaign to boycott foreign goods and refused to pay taxes. Sardar Patel left for Dandi to prepare for Gandhiji's Salt satyagraha. He went to villages to organize for the food and lodging of the marchers. In every village he went, he made stirring speeches, rousing the people to join the march to Dandi. The Government swooped down and arrested him while he was in the village of Ras. This was Sardar Patel's first prison sentence.

Khan Abdul Ghafar Khan started the Khudai Kidmatgar movement in the North West of India. The government imprisoned 90,000 people that were participating in the movement in the first year.

2.4.6. ROUND TABLE CONFERENCES AND GANDHI IRWIN PACT.

First Round Table Conferences was held in November 1930 was attended by eighty-nine delegates from different religious, political groups and princely states. The Indian National Congress, then engaged in civil disobedience, was not represented. Lacking representation from the Congress and preoccupied with problems of federation, the first conference adjourned in January 1931, without having made appreciable progress on the issue of communal representation. Sardar Patel, was released after the Gandhi-Irwin pact of March 1931. Gandhi signed the Pact on behalf of the Congress and by Lord Irwin on behalf of the Government. The terms of the agreement included the immediate release of all political prisoners not convicted for violence, the remission of all fines not yet collected, the return of confiscated lands not yet sold to third parties, and lenient treatment for those government employees who had resigned. British Government also conceded the right to make salt for consumption to villages long the coast, as also the right to peaceful and non-aggressive picketing. That year Sardar Patel presided over the Congress session in Karachi.

The second round table conference opened in London on September 7, 1931. Two committees were formed during the conference - committees on federal

structure and minorities. Gandhi was a member of both and he claimed that he represented all India and dismissed other Indian delegates as non-representative because they did not belong to the Congress. There was serious disagreement on communal representation issue between Congress and other minority groups. Gandhi returned from the conference and continued the civil disobedience movement and was arrested again.

The third round table conference began on November 17, 1932. It was short and unimportant. The Congress, and the Labor opposition in the British Parliament were both absent. Reports of the various committees were scrutinized. The conference ended on December 25, 1932.[81]

2.4.7. CONTINUING REVOLUTIONARY STRUGGLE AND ROLE OF WOMEN REVOLUTIONARIES.

Most historians write about the dominant role of Gandhi and Congress during the Indian freedom movement of 1930s but only a few mention the revolutionary movement that continued in different parts of India. Some of these revolutionary leaders worked in congress but later got disillusioned by Gandhi's non-violent satyagraha. Among the new 'Revolutionary Groups', the most active and famous was the Chittagong group led by Surya Sen. He actively participated in the non-cooperation movement and was popularly known as 'Masterda'. Arrested and imprisoned for two years, from 1926 to 1928, for revolutionary activities, he continued to work in the Congress.

On 18th April 1930, a group of fifty-six revolutionaries under the leader ship of Surya Sen, Ganesh Ghosh and Loknath Baul captured two police armories in Chittagong. They hoisted the National Flag among shouts of *Bande Mataram*and *Inquilab Zindabad* and proclaimed Provisional Revolutionary Government. It was on the Jalalabad Hill that over a thousand British government troops surrounded them on the afternoon of 22 April. After a fierce fight, in which

[81] ibid

over eighty British troops and twelve revolutionaries died, Surya Sen decided to disperse to the neighbouring village there they formed into small groups and conducted raids on Government personnel and property. They continued their fight against British army for over 3 years. Surya Sen was finally arrested on 16 February 1933, tried and hanged on 12th January 1934.

Large-scale participation of young women in freedom struggle under Surya Sen's leadership characterized this phase of revolutionary movement. These women provided shelters, acted as messengers and fought guns in hand. Preetilata Waddekar died while conducting a raid, while Kalpana Dutt was arrested and tried along with Surya Sen and given a life sentence. In December 1931, two schoolgirls of Kummilla in Bengal, Shanti Ghosh and Suneeti Chaudhary, shot dead the district magistrates. In December 1932, Beena Das fired point blank at the Governor while receiving her degree at the convocation. In Nagaland, Rani Gaidilita, a 13-year girl raised a flag against the British and was put into prison for life in 1932.

2.4.8. RISE OF SUBHASH CHANDRA BOSE IN INDIAN FREEDOM MOVEMENT.

Subhash Chandra Bose was born in 1897. He was selected for Indian civil services but resigned from it and returned to India in 1921. He joined Swarjya Party of C.R. Das in Gaya Congress in 1922. In 1930 he was elected Mayor of Calcutta and became a prominent leader of Indian freedom movement. During 1933-36 Subhash Bose met several prominent European leaders and tried to persuade them to help India in its freedom struggle against British colonialism. Many people questioned Gandhi’s leadership. Subhash Chandra Bose and Vithalbhai Patel (brother of Sardar Patel) in a strong statement had said in 1933 that 'Mr. Gandhi as a political leader has failed' and called for 'a radical reorganization of the Congress on a new principle with a new method, for which a new leader is essential.' Subhash returned to India in 1936 and was arrested.

In 1938 he was elected as the President of Indian Congress and made the historic speech in Haripura convention. Subhash brought new ideas to the Congress and wanted a quick move towards launching a freedom struggle. Gandhi and Nehru were in favor of helping British during World War II and against any serious movement that could harm British War efforts. Subhash Bose strongly opposed this idea. Sardar Patel, Rajendra Prasad, J.B. Kripalani, Jawaharlal Nehru and Gandhi supported Pattabhi Sitaramayya as a candidate for the post of Congress president against Subhash in 1939. Subhas Bose was elected on 29th January by 1580 votes against 1377. Gandhi declared that 'Pattabhi's defeat is my defeat'. Not wanting to embarrass these leaders and due to strong policy differences with Gandhi and Nehru, Subhash resigned and formed the new organization Forward Block. Subhash later became President of Indian National Army, which played a crucial role during last part of Indian freedom movement.

2.4.9. BRITISH INVOLVEMENT IN WORLD WAR II AND QUIT INDIA MOVEMENT.

On September 1st., 1939, German troops invaded Poland. Britain and France declared war against Germany on September 3rd 1939. Beginning of World War II hastened the end of British rule in India. During World War II, Congress stated that if it wanted India's cooperation, it must give India the right of self-determination. The British refused and in 1939 Congress led provincial ministries resigned. Role of Gandhi during this period was again controversial. In October 1940, Gandhi called for limited Satyagraha so the movement did not seriously harm the British war effort. Many of his closest colleagues and the rank and file in the Indian National Congress could not bring themselves to accept the feasibility of defending the country against aggression without resort to arms. During the war whenever there was a possibility of a rapprochement between the Congress and the Government for a united war effort, Gandhi stepped aside.

Udham Singh had witnessed his brother being killed in the Jalianwala massacre as a child. Twenty-one years later he took the revenge for that massacre

by killing Sir Michael O'Dwyer on 13th March 1940. Sir Michael O'Dwyer was the governor of Punjab at the time of Jalianwala Bagh massacre and had strongly supported the massacre. Udham Singh was captured and executed On July 31, 1940.

In 1942, Stafford Cripps lead the Cripps Mission, promised Dominion Status with the right of secession but refused to allow immediate transfer of power. The Indian leaders refused to accept promises. Under tremendous pressure from his colleagues in Congress Gandhi agreed for a mass independent movement. The Quit India resolution was passed in 1942, Bombay session of Congress. Gandhi stressed, "We shall either free India or die in the attempt. We shall not live to see the perpetuation of our slavery". This is famously known as "Do or Die". This was declared illegal by British government and all of the prominent leaders were arrested. There were revolts all around India with the slogan of "British Quit India".

2.4.10. ROLE OF INDIAN NATIONAL ARMY (INA).

Mohan Singh, an Indian officer of the British Indian Army who did not join the retreating British army in Malaya first conceived the idea of the Indian National Army and asked for Japanese help. Indian prisoners of war were handed over by the Japanese to Mohan Singh who then tried to recruit them into an Indian National Army. On 1 September 1942, the first division of the INA was formed with 16,300 men. But later due to differences with Japanese Mohan Singh was arrested. Accompanied by Rashbehari Bose, Netaji arrived at Singapore from Tokyo on 27 June. He was given a tumultuous welcome by the resident Indians and was profusely 'garlanded' wherever he went. His speeches kept the listeners spellbound. By now, a legend had grown around him, and its magic infected his audiences. He went to Tokyo and Prime Minister Tojo declared that Japan had no territorial designs on India. The Provisional Government of Free India was formed on 21 October 1943. INA was now known as Azad Hind Fauz (Free India Army) It was reorganized with the creation of a second INA division and even a women's regiment known as Rani Jhansi regiment was created. Subhash Chandra Bose was popularly called 'Netaji' by his followers. His call of ' *Tum mujhe Khun dou mai*

tumhe Azadi dunga'(I promise you freedom, if you are ready to spill your blood) encouraged thousands youths to join the freedom movement.

The Provisional Government of free India formed under 'Netaji' declared war on Britain. In March - April 1944 INA set its foot inside India and captured large parts of Manipur. On April 6th 1944 Kohima, a major city was captured. Indian tricolor (flag) was raised inside free India. But soon the balance of power in World War II shifted in favor of British and allied forces. With defeat of Japan and German forces the INA was forced to retreat from Kohima. Thousands of INA soldiers died fighting British and many were captured. Despite the defeat Subhas Chandra Bose and his INA became household names throughout the country as the British prosecuted the returning soldiers. Subhash Chandra Bose escaped to Japan and some reports say he died in an air-crash while others say he survived the air-crash. His ultimate fate remains unknown till date.[82]

On December 9, 1946 the Congress started framing the Indian Constitution. On March 22, 1947, Lord Mountbatten arrived as the last Viceroy. It was announced that power would be transferred from British to Indian hands by June 1948. Lord Mountbatten entered into a series of talks with the Congress and the Muslim League leaders. Jinnah insisted on creation of Pakistan as a separate country for Indian Muslims. Congress also agreed to the partition of India. Gandhi who had previously said that India would be partitioned over my 'dead body' now agreed to the partition plan. Mountbatten now prepared for the partition of the Sub-continent and announced it on June 3, 1947. The Congress and the Muslem League agreed that India would become free on August 15, 1947. The country would be partitioned under the guidance of the Red Cliff Mission.

India became an independent country and Pakistan was also formed. Jawaharlal Nehru took oath as the first Prime Minister of Independent India. Massive exodus of population from Islamic Pakistan to India took place. Nearly

[82] http://www.gatewayforindia.com/history/british_history, accessed on 21.03.2012

the whole Hindu population living in Pakistan's Punjab and Sindh and East Bengal migrated to India. Large numbers of Hindus were killed in the riots in Pakistan and many others were forcibly converted to Islam. Only a few Hindus survived in Islamic republic of Pakistan. Muslims from Independent India also migrated to Pakistan and many Muslims were killed in riots that took place in India. But majority of Muslims preferred to stay in India and were given equal rights in secular India. The Muslim population of Independent India was much bigger than that of Independent Pakistan. Indian independence was scarred by the trauma and bloodshed of partition.

CHAPTER 3.

SOCIAL WELFARE AND CONSTITUTIONAL FOUNDATION

The history of India's struggle for independence and the debates of the Constituent Assembly show how deeply our people value their personal liberties and how those liberties are regarded as an indispensable and integral part of our Constitution.

The demand for inalienable rights traces its origin in India to the 19th Century and flowered into the formation of the Indian National Congress in 1885. Indians demanded equality with their British rulers on the theory that the rights of the subjects cannot in a democracy be inferior to those of the rulers. Out of that demand grew the plants of equality and free speech. Those and other basic rights found their expression in Article 16 of the Constitution of India Bill, 1895. A series of Congress resolutions reiterated that demand between 1917 and 1919. The emergence of Mahatma Gandhi on the political scene gave to the freedom movement a new dimension: it ceased to be merely anti-British; it became a movement for the acquisition of rights of liberty for the Indian Community. Mrs. Besant's Commonwealth of India Bill, 1925 and the Madras Congress resolution of 1928 provided a striking continuity for that movement. The Motilal Nehru Committee appointed by the Madras Congress resolution said: “It is obvious that our first care should be to have our Fundamental Rights guaranteed in a manner which will not permit their withdrawal under any circumstances. Another reason why great importance attaches to a Declaration of Rights is the unfortunate existence of communal differences in the country. Certain safeguards are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We could not better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the Constitution”.

India represents a mosaic of humanity consisting of diverse religious, linguistic and caste groups. The rationale behind the insistence on fundamental rights has not yet lost its relevance, alas or not. The Congress Session of Karachi

adopted in 1931 the Resolution on Fundamental Rights as well as on Economic and Social change. The Sapru Report of 1945 said that the fundamental rights should serve as a "standing warning" to all concerned that: What the Constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civic rights, equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of the ordinary applications of life.[1]

India is a welfare state. The fact that the preamble of the Constitution itself envisages India to be a ‘socialist' state bears enough evidence for this. Socialism, as envisioned in the Indian Constitution, aims at elimination of inequality in income, status and standards of life. In many decisions, courts have interpreted ‘socialism' to mean a kind of social democracy which comes closer to the conception of a social welfare state.

The Preamble to the Constitution enunciates the great objectives and the social goals for the achievement of which the Indian constitution has been established. There objectives are : to secure to all citizens of India social, economic and political justice, to secure to all Indian citizens liberty of thought, expression, belief, faith and worship; to secure to them equality of status and opportunity; and to promote among them fraternity so as to secure the dignity of the individual and the unity of the nation. The Indian constitution having been conceived and drafted in the mid-twentieth century an era of the concept of social Welfare State is pervaded with the modern outlook regarding the objectives and functions of the State. It embodies a distinct philosophy of government, and, explicitly, in articulate terms, declares that India will be organized as a social Welfare state, i.e. a state which renders social services to the people and promotes their general welfare. In the formulations and declarations of the social objectives contained in the Preamble, one can clearly discern the impact of the modern political philosophy, which regards the state as an organ to secure the good and welfare of the people.

[1] *Minerva Mills v. Union of India*, (1980) 3 SCC 625.

Although the words "Welfare State" are not specifically mentioned into the Constitution, the aims and objectives clearly point to such an entity. Moreover, what is not specifically stated in the Preamble is mentioned in the Directive Principles of State Policy.

Pandit Jawaharlal Nehru had distinct concept of a Welfare State and gave some vital clarifications in this regard, Apart from the generally accepted stipulations, he said in Parliament, once on February 2, 1953, and again on February 17, the same year that "a Welfare State has no meaning unless every individual is property employed end takes part in-nation-building activities. When there is unemployment, he felt, there could be no Welfare State. In any case the unemployed people and their number runs into millions-are not parties to the Welfare State but "outside its pale". He also affirmed that "to realize the ideal of a Welfare Stale requires hard work, tremendous effort and co-operation". According to his concept India may not become a Welfare State for many decades yet because the unemployment problem was unlikely to be solved for many years to come.

Pandit Nehru also drew a distinction between a Welfare State and the Socialistic pattern of society. It is true that a socialistic economy must provide for a Welfare State but it does not necessarily follow that a Welfare State must also be based on a socialistic pattern. "We cannot have a Welfare State in India", he added "with all the socialism or even communism in the world unless our national income goes up substantially. Socialism or communism might help you to divided. Your existing wealth, if you like, but in India there is no existing wealth for you to divide, there is only poverty to divide.

The people's happiness is the ultimate aim of a Welfare State and can be assured only when every one has enough to eat, some shelter in the form of a house, or at least a modest roof over his head, some work to do so as to able to earn a living und some opportunities to contribute to nation-building, which implies constructive activity. Besides, everyone must also have the means to satisfy his basic needs, consumer goods etc. Everything, as Pandit Nehru said, has ultimately

to be judged in terms of human welfare, and the only worth while yard stick we can employ is the happiness of our people.[2]

It is significant that though Parts III and IV appear in the Constitution as two distinct fasciculus of articles, the leaders of our independence movement drew no distinction between the two kinds of State's obligations -- negative and positive.

"Both types of rights had developed as a common demand, products of the national and social revolutions, of their almost inseparable intertwining, and of the character of Indian politics itself.[3]

This chapter is an effort to revisit the ideals of the founding fathers of the Constitution of India and the relevant factors which led the majority of the members of the Constituent Assembly to make India a welfare state and imbibe the constitutionalism of the Constitution with a socialist philosophy. It deals with the ideals of the members of the Constituent Assembly in drafting the Constitution. Social Welfare was the need of the hour so the Constitutional foundation stands on the ideology of establishing a welfare state.

What is the Constitutionalism of India?

One needs to know the 'Constitutionalism' and "Constitutional Law" before understanding the philosophy of Constitution of India. Having a Constitution itself is not Constitutionalism. Even a dictator could create a rulebook calling it Constitution, which never meant that such a dictator had any faith in Constitutionalism. Recognizing the need for governance, the Constitutionalism equally emphasizes the necessity of restricting those powers. The Constitutional law means the rule, which regulates the structure of the principal organs of the Government and their relationship to each other, and determines their principal functions. The rules consist both of legal rules enacted or accepted as binding by

[2] http://www.preservearticles.com accessed on 14.03.2010.

[3] Granville Austin, *"The Indian Constitution: Cornerstone of a Nation"*, p. 52.

all who are concerned in Government. All the Constitutions are the heirs of the past as well as the testators of the future[4].

Constitution of Indian Republic is not the product of a political revolution but of the research and deliberations of a body of eminent representatives of the people who sought to improve the existing system of administration.[5]

Thus the Constitutionalism, in brief, is specific limitations on general governmental powers to prevent exercise of arbitrary decision-making. Unlimited powers concentrated in a few hands at the helm of affairs and their exercise would jeopardize the freedom of the people. These powers have to be checked and balanced with equally powerful alternatives in a system, where it will be nearly impossible for dictators to emerge. In one word 'Limited Governance' is the Constitutionalism, which is supposed to reflect in the Constitutional Law of a democratic state. Constitution of India is the Constitutional Law incorporating the Constitutionalism. The listed fundamental rights and guaranteed remedies, creation of judiciary as an impartial arbiter with all independent powers besides broad based legislative check on the executive are the reflections of such constitutionalism. From these essential characters the doctrines of judicial review, rule of law, separation of powers, universal franchise, transparent executive, fundamental right to equality and quality of life emerged and consolidated. At the same time, the rulebook has a responsibility to check anarchy and possibility of people misusing freedom to resort to violent means of overturning the constitutionally governing institutions. That responsibility is undercurrent in the reasonable restrictions placed on the exercise of fundamental rights of the people. The founding fathers of the Constitution made restrictions specific while the rights appear in general terms, paving a way for independent judiciary to expand the scope of freedoms and reading emerging rights into the sacred statements of rights under fundamental rights chapter. At the same time specification of restrictions operate as powerful restraints on the powers of the rulers. The right as the individual power in the hands of people and authority as the ruling power in the

[4] Jennings – *'Some Characteristics of the Indian Constitution'*, p. 56, 1953.

[5] DD Basu, '*Introduction to the Constitution of India*', p. 3, 3rd Edn. 1946.

hands of institutions cannot go arbitrary and anarchic undermining the democratic peace.

The democratic constitutionalism is three pronged in Indian Constitution, one- guaranteeing freedoms, two- restricting governing institutions, three- empowering the independent arbiter of judiciary with power to review the executive and legislative orders affecting the interests of people in general or afflicting basic norms of rule of law.[6]

Basic Philosophy Mr. Justice H. R. Khanna in his 'Making of Constitution said: "The framing of a Constitution calls for the highest statecraft. Those entrusted with it have to realize the practical needs of the government and have, at the same time, to keep in view the ideals, which have inspired the nation. They have to be men of vision, yet they cannot forget the grass roots"[7]. A Constitution at the same time has to be a living thing, living not for one or two generations but for succeeding generations of men and women. It is for that reason the provisions of the Constitution are couched in general terms, for the great generalities the Constitution have a content and significance that very from age to age and have, at the same time transcendental continuity about them. A constitution states, or ought to state, not the rules of the passing hour, but the principles for an expanding future[8].

A Constitution is a rule of book of a nation, codifying rule of law. Constitution is a legal document having a special legal sanctity, which sets out the framework and the principal functions of the organs of the government of a state, and declares the principles governing the operation of those organs[9]. Like every

[6] ibid

[7] Justice H. R. Khanna, *'H R, Making of India's Constitution'*, pp 1-2.

[8] Ibid.

[9] Wade and Phillips – '*Constitutional Law'*, 14th Edn., p- 1.

other Constitution, the Indian Constitution also seeks to establish the fundamental organs of government and administration, lays down their structure, composition, powers and principal functions, defines the inter-relationship of one organ with another, and regulates the relationship between the citizen and the state, more particularly the political relationship. The states have reasserted certain principles of law through written Constitutions. As a democratic Constitution, the Indian masterpiece also reflects the fundamental political values in substantive ways by guaranteeing Fundamental Rights to the citizens, and in procedural ways by providing remedies. It mirrors basic values about who shall govern, and in what direction. Constitution means the structure of a body, organism or organization, or we can also say what constitutes it or what it consists of. Because the nation is one of the biggest in the world with most of varieties of the people and the cultures, India needs an expressly written code of governance, more specifically when the people chose to have different institutes, estates, mechanisms and levels of sovereignty. And thus we have the longest written constitution, which is one of the essential features of democratic federation.

The Indian Constitution is based on the philosophy of evolving an egalitarian society free from fear and bias based on promoting individual freedom in shaping the government of their choice. The whole foundation of constitutional democracy is building a system of governance in systematic machinery functioning automatically on the wheels of norms and regulations but not on individual whims and fancies. It is easy to dream such a system of rule of law than framing a mechanism for it. The Indian Constitution is a marathon effort to translate philosophical rule of law into practical set up divided into three significant estates checking each other exercising parallel sovereignty and non-egoistic supremacy in their own way. Apart from excellent separation of powers to avoid the absolute concentration, the Constitution of India envisages a distinct distribution of powers between two major levels of Governments- central and provincial with a fair scope for a third tier the local bodies. However, the operation of the system came in contrast with men and their manipulations leading to different opinions and indifferent options. Whatever may be the consequential aberrations, the system of rule of law is perfectly reflected in framing of the Constitutional norms codifying

the best governing mechanisms tested and trusted in various democratic societies world over.

The genesis and development of the concept of the welfare state lay in the interaction of ideas, mainly, conservatism, liberalism and socialism, in the unique British historical setting of a qualitative change from administrative to ameliorative legislation. The formative period of the concept involved an interesting application of empiricism and ideology to the problem of poverty. The welfare state, conceived within the liberal framework, involved a social consensus on a wide spectrum of socio economic policies. Two sociological factors largely contributed to the growth of the concept: first, increasing prosperity that produced a revolution of rising expectations; and second, the hope and the fear generated by the newly acquired manhood franchise. The faith in piecemeal social engineering, bereft of dogma, set the precedent for expanding municipal activity and government's interest in social reform. This, indeed, was an ominous beginning.

3.1. CHALLENGES BEFORE THE CONSTITUENT ASSEMBLY.

The achievement of Independence was itself a mammoth task, now on gaining Independence the challenges before the Constituent Assembly for making an acceptable Constitution was of a great magnitude.

A reference to the history of British rule and Indian Independence struggle provide basic idea of self-governance that emerged into a people's participative democracy. The last emperor of Moghul dynasty did not mind to delegate the civil administration authority to the East India Company, which was the first historic blunder that paved the way for the Company rule. The merchants who came for tea and other such things were granted not only the business rights but the revenue power to collect their dues from the clients. After some years the Company also could bargain power of administering justice within its colony and started applying the law of their own developing islands of their own sovereignty in India. This means the power of governance and the civil administration. Then imperialistic interests improved making it a sovereign with active support of the British Crown.

When the officers of the company looted the innocent people and cheated the company too, the British Administrators realized that it was no longer good to leave the Indian nation in the hands of company and conveniently took over the reigns of governance. It encouraged the independent princely states if the princes subjugate to British, and if not, they won them over in battles fought by Indian born Crown soldiers backed by English captains. Till 1947 they tried to create several states within India and gave them all courage to opt out of acceding to Indian Union apart from inciting communal dissentions. Unification of scattered Indian states within the sub-continent was Herculean task, which made the present Indian Union possible after a violent partition into three pieces.

That was not any easy task, may well be judged from the problems with which the framers of the Constitution was faced. Firstly they had to provide a Constitution which would unite the population of over 300 million people. The population was not homogeneous. There were many communities living in this country, and many languages prevelant in different parts of it. There were other kinds of differences also. Provisions also are to be made for backward people and areas, like tribes and tribal areas. The countries of Europe could not be able to join together or coalesce even in a confederacy, much less under one unitary government. In India, in spite of the size and diversity of the country, we succeeded in framing a Constitution which covered the whole of it.[10]

Next there was two fold problem of the Indian Princely States. Firstly the British declaration on the lapse of paramountcy had freed the Indian States from the suzerainty of the British Crown. The general control which the Crown had so long exercised over the Indian States came to an end all of a sudden. A central authority which could keep the princes in order thus disappeared. In law it became open to any prince or combination of princes to assume independence and even to enter into negotiations with any foreign power and thus become island of independent territory within the country. In fact such tendency was visible. The White Paper on Indian States, dated March 15,1950, observed ; ‘ The dangers inherent in the situation were underlined by the attitude of some of the princes who

[10] Dr Rajendra Prasad, speech in the Constituent Assembly, dated November 26, 1949.

were inclined to sacrifice the national interest of the people on the altar of personal ambition. The events in certain states such as Junagadh and Hyderabad had come as pointers in that direction'. These States, therefore, were to be brought within the orbit of one Central Authority. Secondly, the patent vulnerability of the smaller States, most of which had no form of popular representation and governed completely autonomously, had to be eliminated. Indian Independence would have no meaning, if the people of the States did not have the same political, social and economical freedoms as enjoyed by the people of the Provinces. A positive and bold approach alone could avert the explosive situation towards which the States were heading. The Constitution solved both these aspects of the States' problem. The States were brought under one common authority, integrated and formed into Unions of States. Autocracy in every form was completely eliminated from the Unions.[11]

The communal problem was another hurdle which had to be solved. It was one pretty long standing. The Second Round Table Conference failed, because the communal problem could not be solved, and inspite of several subsequent attempts to solve it, no settlement could be arrived at. Finally it led to the partition of the country. With the division of India, the problem ceased to be of the same magnitude as before, but the Constitution had yet to guard against its reappearance. The Constitution got rid of separate electorates which had poisoned our political life for so many years. It could also be possible to give up reservation of seats in the legislatures for different communities except for two classes of person, namely the depressed classes and tribal people. The reservation was namely for a period of ten years from the commencement of the Constitution.[12]

The framers of the Constitution intended to secure the hard-won freedom with integrity and preferred a strong union within a federation, which otherwise appear contradictory. They had in their minds the horrific memories of the two world wars. The horrendous thought of extermination of millions of people in gas chambers revealed in Nuremberg trials, war crimes, crimes against humanity,

[11] V.N. Shukla, *'Constitution of India'*, 10th ed., Eastern Book Company.

[12] Ibid.

inhuman and barbaric violence over the civil population during wars and civil strife in partition which left a permanent scar reminded the humanity of the need for human life and dignity. Cruelties and infamies during Nazi regime influenced making of the Constitution. The sole task of the Constituent Assembly was framing of the Constitution for Independent India. The search for providing a legal frame and incorporating important systems relevant to India began. The framers looked forward to international documents, progressive democratic constitutions, and constitutional doctrines prevailing in Britain. The concept of a republic is not alien to India, as there are evidences of its existence in ancient times. But a truly democratic republic came into existence, only after India became independent. After centuries of despotic rule, both alien and indigenous, India had the chance of adopting a truly representative democracy, guaranteed by a constitution. Though a lot has been borrowed from the earlier Government of India Act of 1935, the present constitution has a lot of new features. But the reason for adopting the British parliamentary system was because of the familiarity of both the electors and elected of the working of a democratic government.[13]

3.2. CONSTITUENT ASSEMBLY: A SOVEREIGN BODY.

The first meeting of the Constituent Assembly of India, took place in the Constitution Hall, New Delhi, on Monday, the 9th December 1946, at Eleven of the Clock.[14] The first meeting of India's Constituent Assembly in New Delhi on 9th December 1946, was for many of its 296 members the fulfillment of a long cherished hope. The business before the meeting was purely formal, the swearing in of members and the election of a temporary President to conduct business until the installation of the permanent head. But the meeting symbolized an event of unique significance, namely the commencement of a great task of framing free India's Constitution without outsides interference or pressure.[15] . On 11th

[13] H.M. Seervai, *'The Constitutional Law of India'*, Vol. 1, Fourth Edition.

[14] '*Constituent Assembly Debates*', Book 1, Lok Sabha Secretariat.

[15] B.Shiva Rao, *'The Framing of India's Constitution'*, A Study, p 1, Tripathi

December, it elected Dr. Rajendra Prasad as its permanent president. The membership of the Constituent Assembly included all eminent Indian leaders. Though the Constituent Assembly consisted of 296 members, the first historical session was attended by only 210 members. Amongst the 210 members who attended the first historical session of the Constituent Assembly, there were 155 high caste Hindus, 30 Schedule Caste representatives, 5 Tribals, 5 Sikhs, 5 Indian Christians, 3 Anglo Indians, 3 Parsis and 4 Muslim members. Though the Constituent Assembly had 80 Muslim members out of total 296 members, their attendance was very poor as because the Muslim league had called upon the Muslim members to boycott the first historical session of Constituent Assembly.

The roots of the formation of the Constituent Assembly and the framing of the Constitution are relevant to understand its philosophy and evolution. The Constituent Assembly was formulated under the Cabinet Mission Plan prior to Independence. The elections to the Constituent Assembly were conducted under the system of separate electorate based on the community. After such an election too, it could not become a sovereign body. Thus its authority was limited in respect of the basic principles and procedure. The British Government brought it into existence in their process of conceding less and retaining the most of the authority with itself as counter strategy to the revolutionary raising. The Constituent Assembly was expected to work within the framework of the Cabinet Mission scheme alone. However, these limitations were removed by the Indian Independence Act, 1947 under which it was made free to frame any constitution it pleased. Evolution of the Constitution of India Dr. Rajendra Prasad was elected the permanent Chairman of the Constituent Assembly. It met on December 9, 1946. The Muslim League members were not understanding the reason and not agreeing to any viable proposition.

The British Authorities were not in a mood to control or convince them. Thus in the initial days, the Constituent Assembly could not deliberate or decide any considerable thing. However, Jawaharlal Nehru moved the Objective Resolution on December 13, 1946 and that was passed on January 22, 1947. It was the expression to the ideals and aspirations of the people of India and so the objectives of the Constitution. These fundamental objectives guided the drafting

members in framing a rulebook for the governance of the new nation. This ultimately became the very significant preamble of the Constitution of India. After the Independence the Drafting Committee was appointed by the Constituent Assembly in accordance with the decisions on the CA on the reports made by the various Committees. Dr. B.R. Ambedkar was appointed the chairman of the Drafting Committee consisting of Sir Alladi Krishnaswamy Iyer, K.M. Munshi, T.T.Krishnamachari, and Gopalaswami Ayyangar. Sir B.N.Rau prepared the original Draft on which the work of the committee was based. Several eminent personalities were elected to the Constituent Assembly through the indirect method of elections from the members of the Provincial legislatures. In fact, no prominent personality of the country was left out of the Assembly. The members include Jawaharlal Nehru, Rajendra Prasad, Sardar Patel, Maulana Azad, Gopalaswami Ayyangar, Govind Ballabh Pant, Abdul Gaffar Khan, T.T. Krishnamachary, Alladi Krishnaswami Ayyar, H.N. Kunzu, H.S. Gaur, K.V.Shah, Masani, Acharya Kripalani, Liaquat Ali Khan, Khwaza Nazimuddeen, Sir Feroze Khan Noon, Suhrawardy, Sir Zafarullah Khan, Dr. Sachchidananda Sinha. Except Mahatma Gandhi and Jinna almost all prominent public figures figured in this August body[16].

At the time of its establishment, the Constituent Assembly was not a sovereign body. It stood organised on the basis of the Cabinet Mission Plan. Its powers were derived from the sovereign authority of British Parliament. Some Indian leaders held the view that the Constituent Assembly was not a sovereign body. However Sardar Patel and Pandit Nehru believed that it was a sovereign body. The Assembly resolved this issue by adopting: "The Assembly should not be dissolved except by a resolution assented to by at least 2/3rd of the whole number of members of the Assembly. Once constituted it could not be dissolved even by Britain." When on 15th August, 1947, India became Independent, the Constituent Assembly became a fully sovereign body and remained so till the inauguration of the Constitution of India. During this period, it acted in a dual capacity, first as the

[16] Glanville Austin, *'The Indian Constitution: Cornerstone of a Nation'*, p 3088

Constituent Assembly engaged in the making of the Indian Constitution, and secondly as the Parliament of India, it remained involved in legislating for the whole of India.

On a historic Friday, the 13th December, 1946, Hon'ble Pandit Jawahar Lal Nehru places the Aims and Objects of the Constitution in the Constitution Hall, New Delhi. Pandit Nehru said:

‘ The Resolution that I am placing before you is in the nature of a pledge. It has been drafted after mature deliberation and efforts have been made to avoid controversy. A great country is sure to have a lot of controversial issues; but we have tried to avoid controversy as much as possible. The Resolution deals with fundamentals which are commonly held and have been accepted by the people. I do not think this Resolution contains anything which was outside the limitations laid down by the British Cabinet or anything which may be disagreeable to any Indian, no matter to what party or group he belongs. Unfortunately, our country is full of differences, but no one, except perhaps a few, would dispute the fundamentals which this Resolution lays down. The Resolution states that it is our firm and solemn resolve to have a sovereign Indian republic. We have not mentioned the word 'republic' till this time; but you will well understand that a free India can be nothing but a republic’.

‘I desire to make it clear that this Resolution does not go into details. It only seeks to show how we shall lead India to gain the objectives laid down in it. You will take into consideration its words and I hope you will accept them; but the main thing is the spirit behind it. Laws are made of words but this Resolution is something higher than the law. If you examine its words like lawyers you will produce only a lifeless thing. We are at present standing midway between two ears; the old order is fast changing, yielding place to the new. At such a juncture we have to give a live message to India and to the world at large. Later con we can frame our Constitution in whatever words we please. At present, we have to send out a message to show what we have resolved to attempt to do. As to what form or shape this Resolution, this declaration will ultimately take, we shall see later. But one thing is, however, certain: it is not a law; but is something that breathes life in

human minds. I hope the House will pass the Resolution which is of a special nature. It is an undertaking with ourselves and with the millions of our brothers and sisters who live in this great country. If it is passed, it will be a sort of pledge that we shall have to carry out. With this expectation and in this form, I place it before you'.

I beg to move:

"(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 the law of civilised nations, and

(8)this ancient land attains its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind."

"Sir, this is the fifth day of this first session of the Constituent Assembly. Thus far we have laboured on certain provisional and procedural matters which are essential. We have a clear field to work upon we have to prepare the ground and we have been doing that these few days. We have still much to do. We have to pass our Rules of Procedure and to appoint Committees and the like, before we can proceed to the real step, to the real work of this Constituent Assembly, that is, the high adventure of giving shape, in the printed and written word, to a Nation's dream and aspiration. But even now, at this stage, it is surely desirable that we should give some indication to ourselves, to those who look to this Assembly, to those millions in this country who are looking up to us and to the world at large, as to what we may do, what we seek to achieve, whither we are going. It is with this purpose that I have placed this Resolution before this House. It is a Resolution and yet, it is something much more than a resolution. It is a Declaration. It is a firm resolve. It is a pledge and an undertaking and it is for all of us I hope a dedication. And I wish this House, if I may say so respectfully, should consider this Resolution not in a spirit of narrow legal wording, but rather to look at the spirit behind that Resolution. Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion. And so, I cannot say that this Resolution at all conveys the passion that lies in the hearts and the minds of the Indian people today. It seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future. It is in that spirit that I venture to place this Resolution before the House and it is in that spirit that I trust the House will

receive it and ultimately pass it. And may I, Sir, also, with all respect, suggest to you and to the House that when the time comes for the passing of this Resolution let it be not done in the formal way by the raising of hands, but much more solemnly, by all of us standing up and thus taking this pledge anew.

We have just come out of the World War and People talk vaguely and rather wildly of new wars to come. At such a moment this New India is taking birth-renascent, vital, fearless. Perhaps it is a suitable moment for this new birth to take place out of this turmoil in the world. But we have to be cleared at this moment, we, who have this heavy task of constitution building. We have to think of this tremendous prospect of the present and the greater prospect of the future and not get lost in seeking small gains for this group or that. In this Constituent Assembly we are functioning on a world stage and the eyes of the world are upon us and the eyes of our entire past are upon us. Our past is witness to what we are doing here and though the future is still unborn, the future too somehow looks at us, I think, and so, I would beg of this House to consider this Resolution in this mighty prospect of our past, of the turmoil of the present and of the great and unborn future that is going to take place soon. Sir, I beg to move.[17]

Apart from what has been stated above, we find that both before the dawn of independence as well as during the course of debates of the Constituent Assembly stress was laid by the leaders of the nation upon the necessity of bringing about economic regeneration and thus ensuring social and economic justice. The Congress Resolution of 1929 on social and economic changes stated that "the great poverty and misery of the Indian people are due, not only to foreign exploitation in India but also to the economic structure of society, which the alien rulers support so that their exploitation may continue. In order therefore to remove this poverty and misery and to ameliorate the condition of the Indian masses, it is essential to make revolutionary changes in the present economic and social structure of society and to remove the gross inequalities". The resolution passed by the Congress in 1931 recited that in order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions.

[17] 13th December, 1946, *'Constituent Assembly Of India Debates'*- Vol-1

This Objectives Resolution which was moved by Pt. Nehru in the Constituent Assembly on December 13, 1946 and was subsequently passed by the Constituent Assembly mentioned that there would be guaranteed 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". It would, therefore, appear that even in the Objectives Resolution the first position was given to justice, social, economic and political.

Pt. Nehru in the course of one of his speeches, said:

'The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over. Granville Austin in his book "Extracts from the Indian Constitution: Cornerstone of a Nation" after quoting the above words of Pt. Nehru has stated:

Two revolutions, the national and the social, had been running parallel in India since the end of the First World War. With independence, the national revolution would be completed, but the social revolution must go on. Freedom was not an end in itself, only 'a means to an end', Nehru had said, 'that end being the raising of the people...to higher levels and hence the general advancement of humanity'.

The first task of this Assembly (Nehru told the members) is to free India through a new Constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity.[18]

The Preamble of the Constitution embodies all the ideals which were listed in the objectives Resolution. The objective Resolution was designed to declare the

[18] Glanville Austin, *'The Indian Constitution: Cornerstone of a Nation'*,

resolve to make India a sovereign, Independent, Republic and to secure all its citizens, fundamental rights, justice, secularism and welfare state as well as to preserve the unity and integrity of the nation. It declared the resolve to make India a democratic Union with an equal level of self government in all constituent parts. It affirmed that all power and authority of the Government is derived from the people. It affirmed the resolve to frame a Constitution which should secure for India a due place in the country of Nations.[19]

In the making of the Constitution, a very valuable role was played by the Drafting Committee. The Committee was constituted on 29th August, 1947 with Dr. B.R. Ambedkar as its chairman. The members of this committee included its versatile chairman Dr. Ambedkar, as such legal luminaries as B.L.Mitter, N. Gopalswami Ayyanagar, Alladi Krishnaswami Ayyar, K.M. Munshi, Saiyid Mohd Saadulla, N. Madhab Rao and D.P. Khaitan. After the death of Mr. D.P. Khaitan, T.T. Krishnamachari was made its member. Dr. B.N. Rau worked as the Chief Constitutional Advisor attached to this Committee. In all it held 11 plenary sessions and discussions were held for 114 days. Rs.6,396,273 were spent in this exercise.[20]

The members of the Constituent assembly were elected on a limited franchise. But they were also elected on adult franchise in the first general elections held in 1952. The draft Constitution was published in January 1948 and the people of India were given 8 months to discuss it and suggest changes. On November 4, 1948, the general discussions on the draft commenced in the Constituent Assembly and continued for five days. Then there was a thorough discussion clause by clause for about 32 days. As many as 7635 amendments were proposed and 2473 were actually discussed before a third reading was given for another 12 days. The Constitution of India was adopted and signed by the Chairman Dr Rajendra Prasad on November 26, 1949. The draft was considered for 114 days and the Constituent Assembly sat for 2 years 11 months and 18 days. Initially some important Articles came into existence, but the entire Constitution

[19] ibid

[20] http://orissa.gov.in accessed on 17.07.2010

came into force from January 26, 1950. There is a criticism that the Constitution would have been adopted by means of a referendum as was done in Ireland. Several old members of the Constituent Assembly were elected to either Parliament or State Assemblies vindicating their contribution to the drafting the Constitution and accepting the principles enshrined therein. Glanville Austin wrote: "With the adoption of the Constitution by the members of the Constituent Assembly on November 26, 1949, India became the largest democracy in the world. By this act of strength and will, Assembly members began what was perhaps the greatest political venture since that originated in Philadelphia in 1787".[21] Constitution of India is indeed the highest and most valuable contribution of the Constituent Assembly to the Indian Political System.

3.3.THE PREAMBLE- SOVEREIGN DEMOCRATIC REPUBLIC[22].

The Preamble of the Constitution sets out the aims and aspirations of the people of India and these have been translated into the various provisions of the Constitution. The objectives before the Constituent Assemble were to constitute India into sovereign democratic republic and to secure its citizens, justice equality liberty and fraternity. The ultimate aims of the makers of the Constitution was to have a welfare State and an egalitarian society projecting the aims and aspiration of the people of India who made the extreme sacrifice for attainment of the country's freedom. It is worthwhile to note that the Preamble was adopted by the Constituent Assembly after the draft Constitution has been approved.[23]

The idea was that the Preamble should be in conformity with the provisions of the Constitution and express in a few words the philosophy of the Constitution. After the transfer of power, the Constituent Assembly became sovereign, which it reflected in its words "give to ourselves this Constitution" in the Preamble. It is

[21] Glanville Austin, *'The Indian Constitution: Cornerstone of a Nation,'*

[22] By the 42nd Amendment it has been substituted to read 'Sovereign Socialist Secular Democratic Republic'.

[23] B. Shiva Rao, *'Framing of India's Constitution- A Study'*, p-32.

also implied that the Preamble emanated from the people of India and sovereignty lies with them.[24]

The Preamble was extensively debated in the Constituent Assembly[25], and various members had moved in amendments for deletion and addition of various wording of the Preamble that was submitted by the Draft Committee before the Constituent Assembly. Reference to the debates of the Constituent Assembly shows that there was considerable discussion in the said Assembly on the provisions of the Preamble. A number of amendments were moved and were rejected. A motion was thereafter adopted by the Constituent Assembly that "the Preamble stands part of the Constitution."Let us for better understanding have a study of some of the amendments moved in by the Members of the Constituent Assembly.

Maulana Hasrat Mohani: I have three amendments. I want to move them separately, not in one bundle.

Mr. President: Which one do you want to move first?

"That for amendment No.8 of the List of Amendments (Volume I), the following be substituted :-

"That in the Preamble, for the words "We, the People of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic" the following be substituted :-

"We, the People of India having solemnly resolved to constitute India into a Sovereign Federal Republic."

or alternatively

[24] V.N. Shukla, '*Constitution of India*', 10th edn., Eastern Book Company.

[25] *'Constituent Assembly Debates'*, Vol. X, p. 429-456.

"We, the people of India, having solemnly resolved to constitute India into a Sovereign Independent Republic."

I shall just now give my reasons for proposing these amendments. In view of the proverbial shortness of public memory, I want first to remind the Members about a very fundamental fact that has been brought into the present Constitution and in the Draft prepared by Dr. Ambedkar. I refer to Volume IV No.6 of the official report of the proceedings of this Assembly - list 738, Part I: Federal territory and jurisdiction. Under "name of territory and federation" it is said that the Federation hereby established shall be a sovereign independent republic known as India. So it is clearly laid down that we will have only a Federation and it will be a federation of Indian republics. But my friend, Dr. Ambedkar has cleverly, I suppose, dropped the word "Federal" altogether and the word "independent" also has been dropped and he has aid "democratic State". I objected to that when I spoke the other day.

Shri Deshbandhu Gupta: May I draw the attention of the Chair to the point of order moved by me? I am serious about it.

Mr. President: He is moving amendment No. 453 which runs thus :

"That in the Pramble for the words 'We, the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic' the following be substituted: -

'We, the people of India, having solemnly resolved to constituted India into a Sovereign Federal Republic'. "

Or

'We, the people of India having solemnly resolved to constitute India into a Sovereign Independent Republic'. "

So far as this amendment is concerned, I do not see anything in it that is out of order. You are taking only this one, Maulana Sahib ?

Maulana Hasrat Mohani: I have been given some sort of promise. Very well, Sir. According to that report the Committee appointed for framing the constitution was given a clear directive that the Constitution should be framed in accordance with the Objectives Resolution passed by this Assembly. It is quite strange that instead of following the Objectives Resolution, Dr. Ambedkar is passing anything he likes. He wants the Objectives Resolution to be in conformity with his erroneous decision. He has reversed the order and this is what I object to most because it has changed the character of the Constitution. As I pointed out here, what was the object of the Objectives Resolution and the Report. They said that it will be a Federation of sovereign Independent Republics. Mark this plural form "Republics". Now he has reversed the whole thing. He has dropped the word 'Federation'; he has dropped the word Republic and he has dropped also the word, 'independent' for some ulterior motive which I am not going to disclose at this moment. I reserve it for a future occasion when I will throw it in his face when the time comes. For the present I say that according to the Objectives Resolution and according to the instructions given by Pandit Jawaharlal Nehru they should at least change this article in this way, that the spirit of what he suggested may be included in the article proposed by Dr. Ambedkar. He in fact, accepted this thing; he drops the word 'independent'. For the word 'independent' I want to put the word 'Federal' that is, a sovereign federal Republic, it does not matter if it is not a Republic. When I say a Sovereign Federal Republic, it means a Republic and the State units of that will also be Republics or it will be a Federation. I say 'No'. He takes that word only because it implies also a sort of a unitary system, and whatever he wants he has reversed and changed the whole character of this Constitution. We mean and the Objectives Resolution means that India will be made a Federation of Independent Republics and he now says "No". India will be transformed and in the place of the British Empire you will create an Indian Empire which will consist only of States which will have got no power and in the States you have also included and brought down the Provinces also. Formerly, I thought that the States will get the benefit of this inclusion but you have brought down the provinces also and you have deprived them of everything and even the sort of provincial autonomy has been taken away and in fact you have allowed nothing for the Provinces. You decided that you will have elected governors for the

provinces. I objected to the word ‘governors’ in the very beginning and when Pandit Jawaharlal Nehru said "I cannot satisfy the Maulana; he is a very deep man. He is afraid of this word ‘Governor’, I suggested that instead of the word ‘Governor’ we may put the word "president’’ also in regard to the provinces. They said that they need not do that. I did not press that matter to the provinces. They said that they need not do that. I did not press that matter at that time but now I find on hearing the explanations given by Dr. Ambedkar that he has reversed the whole picture and he has let the cat out of the bag. He has clearly said: "What will be India that is Bharat? It will be a Union of States". What does this mean? You have discarded the word ‘Republic’; you have discarded the word "Federation"; you have discarded the word "Independent", and my honourable friend, Dr. Ambedkar says: "Well, what does it matter? It does not matter when we say Republic. It is immaterial whether you call it independent or not’’. I say if this is immaterial why is he so anxious to change that word ‘independent’ into ‘democratic’? There is something secretly going behind the scenes and I pointed out on a previous occasion that when Pandit Jawaharlal Nehru changed his mind and went to England to have some sort of connection with the British Commonwealth, then he thought that we will have a Republic and also ‘independent’. So he wanted to create a loophole for himself because he can now say: "We are already a Republic". We are not an independent Republic. What sort of a Republic are we? Some sort of Republic that these European countries, these imperialists, who are past-masters in this jugglery of words, have coined new phrases; and what are these new phrases? Holland has invented a phrase a Republican Dominion’ and France has coined a new word for Vietnam which says that it will be a colonial Republic. We admit that Vietnam is a Republic and Holland says that they have accepted Indonesia as a Republic but it says it is a Republican Dominion. Instead of the Dominion it will be included in an imperial regime and that fraud was brought about by Holland and by France and do you propose that you will also bring about the same fraud to be enacted here?

Maulana Hasrat Mohani: You said that we have got the word Republic. You have dropped the word Federation. You will also say that of course Pandit Jawaharlal Nehru has agreed to remain in the British Commonwealth because they

accept we are independent. But, what sort of independence? It will be a republican dominion. Because if it is a real republic and not a republican dominion, you should have nothing to do with any king or Emperor directly or indirectly in any manner. When once Pandit Jawaharlal Nehru has agreed to remain in the British Comonwealth, I think he has forfeited his right to call India as a Republic. It is not a republic. If it is a republic, it is a republican dominion, as I said just now.

So, my alternative proposal is this. Either introduce the word ‘Federal’ instead of the word "Democratic". It will make something clear. If you do not want to introduce this word ‘federation’, if you are afraid of it, I will grant a concession to Dr. Ambedkar and you stick to the original wording of the Objectives Resolution which is given here. It will be "Independent Sovereign Republic". I say, drop this word ‘democratic’ and keep to the actual words used in the Objectives Resolution. If you use the words "independent Republic’’ my object will be served. I come forward and say that whatever has been done by Pandit Jawaharlal Nehru is absolutely a false policy.

Mr. President: Does any one else wish to say anything about this amendment? I will put it to the vote. First alternative.

The question is:

"That in the Preamble for the words, ‘We, the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic’ the following be substituted:-

‘We, the people of India, having solemnly resolved to constitute India into a Sovereign Federal Republic’."

The amendment was negatived.

Mr. President: I shall put the second alternative.

The question is:

"That in the Preamble, for the words, 'We, the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic' the following be substituted:-

We, the people of India, having solemnly resoled to constitute India into a Sovereign independent Republic'".

The amendment was negatived.

Maulana Hasrat Mohani: Mr. President, I move:

"That in the preamble, for the words 'We, the People of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic' the words 'We, The People of India, having solemnly resolved to constitute India into a Union of Indian Socialistic Republics to be called U.I.S.R. on the lines of U.S.S.R.' be substituted".

Shri Deshbandhu Gupta: May I now raise the point of order again and submit that it is out of order because it goes counter to the Constitution we have passed?

Mr. President: A point of order has been raised that the whole Constitution that has been framed and accepted by this house is inconsistent with this amendment of the preamble and therefore it should be ruled out of order.

Mr. President: Then I will put it to vote.

The question is:

"That in the Preamble for the words 'We, the People of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic' the words 'We The people of India, having solemnly resolved to constitute India into a union of Indian Socialistic Republics to be called U.I.S.R. on the lines of U.S.S.R. be substituted".

The amendment was negatived.

Mr. President: Now we have got a large number of amendments of which notice is given by other Members. Some of these amendments relate to two things. In some of them the name of God is brought in some form or other in this preamble. In some others, the name of Mahatma Gandhi is brought in some form or other. Then there are some in which some amendments are suggested to the wording. But those are rather minor things, and the main amendments are really those in which the name of God is brought in, or the name of Mahatma Gandhi is brought in or both together. Now, I would like to know from Members if they insist upon these amendments being moved, because I cannot prevent them from moving them; but I would suggest that neither God nor Mahatma Gandhi admits of a discussion in this House.

Smt. Purnima Banerji: (United Provinces: General). Mr. President, I would beg of you to see that the matter of God is not made the subject of discussion between a majority and a minority. It is most embarrassing. To most of us, believers and non-believers, it will be difficult to affirm or deny God. Let us not try to invoke his name in vain. It should not be brought up in this form and the members compelled to vote one way or the other. The name of God is invoked by every nation upon earth and god is an Impartial Entity and he should be allowed to remain so. With these words, I appeal to Mr. Kamath not to put us to the embarrassment of having to vote upon God.

Shri H. V. Kamath: I regret I cannot accept the appeal. I shall move amendment No. 430 standing in my name. Sir, I move:

"That in amendment no. 2 of the list of Amendments (Volume I), the following be substituted for the proposed preamble:-

'In the name of God,

We, the people of India,

Having solemnly resolved to constitute India into a Sovereign democratic republic, and to secure to all her citizens Justice, social, economic and political;

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

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

Fraternity, assuring the dignity of the individual and the unity of the nation;

In our Constituent Assembly do hereby adopt, enact and give to ourselves this Constitution".

Mr. President: It is exactly the same as the Preamble except that it begins with 'In the name of God'.

Shri Rohini Kumar Chaudhuri : (Assam: General): May I move an amendment to that of Sh. Kamath that, instead of 'In the name of God', would he be pleased to accept 'In the name of Goodess'? (laughter).

Shri H.V. Kamath: Mr. President, all that we have done in this House has been done on behalf of and for the people of India, and all decisions have been taken here by the vote of the House. Weather this becomes a matter for the vote of the House or not, I am sure in their heart of hearts the people of India for whom we have been working and toiling here for the last three years would endorse this amendment in toto. That is so far as the point raised by Mr. Pillai is concerned.

I have taken only a slight liberty with the text of the Preamble. As I have pointed out, I am sticking to the wording of the Objectives Resolution moved by Pandit Jawaharlal Nehru in December, 1946. In the first part of it, the future with reference to the governance of the country the words used are "her future governance", here being apt for the motherland. That being so, we should say 'her' and not 'its' citizens in the preamble. I would leave this however to the Drafting Committee.

As regards the substance of the motion I do not propose to make a long speech. In this august House, the first Constituent Assembly of India, of our Bharata Varsha, in this land, ancient but ever young, which has through the ages renewed itself at the Divine Fountain, let us consecrate this Constitution by a Solemn dedication to God in the spirit of the Gita. Whatever our shortcomings, whatever the defects and errors of this Constitution let us pray that God will give us strength, courage and wisdom to transmute our baser metal into gold, through hard work, suffering and sacrifice for India and for her people. This has been the

voice of our ancient civilisation, has been the voice through all these centuries, a voice distinctive, vital and creative, and if we, the people of India, heed that voice, all will be well with us.

Shri Rohini Kumar Chaudhuri: We should remember that when we started our political movement, we started it with the singing of Bande Mataram. What does Bande Mataram mean? It means an invocation to a Goodess. It means belief in a Goodess. Sir, we who belong to the Sakthi cult, protest against invoking the name of God alone, completely ignoring the Goodess. That is my submission. If we bring in the name of God at all, we should bring in the name of the Goddess also. As I said, this amendment should not have been brought. But as it has been brought, this is my point of view.

The Honourable Shri Satyanarayan Sinha: (Bihar: General): Sir, the question may now be put.

Mr. President: There are so many others who are wanting to speak. But it has now been suggested that the matter be closed.

The question is:

"That the question be now put".

The motion was adopted.

Mr. President: Now I have to put the amendment moved by Mr. Kamath to vote. There is no alternative left to me.

The Honourable Dr. B.R. Ambedkar: He may be asked to withdraw it.

Mr. President: I suggested to him not to move it. It rests with him to withdraw it.

Shri H.V. Kamath: I am not withdrawing it.

Mr. President: He says he does not withdraw it.

The question is:

"That in amendment No. 2 of the List of Amendments (Volume I), the following be substituted for the proposed preamble:-

'In the name of God,
We, the people of India,
Having solemnly resolved to constitute India into a Sovereign democratic republic, and to secure to all her citizens,
Justice, social economic and political;
Liberty of thought, expression, belief, faith and worship;
Equality of status and of opportunity; and to promote among them all;
Fraternity, assuring the dignity of the individual and the unity of the nation;
in our Constituent Assembly do hereby adopt, enact and give to ourselves the Constitution'".

Shri H.V. Kamath: I claim a division.

Pandit Govind Malaviya: I want a division on this question.

Maulana Hasrat Mohani: I also want a division on this question.

Pandit Govind Malaviya: I want a division because I feel that we are doing an injustice to this country and to its people and I want to know who says what on this matter.

The Assembly divided by show of hands.

Ayes: 41

Noes: 68.

The amendment was negatived.

Shri H.V. Kamath: This, Sir, is a black day in our annals. God save India.

Prof. Shibban Lal Saksena: Sir, I beg to move:

"That for the Preamble, the following be substituted:-

'In the name of God the Almighty, under whose inspiration and guidance, the Father of our Nation, Mahatma Gandhi, led the Nation from slavery into Freedom, by unique adherence to the eternal principles of Satya and Ahimsa, and who sustained the millions of our countrymen and the martyrs of the Nation in their heroic and unremitting struggle to regain the Complete Independence of our Motherland,

We, the People of Bharat, having solemnly resolved to constitute Bharat into a Sovereign, Independent, Democratic, Socialist Republic, and to secure to all its citizens:

JUSTICE, social, economic and political,
LIBERTY of though, expression, belief, faith and worship,
EQUALITY of status and of opportunity; and to promote among them all;
FRATERNITY assuring the dignity and freedom of the individual and the unity of the country and the Nation:
In our Constituent Assembly this;……..day of Vikrami Samvat 2006 (the 26th day of January, 1950 A.D.) do hereby enact, adopt and give to ourselves this Constitution'".

I have been very much pained to see the attitude of some of our friends regarding the introduction of the holy name of God and the Father of the Nation at the beginning of our Constitution. While they have a right to have their say, other people also have a full right to have their say. This country has always prided on its discoveries in the realm of the spirit and we are now afraid even to put in God's name at the commencement of our Constitution. I am one of those who think that we have produced a great piece of work by preparing this Constitution. There may be some defects in it. But I am sure we have done some very great

things. It is only meet and proper that the name of God and the name of the Father of the Nation should be put at the beginning of our Constitution. I am sorry that some people should have thought that we are forcing it on them. There are other Constitutions in the world –the Irish Constitution, for instance-wherein in the very beginning in the Preamble God has been mentioned and homage has been paid to the martyrs who won their freedom. I have therefore been very much pained to feel that some Members merely at the mention of the name of God or the Father of the Nation feel that something is sought to be forced upon somebody. If they feel that way, they are at liberty to have their opinion, but why force others who feel intensely in the matter to eliminate God's name? I greatly regret the attitude of my friends. I hope they will reconsider it. This Constitution will probably build our country on a new pattern and on the basis of the ideals set by the Father of the Nation. It is therefore meet and proper that we should humble ourselves before God and pay homage to the Father of the Nation by incorporating their names in the very beginning of the Constitution.

Shri Brajeshwar Prasad: (Bihar:General): Mr. President, I rise to oppose the amendment moved by my friend Prof. Shibban Lal Saksena. I do not want that the name of Mahatma Gandhi should be incorporated in this Constitution, because it is not a Gandhian Constitution. The foundation stones of this Constitution are the decisions of the American Supreme Court. It is the Government of India Act, 1935, repeated again. If we had a Gandhian Constitution, I would have been the first to offer my support. I do not want that the name of Mahatma Gandhi should be dragged in the rotten Constitution.

Mr. President: I will now put this amendment to vote.

Acharya J.B. Kripalani: (United Provinces: General): May I request the Mover of the amendment to withdraw it? It is not behoving us to vote on this amendment. We must be very sparing of the use of the name of the Father of the Nation. My friend Shibban Lal knows that I yield to nobody in my love and respect for Gandhiji. I think it will be consistent with that respect if we do not bring him into this Constitution that may be changed and reshaped at any time.

Prof. Shibban Lal Saksena: Sir, in response to the appeal of Acharya Kriplani, I beg to withdraw my amendment.

The amendment was, by leave of the Assembly withdrawn.

(Amendment No. 4 was not moved).

Shri Brajeshwar Prasad: Mr. President, Sir, there are eight amendments standing in my name. I refer to amendments Nos. 313,314,316 and 317,318,319,320 and 323. Sir, I would like to move only one amendment.

I refer to amendment No. 313. Mr. President, Sir, I move:

"That for amendment No. 1 of the List of amendments (Vol. 1), the following be substituted:-

‘That for the Preamble the following be substituted:-

"WE THE PEOPLE OF INDIA, having resolved to constitute India into a SECULAR CO-OPERATIVE COMMONWEALTH to establish SOCIALIST ORDER and to secure to all its citizens-

1. adequate means of livelihood.

2.Free and compulsory education

3.Free medical aid

4.Compulsory military training

do hereby ordain and establish this Constitution for India".

Dr. P.S. Deshmukh: What about a camel and motor cycle?

Shri Brajeshwar Prasad: It is for you to suggest those things. Sir, this word secular has not found any place in our Constitution. This is the word on which the greatest stress has been laid by our national leaders. I do submit that this word ought to be incorporated in our Preamble because it will tone up the morale of the minorities and it will check the spirit of loafers that is rampant in politics. I have laid stress on another word. I refer to the word ‘Socialist’. I believe that the future of India is in Socialism. I believe in a Socialist order. When I say that I believe in a socialist order. I do not mean that I accept the Marxian interpretation of History.

I do not believe in class war nor in the materialist Philosophy which is so widely prevalent among the socialist circles. By socialism I mean an equalitarian social order. Equality of opportunity without equality of income is a mere shibboleth. I believe that in India we have to evolve a new type of socialism consistent with the tradition and history of this land. The theory of materialism is a well-knit dogma. I think that we people in India have not to learn anything from Germany on philosophical speculation.

Now I come to some other words which have found place in the Preamble. There seems to be a confusion of thought. I hold the opinion that the word 'liberty' and 'equality' do not go together. They are incompatibles. They are the enemies of one another, the one can only triumph at the expense of the other.

I do not want to place impossible ideals before the nation. Sir, it is only in a class-less society that we can achieve a reconciliation of the two concepts of liberty and equality.

I have suggested that instead of these ideals laid down in the preamble we should have some pragmatic ideals before us. If we succeed in providing an adequate means of livelihood, free and compulsory education, free medical aid and compulsory military training I would think that our efforts have borne fruit. I do not want to place impossible ideals before the nation which we know well that neither in our life-time nor in the life-time of our children or our grand children we will not be able to achieve. I would like to refer to another point before I conclude. I object to the word 'sovereignty' in this Preamble. I hold the opinion that the whole concept of Austrian sovereignty has been exploded. A legal concept must have some relation with real facts. If it is not so, it has got no value.

I hold the opinion that this ideal is neither necessary nor desirable because sovereignty leads to war; sovereignty leads to imperialism. (Clapping and interruption).

Shri Brajeshwar Prasad: Sir, I will now deal with only one aspect of the question. The word 'sovereign' has found a place in this Preamble. I am rather thick-skinned. I will never resume my seat. I will speak and then take my seat. I

feel that this word ‘sovereign’ is entirely misplaced. A State consists of individuals. Are individuals sovereign in any sense of the term? If individuals are not sovereign, how can a State which consists of individuals be sovereign. It is a very well-known fact that man has no free will of his own, that he is circumscribed by factors of heredity and environment. Both qualitatively and quantitatively he holds a very insignificant place in the universe. If man is so insignificant, if man is a non-entity in the world how can a State which consists of individuals be a sovereign State? Therefore, Sir, I am opposed to this idea of sovereignty.

We are sovereign. We are a sovereign State to the extent it is possible for a modern State to be sovereign. We do not aspire to rise to those Austrian heights because, as I have already stated, it is a frivolous concept, it is a mischievous concept. The deletion of the word ‘sovereign will not in any way deter us from exercising the functions of sovereignty which are vested in the Government of India. It will not detract one iota of sovereignty but by the retention of this word ‘sovereign’, we are placing a false ideal, a mischievous ideal before the nation. Therefore, I am opposed to this Preamble. Let us have some pragmatic ideals, ideals which we may be capable of achieving in our own life time and in the life time of our children.

Mr. President: Does any one wish to say anything about the amendment? I shall put this amendment to vote.

The question is:

"That the amendment No. 1 of the List of Amendments (Vol. I), the following be substituted:-

> "That for the Preamble, the following be substituted:-
>
> *"WE THE PEOPLE OF INIDA-having resolved to constitute India into a SECULAR CO-OPERATIVE COMMONWEALTH to establish SOCIALIST ORDER and to secure to all its citizens-*
>
> - *an adequate means of LIVELIHOOD*
> - *FREE AND COMPULSORY EDUCATION*

- *FREE MEDICAL AID*
- *COMPULSORY MILITARY TRAINING*

do hereby ordain and establish this Constitution for India".

The amendment was negatived.

Smt. Purnima Banerji: Sir, I move:

"That in amendment No. 2 of the List of Amendments (Volume 1), for the first paragraph in the proposed preamble, the following be substituted:-

"We on behalf of the people of India from whom is derived all power and authority of the Independent India,

With your permission, Sir, I would like to drop the word *"sovereign"* here.

"its constituent parts and organs of Government, having solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens:-

Sir, my honourable friend Mr. Tyagi has given point to my amendment and further strengthened my hands. I feel that the Preamble that we are now dealing with forms one of the most important parts of the Constitution and to persons like us who are not of a legalistic bent of mind, it stands as a charter of our freedom and as a measure of our success or our failure. It lays down the goal to which we are going and therefore at this moment if members of this House will allow us to express what we feel on this subject with a little more patience, then, I personally will be very grateful.

Sir, I feel that the Constitution which we have drawn up has invested the President and Parliament with wide powers. At this moment, I do not think we should be content with considering the masses of our people as the sovereign authority from all power is derived and in whom all sovereign authority rests by merely believing that because they once to to the polls once in five years their

sovereignty is secured. Therefore, I feel that, in the Preamble, mention of that sovereignty should be made. I have not gone beyond what the House has already passed. The wording which I have quoted here is taken almost verbatim from the Objectives Resolution which was first passed in this House in January 1947. As I said before, the three parts of the Constitution or rather three incidents in the Constitution, one, the Objectives Resolution, second the statement of Objectives of State policy and the Preamble are supposed not to have any legal binding upon the Constitution. But they, in fact, constitute the very life-breath of the Constitution which we have here framed. I do not wish to take more of your time. I would strengthen my argument with the speech quoted by my honourable friend Mr. Tyagi From the speech made by Dr. Ambedkar when he moved the Preamble. At that moment, I was not present in the House. But that has borns my contention out that the sovereignty of the people should be mentioned somewhere in the Constitution. With these words, I move my amendment.

Shri Mahavir Tyagi: Sir, in supporting the amendment of my honourable friend. Smt. Banerji, I have to remind the House of the proceedings of 15th November, 1948, when a similar amendment was moved by me. It was worded like this that the sovereignty will vest in the whole body of people. It was discussed thread-bare and I was assured that the article to which I was moving that amendment was not the proper place for that amendment and I was promised that this amendment would be considered when the Preamble was discussed. Now is the occasion when I beg to remind the House of the promise the Chairman of the Drafting Committee gave me. I am keen that the residence of the sovereignty should be defined. I am more keen about it because up till today the sovereignty vests in His Majesty the King of England. There is an Englishman in whom we have vested the sovereignty for a century past. So if we do not say in so many word, as to where the sovereignty would vest in future it will go on vesting in an Englishman. We want to break it away from him. Therefore, we must definitely say that there is no more sovereignty attached to the King of England.

Then, I also do not want to let remain any doubt or danger of any Government, this or future, to bargain or barter away the sovereignty of the country in the name of Commonwealth or common brotherhood or common

citizenship or whatever it be. So the sovereignty must be vested in so many words in the people as a whole. In China in their Constitution they have put it that the sovereignty vests in the whole people of China. Whether the Communists take China or not, the people will remain. People will not be animals if they become communists or if they adopt any party label. People will remain in India as well and the sovereignty will vest in the people of India. It must be defined so that the Govt. might not misuse it. It does not vest even in the Govt. Govt. only represents the people. Because Dr. Ambedkar has agreed to put it in the Constitution, I do not want to dilate upon it and I hope he will kindly accommodate these words and make it clear once for all that the sovereignty vests in the people and not in any foreigner as it does today, nor in the state even though it has the title of being a "sovereign state".

Acharya J. B. Kriplalani: Mr. President, Sir, I was not my intention to speak but some friends wanted that at this last moment when practically we are finishing our Constitution I should speak a few words. Some of my friends said that I began, by a formal speech, the proceedings of this House and that I should, at this time of its Second Reading which is for all practical purposes the final reading, finish the proceedings.

Sir, you like a good host, have reserved the choicest wine for the last. This Preamble should have come in the beginning of the Constitution even as it is given in the beginning of the Constitution. There was a reason for that because it would have been before us in every detailed provision that we made in the Constitution. It would have cautioned us that we were not deviating from the basic principles which we have laid down in the Preamble. As I have sat in this House from day to day, I have seen that very often we have devastated from the basic principle laid down in the preamble only recently we want against the great principle of democracy. This unfortunate land is divided into many castes and economic classes. There are innumerable divisions. I think it was the first time in the history of World’s Constitutions that a new caste of administrators was created, and it was placed in a privileged position. It was placed in the position where even the chosen representatives of the people could not touch its special

privileges as against the people,. This, I submit, was going against the first basic principles of our Constitution.

Sir, I want, at this solemn hour to remind the House that what we have stated in this Preamble are not legal and political principles only. They are also great moral and spiritual principles and if I May say so, they are mystic principles. In fact these were not first legal and constitutional principles, but they were really spiritual and moral principles. If we look at history, we shall find that because the lawyers and politician made their principles into legal and constitutional form that their life and vitality was lost and is being lost even today. Take democracy. What is it? It implies the equality of man, it implies fraternity. Above all it implies the great principle of non-violence. How can there be democracy where there is violence? Even the ordinary definition of democracy is that instead of breaking heads, we count heads. This non-violence then there is at the root of democracy. And I submit that the principle of non-violence, is a moral principle. It is a spiritual principle. It is a mystic principle. It is a principle which says that life is one, that you cannot divide it, that it is the same life pulsating through us all. As the Bible puts it. "we are one of another," or as Vendanta puts it, that all this is One. If we want to use democracy as only a legal, constitutional and formal device, I submit, we shall fail. As we have put democracy at the basis of your Constitution, I wish Sir, that the whole country should understand the moral, the spiritual and the mystic implication of the word "democracy". If we have not done that, we shall fail as they have failed in other countries. Democracy will be made into autocracy and it will be made into imperialism, and it will be made into fascism. But as a moral principle, it must be lived in life. If it is not lived in life, and the whole of it in all its departments, it becomes only a formal and a legal principal. We have got to see that we live this democracy in our life. It would be inconsistent with democracy to have it only in the legal and political field. Politically, we are a democratic people but economically we are divided into such classes that that the barriers cannot be crossed. If we have got to be democratic we have got to be economically so too.

I also say democracy is inconsistent with caste system. That is social aristocracy. We must do away with castes and classes. Otherwise we cannot swear

by democracy. And we must remember that economic democracy does not merely mean that there should be no classes, that there should be no rich and poor; but the State itself should live in a manner that is consistent with the life of the poor, if people happen to be poor. It is not economic equality if for pomp and pageant, we spend thousands and lakhs of rupees. It is again not democracy if at every corner of the Govt. House human beings are made to stand statue like and unmoving. Such things are against the dignity of the individuals, if we establish democracy, we have to establish it in the whole of our life, in all its departments, whether it be in administration, or in society or in the economic field. This we must know and understand.

Then we have said that we will have liberty of thought, expression, belief, faith and worship. We must understand the implications of this also. All these freedoms can only be guaranteed on the basis of non-violence. If there is violence, you cannot have liberty of thought, you cannot have liberty of expression, you cannot have liberty of faith or liberty of faith or liberty of worship. And this non-violence should go so far as to make us not only what is popularly called tolerant of other people, but to a certain extent, we should accept their ideas as good for them. Mere tolerance will not carry us far. Many people are merely tolerant. Why? Because they are indifferent. They say "this man's worship is different from ours. It is wrong. The man is sure to go to hell; but let him, it is none of my business". That is not tolerance. That is intolerance, if violence is not used physically, it is because it is not possible always to use violence, but there is mental violence. We have to respect each other's faith. We have to respect it as having an element of truth. No religion in the world is perfect, and yet there is no faith without some element of God's truth.

Then we have said that there should be equality of status and opportunity. This implies that in our public affairs, we should be absolutely above board that there should be no nepotism, there should be no favouritism, there should be no "mine" and 'not mine'. This can be done. We can give equality of opportunity and equality of status only when what is considered as "Ours" is put behind and what is considered as "Not Ours" is put before. Unless we do these things, we will not be able to fulfil the aims of our Constitution.

Again I come to the great doctrine of fraternity which is allied with democracy. It means that we are all sons of the same God, as the religious would say, but as the mystic would say, that there is one life pulsating through us all, or as the Bible says. "We are one of another". There can be no fraternity without this. So I want this House to remember that what we have enunciated are not merely legal, constitutional and formal principles, but moral principles; and moral principles have got to be lived in life. They have to be lived whether it is private life or it is public life, whether it is commercial life, political life or the life of an administrator. They have to be lived throughout. These things, we have to remember if our Constitution is to succeed.

Sir, one word more and I have done. I think the amendment proposed by Smt. Purnima Banerji should be accepted, because it really describes the true position and as such it should be enunciated in the Preamble. On formal occasion, on great occasions, on important occasions, we have to remind our selves that we are here as the representatives of the people. More than that, we have to remind ourselves that we are the servants of the people. We often forget that we are here as the representatives capacity. We often forget that we are the servants of the people. It always happens that our language, because of our thoughts and actions, gives little countenance to this basic idea. A Minister says "Our Government" not "The People's Government". The Prime Minister says "My Government". Therefore, on this solemn occasion, it is necessary to lay down clearly and distinctly, that sovereignty resides in and flows from the people. (Cheers) I hope therefore, this House will carry Smt. Purnima Banerji's amendment.

Mr. President: Are there some other people who want to speak?

Mr. Naziruddin Ahmad: Mr. President, Sir, the eloquent words of Acharya Kripalani require one explanation. He seems to think –and I speak with great respect-that the success of a democracy depends upon the introduction of some sweet and palatable words in the Constitution. I however, submit that the success of a democracy depends on how it is practically worked. It has nothing to do whatever with what we may state in the Preamble or in the Constitution. On the actual working of democracy its success depends.

Mr. President: I take it that closure is accepted. I shall now ask Dr. Ambedkar to reply.

The Honourable Dr. B.R. Ambedkar: Mr. President, Sir, the point in the amendment which makes it, or is supposed to make it, different from the Preamble drafted by the Drafting Committee lies in the addition of the words "from whom is derived all power and authority". The question therefore is whether the Preamble as drafted, conveys any other meaning than what is the general intention of the House, viz..that this Constitution should emanate from the people and should recognise that the sovereignty to make this Constitution vests in the people. I do not think that there is any other matter that is a matter of dispute. My contention is that what is suggested in this amendment is already contained in the draft Preamble.

Maulana Hasrat Mohani: Then why don't you accept it?

The Honourable Dr. B.R. Ambedkar: I propose to show now, by a detailed examination, that my contention is true.

Sir, this amendment, if one were to analyse it, falls into three distinct parts. There is one part which is declaratory. The second part is descriptive. The third part is objective and obligatory, if I may say so. Now, the declaratory part consists of the following phrase: We the people of India, in our Constituent Assembly, this day, this month…….do hereby adopt, enact and give to ourselves this Constitution'. Those Members of the House who are worried as to whether this Preamble does or does not state that this Constitution and the power and authority and sovereignty to make this Constitution vest in the people should separate the other parts of the amendment from the part which I have read out, namely the opening words 'We the people of India in our Constituent Assembly, his day, do hereby adopt, enact and give to ourselves this Constitution' Reading it in that fashion…….

Shri Mahavir Tyagi: Where do the people come in? It is the Constituent Assembly Members that come in.

The Honourable Dr. B.R. Ambedkar: That is a different matter. I am for the moment discussing this narrow point: Does this Constitution say or does this Constitution not say that the Constitution is ordained, adopted and enacted by the people. I think anybody who reads its plain language, not dissociating it from the other parts, namely the descriptive and the objective cannot have any doubt that that is what the Preamble means.

Now my friend Mr. Tyagi said that this Constitution is being passed by a body of people who have been elected on a narrow franchise. It is quite true that it is not a Constituent Assembly in the sense that it includes every adult male and female in this country. But if my friend Mr. Tyagi wants that this Constitution should not become operative unless it has been referred to the people in the form of a referendum, that is quite a different question which has nothing to do with the point which we are debating whether this Constitution should have validity if it was passed by this Constituent Assembly or whether it will have validity only, when it is passed on a referendum. That is quite a different matter altogether. It has nothing to do with the point under debate.

The point under debate is this: Does this Constitution or does it not acknowledge, recognise and proclaim that it emanates from the people? I say it does.

I would like honourable Members to consider also the Preamble of the Constitution of the United States. I shall read a portion of it. It says: "we the people of the United States"-I am not reading the other parts-"We the people of the United States do ordain and establish this Constitution for the United States of America". As most Members know, that Constitution was drafted by a very small body. I forget now the exact details and the number of the States that were represented in that small body which met a Philadelphia to draw up the Constitution. (Honourable Members: There were 13 States). There were 13 States. Therefore, if the representatives of 13 States assembled in a small conference in Philadelphia could pass a Constitution and say that what they did was in the name of the people, on their authority, basing on it their sovereignty. I personally myself, do not understand, unless a man was an absolute pedant, that a body of

people 292 in number, representing this vast continent, in their representative capacity, could not say that they are acting in the name of the people of this country. ('Hear, hear').

Maulana Hasrat Mohani: I do not think. It is only a community.

The Honourable Dr. B.R. Ambedkar: That is a different matter, Maulana. I cannot deal with that. Therefore, so far as that contention is concerned, I submit that there need be no ground for any kind of fear or apprehension. No person in this House desires that there should be anything in this Constitution which has the remotest semblance of its having been derived from the sovereignty of the British Parliament. Nobody has the slightest desire for that. In fact we wish to delete every vestige of the sovereignty of the British Parliament such as it existed before the operation of this Constitution. There is no difference of opinion between any Member of this House and any Member of the Drafting Committee so far as that is concerned.

Some Members, I suppose, have a certain amount of fear or apprehension that, on account of the fact that earlier this year the Constituent Assembly joined in making a declaration that this country will be associated with the British Commonwealth, that association has in some way derogated from the sovereignty of the people. Sir, I do not think that that is a right view to take every independent country must have some kind of a treaty with some other country. Because one sovereign country makes a treaty with another sovereign country, that country does not become less sovereign on that account. (Interruption). I am taking the worst example. I know that some people have that sort of fear. (Interruption).

The Honourable Dr. B.R. Ambedkar: I say that this Preamble embodies what is the desire of every Member of the House that this Constitution should have its root, its authority, its sovereignty, from the people. That it has.

Therefore, I am not prepared to accept the amendment. I do not want to say anything about the text of the amendment. Probably the amendment is somewhat worded, if I may say so with all respect, in a form which would not fit in the Preamble as we have drafted, and therefore on both these ground I think there is

no justification for altering the language which has been used by the Drafting Committee.

Mr. President: The question is:

"That in amendment No. 2 of the List of Amendments (Volume I), for the first paragraph in the proposed Preamble, the following be substituted:-

'We, on behalf of the people of India from whom is derived all power and authority of the Independent India, its constituent parts and organs of government, having solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens".

The amendment was negatived.

Mr. President: There is no other amendment. The Preamble, as it is now open to discussion, if any Member wishes to say anything.

Honourable Members: The question may now be put.

Mr. President: If nobody is willing to speak, I shall put the Preamble to the vote. The question is:

"That the Preamble stand part of the Constitution".

The motion was adopted.

The Preamble was added to the Constitution.

The Preamble begins with the words "WE THE PEOPLE OF INDIA" and ends with the words "..adopt, enact and give to ourselves this Constitution". It indicates that ultimate sovereignty lies with the people of India who collectively constitute the supreme source of authority in the country. The Constitution of India now proclaims India to be Sovereign, Socialist Secular Democratic Republic. The Constitution of India is republican in character as the executive head of India is not any hereditary monarch. But the more significant aspect is that the Republic is democratic. Justice, liberty, equality, and fraternity which are

the essential characteristic of a democracy are declared in the Preamble, as well as the very objectives of the Constitution.

For some time it was assumed that like the preamble of a statute, the Preamble of the Constitution was not a part of the Constitution. But the *Kesavananda Bharati case*[26] held that it is the part of the Constitution.

This resolve reflected in Resolution passed on the 22nd January 1947 and inspired the shaping of the Constitution into a dynamic document. This resolution is the inner theme of the Preamble, which should be read, referred and remembered.

We, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizen: JUSTICE-social economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; And promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949 do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

The concept of "We the people…" being the source and authority for drawing up the Constitution was also taken from the US model and preamble begins with those words. Though the Constituent Assembly had legal power to enact the Constitution, the Preamble followed the American example and claims that We the people of India, do hereby adopt, enact and give to ourselves this Constitution" and declared that objective of the Constitution were justice, liberty, equality and fraternity. Though there was broad mention of objectives in the Preamble, the framers chose to include detailed goals and objectives in Part IV entitled "Directive Principles of State policy" on the lines of Irish Free State, mentioning that they were not enforceable like Fundamental Rights. Preamble is a

[26] *Kesavananda Bharati v. State of Kerela*, (1973) 4 SCC 225

statement of objects, which are expected by the Constitution makers to be realized through the implementation of the Constitution. [27]

In *Berubari Union and Exchange of Enclaves*[28], the Supreme Court considered the preamble a key to open the mind of the Constitution makers. It is a guide to interpretation of the provisions of the Constitution. Preamble made it clear that Constitution emanated from the people of India and not from any external authority or any less authority than the people of India.

Many Constitution experts and the Supreme Court stated that it is a conclusive assumption and a legal fiction, which cannot be tested or questioned in any court. Supreme Court held that the preamble was part of the constitution and it could be amended except the basic features in the Preamble. 42nd Amendment inserted three "Secularism, Socialism and Integrity" in Preamble. As these concepts were already implied in the Constitution, the addition was not considered to be the amendment of the basic features.

Dr. B.R. Ambedkar in his concluding speech in the Assembly stated that "Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life, which recognizes liberty, equality and paternity, which are not to be treated as separate items in a trinity. They form a union of the trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity"[29]

3.4. SECULAR STATE.

India is the second most 'Populous country of the world. The people inhabiting this vast land profess different religions and speak different languages.

[27] Basu, D.D. '*Introduction to the Constitution of India*', 18th Edn.

[28] AIR 1960 SC 845,

[29] *Constituent Assembly of India*, Vol- XI Friday, 25th November, 1949.

Despite the diversity of religion and language, there runs through the fabric of the nation the golden thread of a basic innate unity. It is a mosaic of different religions languages and cultures. Each of them has made a mark on the Indian polity and India today represents a synthesis of them all. The closing years of the British rule were marked by communal riots and dissensions. There was also a feeling of distrust and the demand was made by a section of the Muslims for a separate homeland. This ultimately resulted in the partition of the country. Those who led the fight for independence in India always :aid great stress on communal amity and accord. They wanted the establishment of a secular State wherein people belonging to the different religious should all have a feeling of equality and non-discrimination. [30]

Although the words secular state are not expressly mentioned in the Constitution, there can be no doubt that our Constitution-makers wanted establishment of such a state. The provisions of the Constitution were designed accordingly. There is no mysticism in the secular character of the state. Secularism is neither anti-God, nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the state and ensures that no one shall be discriminated against on the ground of religion. The Constitution at the same time expressly guarantees freedom of conscience and the right freely to profess, practise and propagate religion. The Constitution- makers were conscious of the deep attachment the vast masses of our country had towards religion, the sway it had on their minds and the significant role it played in their lives.[31]

Although it was through the Constitution (Forty-second) Amendment Act, 1976 that India was announced a secular republic by inserting the word SECULAR, in the Preamble of the Constitution, nobody have ever doubted that the republic was conceived and made secular from the very beginning. Since secularism does not have a universal agreed definition or form, the Indian Constitution and State have been constantly examined in respect of the model of secularism they provide and practice and the strength and weakness of such model

[30] B. Shiva Rao, *'The Framing of India's Constitution -Select Documents'*, Vol. II

[31] ibid

and practice have been pointed our in the light of experience gained from other systems and the peculiarities of the Indian society. Among the varying conception of secularism, the common element is the absence of State sponsored or State favoured religion. This element has always been present in the background, making and final provision of the Constitution. Barring some extreme views, which had no role shaping the Constitution, at no stage India was conceived either a theocratic or an anti-religion State. It is amply supported by the core provisions of the Constitution which have remained unchanged since its inception.[32]

Prof. Upendra Baxi[33] says that "Secularism" in the Indian Constitution connotes :

"(i) The State by itself, shall not espouse or establish or practice any religion;

(ii)public revenues will not be used to promote any religion;

(iii)the State shall have the power to regulate any 'economic, financial or other secular activity' associated with religious practice [Article 25(2)(a) of the Constitution;

(iv)the State shall have the power through the law to provide for social welfare and reform or the throwing open of the Hindu religious institutions of a public character to all classes and sections of Hindus' Article 25(2)(b) of the Constitution;

(v)the practice of untouchability (insofar as it may be justified by Hindu religion) is constitutionally outlawed by Article 17;

(vi)every individual person will have, in that order, an equal right to freedom of conscience and religion;

(vii)these rights are however subject to the power of the State through law to impose restrictions on the ground of 'public order, morality and health',

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[32] V.N. Shukla, '*Constitution of India*', 10th edn., Eastern Book Company.

[33] Prof. Upendra Baxi, *'The Struggle for the Re-definition of Secularism in India',* Social Action, Vol. 44, 1994.

(viii)"these rights are furthermore subject to other fundamental rights in Part III;"

Indian concept of secularism means "the equal status to all religions". That "no one religion should be given preferential status or unique distinction and that no one religion should be accorded special privileges in national life". That would be violative of basic principles of democracy. No group of citizens can so arrogate to itself the right and privilege which it denies to others. No person shall suffer any form of disability or discrimination because of his religion, but also alike should be free to share to the fullest degree in the common life. This is the basic principle in separation of religion and the State. The Constitution makers intended to secure secular and socialist goals envisaged in the preamble of the Constitution.[34]

In *Kesavananda Bharati case*[35] and *Indira Nehru Gandhi v. Raj Narain*[36] *case* the Supreme Court held that secularism is a basic feature of the Constitution.

Though the concept of "secularism" was not expressly engrafted while making the Constitution, its sweep, operation and visibility are apparent from fundamental rights and directive principles and their related provisions. It was made explicit by amending the preamble of the Constitution 42nd Amendment Act. The concept of secularism of which religious freedom is the foremost appears to visualise not only of the subject of God but also an understanding between man and man. Secularism in the Constitution is not anti-God and it is sometimes believed to be a stay in a free society. Matters which are purely religious are left personal to the individual and the secular part is taken charge by the State on grounds of public interest, order and general welfare. The State guarantee individual and corporate religious freedom and dealt with an individual as citizen

[34] Granville Austin, '*The Indian Constitution : Cornerstone of a Nation'*.

[35] *Kesavananda Bharati v. State of Kerela,* (1973) 4 SCC 225.

[36] *Indira Nehru Gandhi v. Raj Narain,* 1975 Supp SCC 1.

irrespective of his faith and religious belief and does not promote any particular religion nor prefers one against another. The concept of the secular State is, therefore, essential for successful working of the democratic form of Government. There can be no democracy if anti-secular forces are allowed to work dividing followers of different religious faith flying at each other's throats. The secular Government should negate the attempt and bring order in the society. Religion in the positive sense, is an active instrument to allow the citizen full development of his person, not merely in the physical and material but in the non-material and non-secular life.

Dr Ambedkar believed that Buddhism is the religion best suited to the Indian soil. Mahatma Gandhi, Father of the Nation, spoke for the need of religion thus: “The need of the mankind is not one of religion, but mutual respect and tolerance of the devotees of different religions. We want to reach not a data level, but unity in diversity. The soul of all religions is one, but it is encased in the multitude of forms. The latter will persist to the end of the time."[37]

The Constitution Bench, after a detailed discussion, summarised the true concept of secularism under the Indian Constitution as under :- "It is clear from the constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasising that there is no religion of the State itself. The Preamble of the Constitution emphasises this aspect and indicates that it is in this manner the concept of secularism embodied in the constitutional scheme as a creed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touchstone of the Constitution. The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution."[38]

[37] *S.R. Bommai v. Union of India,* AIR 1994 SC 1918.

[38] *Dr. M. Ismail Faruqui v. Union of India*, (1994) 6 SCC 360.

3.5. FUNDAMENTAL RIGHTS.

The Constitution of India declares certain fundamentals to the individual. Some of this can only be claimed by the citizens of India, others apply equally to non-citizen also. The fundamental right is inviolable in the sense that no law, ordinance, custom, usages, or administrative order can abridge or take away a fundamental right. A law which violates any of the fundamental right is void. They are binding on the legislature as well as the executive. A fundamental right cannot be taken even by a constitutional amendment if it forms the basic structure of the Constitution.[39]

The committee on fundamental right had presented a draft of the list of rights intendent to be treated as fundamental rights before the Constituent Assembly of India[40] on 29th April 1947. The list are enumerated as follows for making a study:

Justiciable Fundamental Rights

Rights of Equality

4. (1) The State shall make no discrimination against any citizen on grounds of religion, race, caste or sex.

(2) There shall be no discrimination against any citizen on any ground of religion, race, caste or sex in regard to:

(a) access to trading establishments including public restaurants and hotels, (b) the use of wells, tanks, roads and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public:
Provided that nothing contained in this clause shall prevent separate provision being made for women and children.

[39] V.N. Shukla, '*Constitution of India*', 10th edn., Eastern Book Company.

[40] ' *Constituent Assembly Of India'*, Tuesday, the 29th April, 1947.

5. There shall be equality of opportunity for all citizens in matters of public employment and in the exercise of carrying on of any occupation, trade, business or profession.

Nothing herein contained shall prevent the State from making provision for reservations in favour of classes who, in the opinion of the State, are not adequately represented in the public services.

No citizen shall on grounds only of religion, race, caste, sex, descent, place of birth or any of them be ineligible for public office or be prohibited from acquiring, holding or disposing of property or exercising or carrying on any occupation, trade, business, or profession within the Union.

Nothing herein contained shall prevent a law being made prescribing that the incumbent of an office to manage, administer or superintend the affairs of a religious or denominational institution or the member of the Governing Body thereof shall be a member of that particular religion or denomination.

6. "Untouchability" in any form is abolished and the imposition of any disability on that account shall be an offence.

7. No heritable title shall be conferred by the Union.

No citizen of the Union and no person holding any office of profit or trust under the State shall, without the consent of the Union Government, accept any present, emoluments, office, or title of any kind from any foreign State.

Rights of Freedom

8. There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the Unit concerned whereby the security of the Union or the Unit, as the case may be, is threatened:-

(a) The right of every citizen to freedom of speech and expression: Provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libellous or defamatory matter actionable or punishable.

(b) The right of the citizens to assemble peaceably and without arms :Provision may be made by law to prevent or control meetings which are likely to cause a breach of the peace or are a danger or nuisance to the general public or to prevent or control meetings in the vicinity of any chamber of a Legislature.

(c) The right of citizens to form associations or unions: Provision may be made by law to regulate and control in the public interest the exercise of the foregoing right provided that no such provision shall contain any political, religious or class discrimination.

(d) The right of every citizen to move freely throughout the Union.

(e) The right of every citizen to reside and settle in any part of' the Union, to acquire property and to follow any occupation, trade business or profession :

Provision may be made by law, to impose such reasonable restrictions as may be necessary in the public interest including the protection of minority groups and-tribes.

9. No person shall be deprived of his life, or liberty, without due process of law, nor shall any person be denied the equal treatment of the laws within the territories of the Union:

Provided that nothing herein. contained shall detract from the powers of the Union Legislature in respect of foreigners.

10. Subject to regulation by the law of the Union trade, commerce, and intercourse among the units by and between the citizens shall be free:

Provided that any Unit may by law impose reasonable restrictions in the interest of public order, morality or health or in an emergency;

Provided that nothing in this section shall prevent any Unit from imposing on goods imported from other Units the same duties and taxes to which the goods produced in the Unit are subject;

Provided further that no preference shall be given by any regulation of commerce or revenue by a Unit to one Unit over another.

11. (a) Traffic in human beings, and

(b) forced labour in any form including begar and involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted; are hereby prohibited and any contravention of this prohibition shall be an offence.

Explanation.-Nothing in this sub-clause shall prevent the State from imposing compulsory service for public purposes without any discrimination on the ground of race, religion, caste or class.

12. No child below the age of 14 years shall be engaged to work in any factory, mine or any other hazardous employment.

Explanation.-Nothing in this clause shall prejudice any educational programme or activity involving compulsory labour.

Rights Relating to Religion

13. All persons are equally entitled to freedom of conscience, and the right freely to profess, practise and propagate religion subject to public order, morality or health, and to the other provisions of this Chapter.

Explanation 1.-The wearing and carrying of Kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation 2.-The above rights shall not include any economic, financial, political or other secular activities that may be associated with religious practice.

Explanation 3.-The freedom of religious practice guaranteed in this clause shall not debar the State from enacting laws for the purpose of social welfare and reform.

14. Every religious denomination shall have the right to manage its own affairs in matters of religion and, -subject to the general law, to own, acquire and administer property, movable and immovable, and to establish and maintain institutions for religious or charitable purposes.

15. No person may be compelled to pay taxes, the proceeds of which are specifically appropriated to further or maintain any particular religion or denomination,

16. No person attending any school maintained or receiving aid out of public funds shall be compelled to take part in the religious instruction that may be given in the school or to attend religious worship held in the school Or in premises attached thereto.

17. Conversion from one religion to another brought about by coercion or undue influence shall not be recognised by law.

Cultural and Educational Rights:

18. (1) Minorities in every Unit shall be protected in respect of their language, script and culture and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect.

(2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission into State educational institutions, nor shall any religious instruction be compulsorily imposed on them.

(3) (a) All minorities whether based on religion, community or language shall be free in 'any Unit to establish and administer educational institutions of their choice.

(b) The State shall not, while providing State aid to schools, discriminate against schools under the management of minorities whether based on religion, community or language.

Miscellaneous Rights

19. No property, movable or immovable, of any person or corporation including any interest in any commercial or industrial undertaking, shall be taken or acquired for public use unless the law provides for the payment of compensation for the property taken or acquired and specified the principles on which and the manner in which the compensation is to be determined.

20. (1) No person shall be convicted of crime except for violation of a law in force at the time of the commission of that act charged as -an offence, nor be subjected to a penalty greater than that applicable at the time of the commission of the offence.

(2) No person shall be tried for the same offence more than once nor be compelled in any criminal case to be a witness against himself.

21. (1) Full faith and credit shall be given throughout the territories of the Union to the public acts, records and judicial proceedings of the Union and every Unit thereof, and the manner in which and the conditions under which such acts, records and proceedings shall be proved and the effect thereof determined shall be prescribed by the law of the Union.

(2) Final civil judgements delivered in any Unit shall be executed throughout the Union subject to such conditions as may be imposed by the law of the Union.

Rights to Constitutional Remedies

22. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of any of the rights guaranteed by this part is hereby guaranteed.

(2) Without prejudice to the powers that may be vested in this behalf in other courts, the Supreme Court shall have power to issue directions in the nature of the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari appropriate to the right guaranteed in this part of the Constitution.

(3) The right to enforce these remedies shall not be suspended unless when, in case of rebellion or invasion or other grave emergency, the public safety may require it.

23. The Union Legislature may by law determine to what extent any of the rights guaranteed by this part shall be restricted or abrogated for the members of the armed forces or forces charged with the maintenance of public order so as to ensure fulfilment of their duties and the maintenance of discipline.

24. The Union Legislature shall make laws to give effect to those provisions of this part which require such legislation and to prescribe punishment for those acts which are declared to be offences in this part and are not already punishable.

Speaking on the debates on fundamental right Dr. B. R. Ambedkar the Chairman of the Drafting Committee of the Constituent Assembly on Thursday, the 4th November 1948 said: The most criticized part of the Draft Constitution is that which relates to Fundamental Rights. It is said that Article 13 which defines fundamental rights is riddled with so many exceptions that the exceptions have eaten up the rights altogether. It is condemned as a kind of deception. In the opinion of the critics fundamental rights are not fundamental rights unless they are also absolute rights. The critics rely on the Constitution of the United States and to the Bill of Rights embodied in the first ten Amendments to that Constitution in support of their contention. It is said that the fundamental rights in the American Bill of Rights are real because they are not subjected to limitations or exceptions.

I am sorry to say that the whole of the criticism about fundamental rights is based upon a misconception. In the first place, the criticism in so far as it seeks to distinguish fundamental rights from non-fundamental rights is not sound. It is incorrect to say that fundamental rights are absolute while non-fundamental rights are not absolute. The real distinction between the two is that non-fundamental rights are created by agreement between parties while fundamental rights are the gift of the law. Because fundamental rights are the gift of the State it does not follow that the State cannot qualify them.

In the second place, it is wrong to say that fundamental rights in America are absolute. The difference between the position under the American Constitution and the Draft Constitution is one of form and not of substance. That the fundamental rights in America are not absolute rights is beyond dispute. What the Draft Constitution has done is that instead of formulating fundamental rights in absolute terms and depending upon our Supreme Court to come to the rescue of Parliament by inventing the doctrine of police power, it permits the State directly to impose limitations upon the fundamental rights. There is really no difference in

the result. What one does directly the other does indirectly. In both cases, the fundamental rights are not absolute.[41]

Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and en forced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamable of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceedings, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceedings. Such a concession, if enforced, would defeat the purpose of the Constitution. [42]

The whole object of Part III of the Constitution is to provide protection for the freedoms and rights mentioned therein against arbitrary invasion by the State. Its is the basic foundation of the Constitution. Part-III dealing with 'Fundamental Rights' which represent the core of the Indian Constitutional philosophy envisage the methodology for removal of historic injustice and inequalities -either inherited or artificially created - and social and economic disparity and ultimately for achieving an egalitarian society in terms of the basic structure of our Constitution as spelt out by the preamble.

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[41] '*Constituent Assembly Of India Debates*'- Vol. VII, Thursday, The 4th November 1948

[42] '*Olga Tellis v. Bombay Municipal Corporation*', AIR 1986 SC 180.

Our Constitution is unquestionably unique in its character and assimilation having its notable aspirations contained in 'Fundamental Rights' in Part III through which the illumination of Constitutional rights comes to us not through an artless window glass but refracted with the enhanced intensity and beauty by prismatic interpretation of the Constitutional provisions dealing with equal distribution of justice in the social, political and economic spheres.

The founding fathers of our Constitution have designedly couched Articles 14, 15 and 16 in comprehensive phraseology so that the frail and emaciated section of the people living in poverty, rearing in obscurity, possessing no wealth or influence, having no education, much less higher education and suffering from social repression and oppression should not be denied of equality before the law and equal protection of the laws and equal opportunity in the matters of public employment or subjected to any prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

To achieve the above objectives, the Government have enacted innumerable social welfare legislations and geared up social reformative measures for uplifting the social and economic development of the disadvantaged section of people. True, a rapid societal transformation and profusion of other progressive changes are taking place, yet a major section of the people living below the poverty line and suffering from social ostracism still stand far behind and lack in every respect to keep pace with the advanced section of the people. The undignified social status and sub human living conditions leave an indelible impression that their forlorn hopes for equality in every sphere of life are only a myth rather than a reality. It is verily believed - rightly too - that the one and only peerless way and indeed a most important and promising way to achieve the equal status and equal opportunity is only by means of constitutional justice so that all the citizens of this country irrespective of their religion, race, caste, sex, place of birth or any of them may achieve the goal of an egalitarian society.

The Supreme Court has laid down a series of landmark judgments in relation to social justice by interpreting the constitutional provisions upholding the cherished values of the Constitution and thereby often has shaped the course of our

national life. Notwithstanding a catena of expository decisions with interpretive semantics, the naked truth is that no streak of light or no ray of hope of attaining the equality of status and equality of opportunity is visible.[43]

3.6. DIRECTIVE PRINCIPLES OF STATE POLICY.

Part IV of the Constitution enumerates certain Directives Principles of State Policy which are declared as fundamental in the governance of the Country. These principles are intended to be the imperative basic of State policy. These are really in the nature of instructions issued to future legislatures and executives for their guidance.

The resolution taken by the Constituent Assembly [44]on Saturday, the 30th August 1947, has set out the fundamental principles of governance as follows:

FUNDAMENTAL PRINCIPLES OF GOVERNANCE

PREAMBLE

1.The principles of policy set forth in this part are intended for the guidance of the State. While these principles are not cognizable by any court, they are nevertheless fundamental in the governance of the country and their application in the making of laws shall be the duty of the State.

PRINCIPLES

2. The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

3. The State shall, in particular, direct its policy towards securing:

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

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[43] *Indra Sawhney v.Union Of India,* 1992 Supp (3) SCC 212

[44] **'***Constituent Assembly **of** India Debates*' – Vol. V, Saturday, 30th August 1947.

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

(iii) that the operation of the competition shall not be allowed to result in the concentration of the ownership and control of essential commodities in a few individuals to the common detriment;

(iv) that there shall be equal pay for equal work for both men and women;

(v) that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their age and strength;

(vi) that childhood and youth are protected against exploitation and against moral and material abandonment.

4.The State shall, within the limits of its economic capacity and development, make effective provision for securing the, right to work, to education and to public assistance in case of unemployment, old age, sickness, disablement- and other cases of undeserved want.

5. The State shall make provision for securing just and humane conditions of work and for maternity relief for workers.

6.The State shall endeavour to secure, by suitable legislation, economic Organisation and in other ways, to all workers, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.

7. The State shall endeavour to secure for the citizens a uniform civil code.

8.Every citizen is entitled to free primary education, and It shall be the duty of the State to Provide within a period of 10 years from the commencement of this Constitution for free and compulsory primary education for all children until they complete the age of 14 years.

9.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 aboriginal tribes, and shall protect them from social injustice and all forms of exploitation.

10.The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of 'Public health as among its primary duties.

11.It shall be the obligation of the State to protect every monument or Place or object of artistic or historic interest, declared by the law of the Union to be of national importance, from spoliation, destruction, removal, disposal or export. as the case may be, and to preserve and maintain according to the law of the Union all such monuments or places or objects.

12.The State shall promote international peace and security by the prescription of open, just and honourable relations between nations by the firm establishment of the understandings of international law as the actual rule of conduct among governments and by the maintenance of justice and the scrupulous respect for 'treaty obligations in the dealings of organised people with one another.

Speaking on the debates on fundamental right Dr. B. R. Ambedkar the Chairman of the Drafting Committee of the Constituent Assembly[45] on Thursday, the 4th November 1948 said: In the Draft Constitution the Fundamental Rights are followed by what are called "Directive Principles". It is a novel feature in a Constitution framed for Parliamentary Democracy. The only other constitution framed for Parliamentary Democracy which embodies such principles is that of the Irish Free State. These Directive Principles have also come up for criticism. It is said that they are only pious declarations. They have no binding force. This criticism is of course superfluous. The Constitution itself says so in so many words.

[45] '*Constituent Assembly Of India Debates*'- Vol. VII, Thursday, The 4th November 1948.

If it is said that the Directive Principle have no legal force behind them, I am prepared to admit it. But I am not prepared to admit that they have no sort of binding force at all. Nor am I prepared to concede that they are useless because they have no binding force in law.

The Directive Principles are like the Instrument 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 to the President and to the Governors. The texts of these Instruments of Instructions will be found in Schedule IV of the Constitution. What are called Directive Principles is merely another name for Instrument 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 install 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 Court of Law. But he will certainly have to answer for them before the electorate at election time. What great value these directive principles possess will be realized 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 & 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 powers. But that is only a matter of arrangement.

Social, economic and political justice is the objective set out in the Directive Principle and it is this objective which is made fundamental in the governance of the country and which the State is laid under an obligation to realise. This Directive Principle forms the base on which the entire structure of the Directive Principles is reared and social, economic and political justice is the signature tune of the other Directive Principles.

The Fundamental Rights are no doubt important and valuable in a democracy. but there can be no real democracy without social and economic justice to the common man and to create socio- economic conditions in which there can be social and economic justice to every one, is the theme of the Directive Principles. It is the Directive Principles which nourish the roots of our democracy, provide strength and vigour to it and attempt to make it a real participatory democracy which does not remain merely a political democracy but also becomes social and economic democracy with Fundamental Rights available to all irrespective of their power, position or wealth. The dynamic provisions of the Directive Principles fertilise the static provisions of the Fundamental Rights. The object of the Fundamental Rights is to protect individual liberty, but can individual liberty be considered in isolation from the socio-economic structure in which it is to operate. There is a real connection between individual liberty and the shape and form of the social and economic structure of the society. Can there be any individual liberty at all for the large masses of people who are suffering from want and privation and who are cheated out of their individual rights by the exploitative economic system ? Would their individual liberty not come in conflict with the liberty of the socially and economically more powerful class and in the process, get mutilated or destroyed ? It is axiomatic that the real controversies in the present day society are not between power and freedom but between one form of liberty and another. Under the present socio-economic system, it is the liberty of the few

which is in conflict with the liberty of the many. The Directive Principles therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. It will thus be seen that the Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have even the bare necessities of life and who are living below the poverty level.[46]

The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the socio-economic revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire Constitution by the aim of national renascence, says Granville Austin[47], "the core of the commitment to the social revolution lies in the Fundamental Rights and the Directive Principles of State Policy." These are the conscience of the Constitution and, according to Granville Austin, "they are designed to be the Chief instruments in bringing about the great reforms of the socio-economic revolution and realising the constitutional goals of social, economic and political justice for all. The Fundamental Rights undoubtedly provide for political justice by conferring various freedoms on the individual, and also make a significant contribution to the fostering of the social revolution by aiming at a society which will be egalitarian in texture and where the rights of minority groups will be protected. But it is in the Directive Principles that we find the clearest statement of the socioeconomic revolution. The Directive Principles aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by

[46] *Minerva Mills Ltd. v. Union Of India,* AIR 1980 SC 1789.

[47] Granville Austin, '*The Indian Constitution : Cornerstone of a Nation*'.

society and by nature, free from the object physical conditions that had prevented them from fulfilling their best salves.

The Directive Principles, therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country.

Thus, the Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people, who do not have even the bare necessities of life and who are living below the poverty level.

3.7. SALIENT FEATURES OF THE CONSTITUTION.

The Constitution of India can be briefly ascertained by having a study of its basic salient features. Though there are many feature which lay down the constitutional foundation of the Constitution, we study the most significant features of the Constitution without which the Constitution would not have acclaimed the heights it has today.

The constitutional foundation of the Indian Constitution and the basic philosophy of our Constitution can be summed up in the Preamble, which declares India to be a Sovereign Socialist Secular Democratic Republic[48]. It is the bulkiest written Constitution. As the framers wanted to remove difficulties during the working of the Constitution, they incorporated several details to avoid loopholes

[48] *http://www.hrdiap.gov.in* accessed on 30.11.2012.

and defects. They framed the Chapter on Fundamental Rights on the model of the American Constitution, and adopted the parliamentary system of Government from the United Kingdom, they took the idea of the Directive Principles of State Policy from the Constitution of Ireland, and added elaborate provisions relating to Emergency in the light of the Constitution of the German Reich and the Government of India Act, 1935. It lays down the structure not only of the Central Government but also of the States, while American Constitution left the aspect of drafting the provisions of governance to the States. The vastness of the country and diversity in the society with peculiar problems is another reason for bulkiness of the Constitution.

According to Preamble, India is a Sovereign, Socialist, Secular, Democratic Republic. The word Sovereign emphasises that India is no more dependent upon any outside authority. The term "Socialist" has been inserted in the Preamble by the Constitution 42nd Amendment Act, 1976. In general, it means some form of ownership of the means of production and distribution by the State. India has chosen mixed economy and now drifting towards privatisation.

The term Secularism means a State which has no religion of its own as a recognised religion of State. It treats all religions equally. In a secular State the State regulates the relation between man and man. It is not concerned with the relation of man with God. The term "democratic" indicates that the Constitution has established a form of Government which gets authority from the will of the people. The rulers are elected by the people. Justice, liberty Equality and Fraternity are the essential features of the democracy.

The term Republic signifies that there shall be an elected head of the State who will be the Chief Executive Head. The President of India, unlike the British King or Queen, is not a hereditary monarch but an elected person chosen for a limited period. It is an essential ingredient of a Republic.

The Parliamentary form of Government is practiced in the country. Both at the Centre and States, the Constitution established a parliamentary form of Government. The British model has been adopted in toto, in this regard. The essence of the parliamentary form of Government is its responsibility to the

legislature. The Council of Ministers is collectively responsible to the Lower House i.e., Lok Sabha. In States the Council of Ministers is responsible to Legislature, and therefore it is called responsible Government. On the other hand the American Government is a Presidential form of Government, where the President, the real executive and elected directly by the people for 4 years. All executive powers are vested in him. He is not responsible to the Lower House, i.e., the Congress. The members of his cabinet are not members of Legislature. They are appointed by the President and therefore, responsible to him. Parliamentary democracy has three important characteristics namely,-- (i) the executive is responsible to the Lower House; (ii) the Lower House has a democratic basis (i.e. it is elected by the people; and (iii) the ultimate legislative and financial control is vested in this Lower House. The Parliamentary system of Government in India is based on adult suffrage, whereby all citizens of India who are not less than 18 years of age and are not disqualified on certain grounds like non residence, unsoundness of mind or corrupt practices have the right to be registered as voters in any election to the Lok Sabha and to the Legislative Assemblies of the States.

The Constitution of India is partly rigid and partly flexible. There are certain provisions which can be amended by a simple majority in Parliament, while there are certain other provisions whose amendment requires not only a special majority in Parliament but also ratification by at least one half of the State Legislatures. A written constitution is generally said to be rigid. But the Indian Constitution despite being a written one is not rigid and it is sufficiently flexible.

The incorporation of a formal declaration of Fundamental Rights in Part III of the Constitution is deemed to be a distinguishing feature of a democratic State. These rights impose limitations on the powers of the State. The State cannot take away or abridge these Fundamental Rights of the citizen guaranteed by the Constitution. If it passes such a law it may be declared as unconstitutional by the Courts. Besides declaring the fundamental rights, the Constitution provided a machinery to enforce them.

The Supreme Court is empowered to grant most effective remedies in the nature of Writs of Habeas Corpus, Mandamus, Prohibition, Quo Warranto, and

Certiorari whenever these rights are violated. However, the Fundamental Rights are not absolute. They are subjected to certain restrictions, based on some social interests. Thus, our Constitution tries to strike a balance between the individual liberty and the social interest. This idea of incorporating Bill of Rights has been taken from the Constitution of the United States.

The Directive Principles of State Policy contained in Part IV set out the aims and objectives to be taken up by the States in the governance of the country.Unlike the Fundamental Rights, these rights are not justiciable. Though by their vary nature they are not justiciable in the Court of law, yet the State Authorities have to answer for them to the electorate at the time of election. The idea of the welfare state envisaged in our Constitution can only be achieved if the States endeavour to implement them with a high sense of moral duty. The support to villages and rural economy called Gram Swaraj, one of the ideals of Mahatma Gandhi could be found only in Directive Principles of State Policy. Ideals which could not be guaranteed as enforceable rights were accommodated in this Part after much deliberations in the Constituent Assembly.

The Constitution (42nd Amendment Act, 1976) has introduced a Code of ten "Fundamental Duties" for Citizens. The fundamental duties are intended to serve as a constant reminder to every citizen that while the Constitution has specifically conferred on them certain fundamental rights, it also requires the citizens to observe certain basic norms of democratic conduct and democratic behaviours. These duties, like the Directive Principles of State Policy cannot be judicially enforced. However they remind the responsible citizen what Constitution expects from them.

In the place old communal franchise, the uniform adult suffrage system has been adopted. Under the Indian Constitution every man and woman above 18 years of age has been given the right to elect their representatives for the legislature. The adoption of the universal adult suffrage under Article 326 without any qualification of sex, property, taxation, or the like is a bold experiment in India having regard to vast extent of the country and its population, with an overwhelming illiteracy.

An Independent Judiciary is one of the most important foundation of the Constitution. After a thorough deliberation in the Constituent Assembly, the founding fathers created an independent judiciary with a power of Judicial Review as the custodian of the fundamental rights of the citizen. It plays a significant role in determining the limits of power of the Centre and States. Single independent judiciary to interpret the Union and State Laws, vibrant judicial review of executive and legislative action are other basic features of the Indian Constitution which secure the philosophical foundations of the rule of law and democracy. The judiciary is the only resort for a citizen to enforce the constitutional provisions and secure the rights.

Speaking on the nature of the Draft Constitution. Dr. Ambedkar in his speech delivered On November 4, 1948, in the Constituent Assembly[49] said:

All federal systems including the American are placed in a tight mould of federalism. No matter what the circumstances, it cannot change its form and shape. It can never be unitary. On the other hand the Draft Constitution can be both unitary as well as federal according to the requirements of time and circumstances.

There is another special feature of the proposed Indian Federation which distinguishes it from other federations. A Federation being a dual polity based on divided authority with separate legislative, executive and judicial powers for each of the two polities is bound to produce diversity in laws, in administration and in judicial protection. Up to a certain point this diversity does not matter. It may be welcomed as being an attempt to accommodate the powers of Government to local needs and local circumstances, But this very diversity when it goes beyond a certain point is capable of producing chaos and has produced chaos in many federal States. One has only to imagine twenty different laws -- if we have twenty States in the Union -- of marriage, of divorce, of inheritance of property, family relations, contracts, torts, crimes, weights and measures, of bills and cheques, banking and commerce, of procedures for obtaining justice and in the standards and methods of administration. Such a state of affairs not only weakens the State

[49]Constituent Assembly Debates, Vol. 7, pp. 34, 36-37.

but becomes intolerant to the citizen who moves from State to State only to find that what is lawful in one State is not lawful in another. The Draft Constitution has sough forge means and methods whereby India will have Federation and at the same time will have uniformity in all the basic matters which are essential to maintain the unity of the country. The means adopted by the Draft Constitution are three.

(1) a single judiciary,

(2) uniformity in fundamental laws, civil and criminal, and

(3) a common All India Civil Service to man important posts.

A dual judiciary, a duality of legal codes and a duality of civil services, as I said, are the logical consequences of a dual polity which is inherent in a federation. In the U.S.A. the Federal Judiciary and the State Judiciary are separate and independent of each other. The Indian Federation though a Dual Polity has no Dual Judiciary at all. The High Courts and the Supreme Court form one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under the constitutional Jaw, the civil law or the criminal law.

Judicial Review is another feature that commands significance. Look at the national emblem, the chakra and satyameva jayate. The chakra is motion, satyam is sacrifice. The chakra signifies that the Constitution is a becoming, a moving equilibrium; satyam is symbolic of the Constitution's ideal of sacrifice and humanism. The Court will be doing its duty and fulfilling its oath of loyality to the Constitution in the measure judicial review reflects these twin ideals of the Constitution.

The country is a Secular Socialist State. The Citizens of our country are free to follow any religion and they enjoy equal rights without any distinction of caste, creed religion or sex. The word "secular" has been included in the Preamble by Forty Second Amendment. Article 15 (1) prohibits any discrimination based on religion, and Article 25 (1) provides that subject to public order, morality and health and to the other provisions, all persons are equally entitled to freedom of

conscience and the right freely to profess, practice and propagate religion. Secularism is also subject to democratic socialism. Religious freedom cannot therefore be used to practice economic exploitation. The right to acquire, own and administer property by religious institutions is subject to the regulatory power of the State.

The concept of single citizenship is the law of the country. Though the Constitution envisaged a dual polity i.e., Centre and States, it provides for a single citizenship for the whole of India. The American Constitution provides for dual citizenship i.e., the citizen of USA and a State citizenship. Every Indian has a citizenship through out the country with same rights.

Recently Indian citizenship is given to the non-resident Indians permitting them to retain the foreign citizenship.

In sum, the National Movement was committeed : (1) to work for social, economic and political equality of the weaker sections of the people; (2) to disperse concentration of wealth in any form in a few hands; and (3) to acquire property in accordance with law. Payment of compensation would be determined by equitable considerations and not by market value. The men who took the leading part in framing the Constitution were animated by these noble ideals. They embodied them in the Preamble to the Constitution; they proliferated them in the Directive Principles of the State Policy; they gave them ascendancy over the rights in Part III of the Constitution. They made them 'fundamental' in the governance of the country. Pandit Govind Ballabh Pant called them 'vital principles'. [50]And indeed so they are, for when translated into life, they will multiply the number of owners of fundamental rights and transform liberty and equality from a privilege into a universal human right.

[50] Constituent Assembly Debates, Vol. 9, p. 1288.

3.8. CRITICISM TO THE CONSTITUTION.

The Constitution have been subjected to several criticism and some members have seriously raised doubts on the efficacy and working of the Constitution in the Constituent Assembly. A few extracts of the severest and harsh criticism of the Constitution by few members and their concerns that were raised in the debates of the Constituent Assembly[51] are put up below for study and for better understanding.

Seth Damodar Swarup (United Provinces: General): Mr. President, the Second Reading of the Draft Constitution has ended and the Third Reading is going on which will also conclude in three or four days. After that the inauguration of this Constitution will be held over till the historic day of the 26th January. All this is good and for that the Honourable Dr. Ambedkar and his other colleagues of the Drafting Committee deserve the congratulations of the whole House, because they have drafted this Constitution with great skin and labour.

Sir, ordinarily it would be expected of me who is a Member of this House that I should have a feeling of satisfaction for the successful completion of our labours. But Sir, permit me to say that at this moment when I am speaking on this Constitution in this House, far from having any sense of satisfaction I am feeling extremely depressed. The fact is that it appears to me as if my heart were sinking at this moment and a slow palsy is overtaking me This is due to my realisation that in spite of the fact that the British rule ended more than two years ago, the misfortune of the country and its people is that they have not yet perceived in the least any improvement in their conditions as a result of this change. I am afraid that the masses instead of finding any improvement in their lot are beginning to suspect that their lot is becoming worse as a result of this political change. They are unable to perceive as to where all this will end. The fact is that the general public, in whose name this Constitution has been framed and would be passed, sees only despair and darkness around them.

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[51] '*Constituent Assembly of India*'- Vol. XI, Saturday, 19th November 1949.

Mr. President, some of our friends thought that so far no change has been apparent in the condition of the general masses, because so far the Constitution and the laws framed by the British Government are in force. They believed that when our Indian constitution is ready, the masses would definitely feel that they are on the way to progress.

But, Mr. President, I wish to be excused for placing the hard reality before you. The people of this country would not at all be satisfied or happy even after this Constitution is completed and enforced. Because what is there for them, in this Constitution, as it has evolved now, and is soon going to be enforced? You may go through it from the beginning to the end, you will not find anywhere in it any provision for bread for the poor, starving, naked and oppressed people of India. What attempt has been made in this constitution for solving their day to day problems ? Besides this, it does not contain any guarantee of work, or employment for them. Far from ensuring to them wages according to their work, there is no guarantee in it even for a living wag. even for a minimum wage and payment for subsistence.

In these circumstances, Mr. President, even though this Constitution may be the biggest and bulkiest constitution in the world, may even be the most detailed one, it may be heaven for the lawyers, and may even be the Magna Charta for the capitalists of India, but so far as the poor and the tens of millions of toiling,, starving and naked masses of India are concerned, there is nothing in it for them. For them it is a bulky volume, nothing more than waste paper. It is a different matter whether we accept this fact Or not, but we would have to admit that even if we ignore the views of the public, we would have to pay attention to the opinion of the great people.

I wish to invite your attention to the opinion of the honourable the Speaker of our Indian Parliament. He says that constitution that has been framed does not at all contain any shade of Indian genius, and is quite contrary to that. If I am not mistaken the General Secretary of the Congress, Shri Shankarrao Deo has also expressed his views about this Constitution in this House. He says that this Constitution is bound to be rejected if a referendum is taken. So even he leaving

aside the views of the general public about this Constitution and only taking into consideration the views of such respectable people how can we claim, that the public will be satisfied with it?

Mr. President the reason is clear. This Constitution has been framed by the people who are not the true representatives of the general masses. I have stated previously that the framers of this Constitution at best represent 14 per cent of the Indian masses. This is a bitter fact. We, who are here in this House as the representatives of the public have failed to fulfill our duty for which we had assembled here due to various reasons and causes such as party politics. It is for this reason that the people of India are particularly faced with disappointment again, as they had seen after the change of Government. Then, we have to consider, what is in store for us? There is no doubt that the Indian masses will never accept this Constitution in the words of respected Shri Shankarrao Deo. This Constitution cannot work permanently in this country. We have seen that there are some good things too in this Constitution and some nice principles have been enunciated in this, e.g. there is a mention of general franchise and joint electorate, abolition of untouchability. But so far as the principles are concerned, they may be, quite all right. But how far they would be enforced in practice, will be seen when they are put into practice. We see that the mention of Fundamental Rights in the Constitution is a significant matter. But Mr. President, have we really got some Fundamental Rights through this Constitution? I can say emphatically that the grant of Fundamental Rights is a mere farce. They have been given by one hand and taken away by the other. We have been told in plain words that this guarantee about the fundamental rights will not apply in the case of the Acts at present in force, and in respect of libel slander, or contempt of court and the Government is authorised to enact such laws even in future. Besides this, so far as the right of association or the right to go from one place to another is concerned, the Government will have the right to enact any law to take away these rights in the name of public interest so the grant of Fundamental Rights is a farce.

Then, Mr. President, we see that the law regarding property is identical with that contained in the Government of India Act of 1935. The result would be that it would be impossible to nationalise property and there would be many

obstacles in effecting such economic reforms as may be in the interest of the public.

Mr. President, it is a matter of surprise, of pain indeed, that while speaking on the Objective Resolution our Prime Minister had said emphatically that he was a socialist. He had also expressed the hope that the Constitution would be of a socialist republic. We listened to all his speech, but when the amendment seeking to add the word 'socialist' with the word 'republic' was moved in the House, it was rejected.

Mr. President, on the one hand we desire that today's social structure should be maintained without any alteration, and on the other hand we also wish that, poverty and unemployment should vanish from this country. Both these things cannot go hand in hand. While in America our Prime Minister said that socialism and capitalism cannot go hand in hand; it is surprising as to how it can be expected to maintain status quo, to maintain capitalism and also to remove the poverty and unemployment of the masses. Both these things are quite incompatible. It is felt therefore that starving, naked and oppressed people of India would perhaps continue to be in the same misery as they are today. besides this even viewing this from other points of view too we do not arrive at any happy conclusion. Nowadays there is a lot of talk about co-operative commonwealth in our country. But what is the actual fact? It is no direction to say in the Directive Principles that the Governments would establish any such thing. To give directives in round about words is different from giving clear directive for establishing such a order. Still the Congress President wants us to cherish the hope that a classless society will be established in this country within five years. A lay man like me is however unable to understand as to how to reconcile the two statements, the one that we hate socialism and want to maintain the status quo the other that we wish to establish a classless society in our country while preserving the exploiting group. I cannot see how these two objects which are mutually opposite can be realised. Besides this there are several minor things which could be accomplished but have not been done.

The demand for the separation of the executive and the judiciary is a very old one-perhaps as old as the Indian National Congress is believed to be. But this Constitution does not contain any definite plan, any adequate provision to separate the executive and the judiciary as soon as possible.

Looking at States, I can say that no decision has yet been taken to end the Jagirdari system. The result would be that millions of peasants of the States would continue to be slaves of the Jagirdars. Besides this, the farm labourers would continue to be the slaves of the money lenders. Along with this we see that this Constitution contains so many things which are far more reactionary and backward than the provisions of the Government of India Act of 1935. It was provided in the first draft of this Constitution that the Governor would be elected direct by the voters. Later on another proposal was made saying that the Government would be appointed by a panel. But now the President has been given the right to select the Governors and also to fix their tenure of office himself. It is right that the President will as far as possible use his right properly, but this may lead to a tug of war between the provincial government and the Governor. It is just possible that the provincial Government may have a different ideology from that the Central Government and that conflict in ideologies may lead to conflict between the provincial government and the Governor. Besides this the discretionary powers of the Governor are even more reactionary than those contained in the 1935 Act. The Act of 1935 gave the powers of individual judgement to the Governor but it was essential for him to consult the cabinet. But now the Governor need not consult the cabinet regarding the discretionary powers. So, we see that in respect of Governors and three powers too we have gone backward instead of advancing forward.

Again the President has been given greater powers than necessary in the name of emergency powers, and the centre too has been given greater powers to interfere in the provincial affairs more than necessary. Our Constitutional structure is federal in name, but so far as the administrative sphere is concerned , it has become completely unitary structure. We do realise that centralisation is to some extent essential, but over-centralisation means more corruption in the country. Mahatma Gandhi advocated decentralisation throughout his life. It is surprising

that we have forgotten that lesson as soon after his departure, and are now giving undue powers to the President and the Central Government .

Mr. President, the structure of a modern State is generally based on division of powers, between two compartments- Provinces and the Centre. This system is already over-centralised. If we wish to end corruption, bribery and nepotism, the system of two compartments does not seem to be appropriate. For this we needed a four -compartment system. As I had once proposed, there should have been separate village republics, separate city republics and separate provincial republics and they should be federated into a central republic, that would have given us a really democratic federal structure. But as I have just said we have framed a unitary constitution in the name of a federation. This would essentially result in overcentralisation , and our Government which ought to have been the Government of the people, would become a fascist conclusion that the Constitution framed for our country will neither lead to the welfare of our country nor to the protection of those principles on the basis of which we have ostensibly proceeded. This seems to be the reason why the socialist party of India has declared that if and when they happen to capture power, the first things they would do will be to set up a new Constitution Assembly on the basis of general franchise and that constituent Assembly either change this whole constitution totally or would make necessary amendments in it. Mr. President, I would therefore not take any more time of the House and would only say that from the point of view of the interest of the people, high constitutional principles, this Constitution does not deserve to be passed. We should reject this Constitution. But Mr. President we may do it or not, I would submit, and fully believe in what my respected Friend Shri Shankarrao Deo has said, that even though we may accept this Constitution, the people of the country will never accept this. For them this Constitution would not for of greater value than other ordinary law books. The hopes of the people for the Constitution would remain unfulfilled just as they had remained fulfilled by the change of Government. If, therefore, we wish to retain the confidence of the people, there is still a change to do so, but if we do not succeed in this task, I am sure, Mr. President, the masses of India and the posterity too will not remember us by any good or respectable name.

Shri H. V. Kamath: I was saying that this Constitution is a Federal Constitution with a facade of Parliamentary democracy. Mahatma Gandhi wanted India to be a decentralised democracy. He told Louis Fischer, the eminent American publicist some years ago that "there are seven hundred thousand villages in India each of which would be organised according to the will of the citizens, all of them voting. Then there would be seven hundred thousand votes and not four hundred million votes. Each village, in other words, would have one vote. The villages would elect the district administration; the district administrations would elect the provincial administration and these in turn would elect the President who is the head of the executive. Louis Fischer. to whom he propounded this plan, interjected": 'That is very much like the Soviet system'. And Gandhiji replied: ' I did not know that. I do not mind.'

Sir, for good or for ill,-I hope for good-we have deviated from his plan and we have evolved a different plan, partly because we are passing through a difficult transition period. A time will arrive when India is stabilized and strong, and I hope we will then go back to the old plan of the Panchayat Raj or decentralised democracy, with village units self-sufficient in food, clothing and shelter and interdependent as regards other matters. I hope we will later go back to that Panchayat Raj Sir, to my mind the only system that will save India and the world is what I may call spiritual communism; I have in mind not the communism of the materialist brand. I have in mind spiritual communism. That is what Gandhiji had in mind when he based his conception of the future form of Government on the spirit of Divinity controlling human affairs. This meant spiritual communism. That alone will save the world. Today, in the conflict between the atom bomb and the atman it is only atma shakti that will prevail.

Now to go back to the preamble and the Constitution, I find that so far as justice is concerned, the Constitution amply provides for those who adorn the seats of justice. They are better provided for than those who will resort to the Temples of justice. The Drafting Committee had a soft corner for those eminent dignitaries who will preside in those Temples of justice and not to the humble votaries in the temple. As the Constitution was drafted by lawyers, perhaps it was inevitable that it should be so, as in the Sanskrit sloka Nalikagatamapi kutilam na bhavati saralam

shunah puchham. The lawyers' bias could not be avoided and therefore it is that in the Constitution the judges have been unduly pampered.

Shri T. Prakasam (Madras: General) : Mr. president, Sir, this is not the Constitution which I expected for the people of our country, the Constitution which I was expecting along with many others who have been labouring for attaining the freedom of this country, the constitution planned out by Mahatma Gandhi, not only planned out, but also endeavoured to be put into practice. Panchayat Raj was the one which he planned out and recommended to the nation. Before his advent and before his programme was placed before the country nobody ever dreamt that the people divided as they were in every respect, would come together under our leadership, under one banner, and carry out the orders given by him and the Congress. He was the one man who should have been framing constitution, a simple Constitution for the people of this country that would give relief to all, to the millions. His plan was to educate the millions and to make the fight carried on by them to attain freedom ever since he set his foot on this country after coming from South Africa. You know more about Mahatma Gandhi than myself or than anybody else in this country and you, Sir, were good enough to send a reply while the drafting of the Constitution was in progress, to a letter written to you by one ardent constructive worker, an advocate, an educated man who has spent his time in the villages for a good time. In that letter he suggested about this Panchayat organisation of Mahatma Gandhi and you replied to him in detail and you were impressed by that because you were one of the foremost followers of Mahatma Gandhi and a copy of that letter was given to me by that friend and that letter was referred by you to Shri B.N. Rau, the Constitutional Adviser. I raised that point elsewhere when we were discussing and everybody was impressed there, but I myself found it difficult to introduce the Panchayat Constitution-the framework of that-into the Constitution that had made considerable progress. So, we dropped it and the leadership then suggested that there would be the directive principles introduced into the Constitution. We have got that here now. Therefore, the Constitution which I was longing to have was that Constitution. It is only that Constitution that would give really food and cloth and all the necessaries of life to the millions. The millions were ignored during the British Raj and they were

ignored in our country even after the Biritish left and we also ignored them and we are proceeding with this Constitution.

The Constitution is a great document and the friends who have been in charge of this framing of this -Dr. Ambedkar- is a great lawyer, is a very able man. He has shown by the work he has done here, how he would be competent to be a King's Counsel of Great Britain, to be perhaps competent to sit on the Woolsack only; but this is not a Constitution that we, the people of this country wanted Mahatma Gandhi when he took up the organisation of this country in the name of the Congress at once saw how this country could be helped and how the millions could be helped. Therefore, he decided that the whole country should be divided on linguistic basis so that the people of each area would be competent to develop themselves. He not only laid that down as a rule for preaching purposes but he put it into force, carved out the whole country into 21 linguistic areas and he made the people work under that Constitution. As a matter of fact after he had been taken away from us and after we have been enabled to send away the English people from our country to their own country, we should not have discarded the basis on which this country had been educated by him, not only educated but the people of each area had been enabled to carry out the work. What about the Congress work which had been carried out under his direction and under the direction of the Congress and under your leadership and other leadership? The whole thing, how to make their own cloth, their own food and carry out all the items of constructive programme- that had been carried out for 26 years - it is nowhere now. Therefore, I have been sitting here with a painful thought that we had been drifting, avoiding the soul of it as it were.

The Constitution is very carefully drawn up. I have been a student of Constitutional law for a very long time, for over 40 years or 45 years. I have understood the principles of the Constitutions of the various countries of this world. The legal expert here and the Chairman of the Drafting Committee were referring us so often to the American Constitution. What is there in the American Constitution? We can see the essence of it-how 13 different colonies or units came together, and were determined to carry on the war against the British, carried on the war and after completing the war, evolved their own Constitution. When such

was the case, what was the fear in the minds of the Chairman of the Drafting Committee and also of the legal expert-who has been a learned man and who has been on the top of the legal profession? Their mind was not there as they were not in it. Therefore, this Constitution started on the basis of the English Constitution. The Act of 1935 became the basis of this Constitution. We embodied many provisions bodily as it were. They are not of a very extraordinary character, they are not new inventions for the first time by Great Britain. Why should we have been ready to say that we adopt this Constitution of Great Britain of 1935?

Shrimati Renuka Ray (West Bengal: General): So far as the fundamental rights of this Constitution are concerned, I think in the case they bring equality. It is very unfortunate that although the political rights are in these fundamental principles, the economic rights of citizens have not been able to be put in as justiciable rights today. Conditions in our country are such that it has not been possible for us at the present moment to have them as fundamental rights which are enforceable through courts of law. They have been put in as directives of State policy. Sir, it is also all the more unfortunate that among these directives of State policy are some to the most vital rights of citizens and along with them are lumped many matters of much lesser moment. At the same time, I do not think there is anything to despair because it is possible for the parliament and the Government of the future to bring these rights which are now directives as economic rights, in the near future.

Sir, finally I would like to say that may it be given to us to be able to work this Constitution in this generation and in the generations to come, in such a manner, that the lofty ideas that the Father of our Nation laid down, may indeed become a living reality for the people of this land. May Gandhian socialism be a practical contribution of this country to the world of man.

3.9. CONCERN OF THE CONSTITUENT ASSEMBLY.

Before we finish the study of our constitutional foundation that led to the ultimate adoption of our Constitution, its important to understand the significance of the famous concluding speech of Dr. B.R. Ambedkar in which he had raised several concerns and left a message to the future legislatures and to all the citizens

of the country. The extracts of the concluding speech of Dr. Ambedkar in the Constituent Assembly[52] are reproduced below.

On 26th January 1950, India will be an independent country (*Cheers*). What would happen to her independence? Will she maintain her independence or will she lose it again? This is the first thought that comes to my mind. It is not that India was never an independent country. The point is that she once lost the independence she had. Will she lost it a second time? It is this thought which makes me most anxious for the future. What perturbs me greatly is the fact that not only India has once before lost her independence, but she lost it by the infidelity and treachery of some of her own people. In the invasion of Sind by Mahommed-Bin-Kasim, the military commanders of King Dahar accepted bribes from the agents of Mahommed-Bin-Kasim and refused to fight on the side of their King. It was Jaichand who invited Mahommed Gohri to invade India and fight against Prithvi Raj and promised him the help of himself and the Solanki Kings. When Shivaji was fighting for the liberation of Hindus, the other Maratha noblemen and the Rajput Kings were fighting the battle on the side of Moghul Emperors. When the British were trying to destroy the Sikh Rulers, Gulab Singh, their principal commander sat silent and did not help to save the Sikh Kingdom. In 1857, when a large part of India had declared a war of independence against the British, the Sikhs stood and watched the event as silent spectators.

Will history repeat itself? It is this thought which fills me with anxiety. This anxiety is deepened by the realization of the fact that in addition to our old enemies in the form of castes and creeds we are going to have many political parties with diverse and opposing political creeds. Will Indian place the country above their creed or will they place creed above country? I do not know. But this much is certain that if the parties place creed above country, our independence will be put in jeopardy a second time and probably be lost for ever. This eventuality we must all resolutely guard against. We must be determined to defend our independence with the last drop of our blood.(*Cheers*)

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[52] '*Constituent Assembly of India*',- Vol. XI Friday, 25th November, 1949.

On the 26th of January 1950, India would be a democratic country in the sense that India from that day would have a government of the people, by the people and for the people. The same thought comes to my mind. What would happen to her democratic Constitution? Will she be able to maintain it or will she lost it again. This is the second thought that comes to my mind and makes me as anxious as the first.

It is not that India did not know what is Democracy. There was a time when India was studded with republics, and even where there were monarchies, they were either elected or limited. They were never absolute. It is not that India did not know Parliaments or Parliamentary Procedure. A study of the Buddhist Bhikshu Sanghas discloses that not only there were Parliaments-for the Sanghas were nothing but Parliaments – but the Sanghas knew and observed all the rules of Parliamentary Procedure known to modern times. They had rules regarding seating arrangements, rules regarding Motions, Resolutions, Quorum, Whip, Counting of Votes, Voting by Ballot, Censure Motion, Regularization, *Res Judicata*, etc. Although these rules of Parliamentary Procedure were applied by the Buddha to the meetings of the Sanghas, he must have borrowed them from the rules of the Political Assemblies functioning in the country in his time.

This democratic system India lost. Will she lost it a second time? I do not know. But it is quite possible in a country like India – where democracy from its long disuse must be regarded as something quite new – there is danger of democracy giving place to dictatorship. It is quite possible for this new born democracy to retain its form but give place to dictatorship in fact. If there is a landslide, the danger of the second possibility becoming actuality is much greater.

If we wish to maintain democracy not merely in form, but also in fact, what must we do? The first thing in my judgement we must do is to hold fast to constitutional methods of achieving our social and economic objectives. It means we must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But

where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the Grammar of Anarchy and the sooner they are abandoned, the better for us.

The second thing we must do is to observe the caution which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, not "to lay their liberties at the feet of even a great man, or to trust him with power which enable him to subvert their institutions". There is nothing wrong in being grateful to great men who have rendered life-long services to the country. But there are limits to gratefulness. As has been well said by the Irish Patriot Daniel O'Connel, no man can be grateful at the cost of his honour, no woman can be grateful at the cost of her chastity and no nation can be grateful at the cost of its liberty. This caution is far more necessary in the case of India than in the case of any other country. For in India, Bhakti or what may be called the path of devotion or hero-worship, plays a part in its politics unequalled in magnitude by the part it plays in the politics of any other country in the world. Bhakti in religion may be a road to the salvation of the soul. But in politics, Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship.

The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them.

We must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which is Assembly has to laboriously built up.

I do not wish to weary the House any further. Independence is no doubt a matter of joy. But let us not forget that this independence has thrown on us great responsibilities. By independence, we have lost the excuse of blaming the British for anything going wrong. If hereafter things go wrong, we will have nobody to blame except ourselves. There is great danger of things going wrong. Times are fast changing. People including our own are being moved by new ideologies. They are getting tired of Government by the people. They are prepared to have Governments for the people and are indifferent whether it is Government of the people and by the people. If we wish to preserve the Constitution in which we have sought to enshrine the principle of Government of the people, for the people and by the people, let us resolve not to be tardy in the recognition of the evils that lie across our path and which induce people to prefer Government for the people to Government by the people, nor to be weak in our initiative to remove them. That is the only way to serve the country. I know of no better.

We conclude with the observation that the concept of a welfare state, signifying a regime which seeks to ensure the maximum happiness of maximum number of people living within its territory, is by no means new. Several Kings and Emperors in the course of history have given the highest priority to the people happiness and welfare, even as there have been numerous rulers in ail ages who proved to be tyrants and concentrated all their efforts and most of the State revenues on their personal comforts and luxury. The State of Mauryas and Emperor Vikramaditya for instance, were largely a Welfare State. The golden era of Emperor Ashoka in the ancient days and emperor Akbar during the Mughai period are two outstanding instances of rulers establishing a truly Welfare State in their lifetime.

A Welfare State also implies an efficient administration, speedy justice for the people, a regime totally free from graft, corruption, inefficiency, sloth and the frustrating complexities of red tape etc. in modern times a Welfare State means all this and much more. Among the measures which the people of such a State expect are social Welfare legislation, adequate health and medical facilities especially for the poor, the weak, the old and the disabled in other words, the admittedly weaker sections of society.

In India the concept of a Welfare State was accepted decades ago. During the British regime, social Welfare was not among the principal objectives of the government. The emphasis then being on maintaining law and order and also on facilitating the economic exploitation of the Indian people by British economic interests. But since the dawn of independence in 1947, the Indian leaders have earnestly sought to establish a Welfare State. The constitution of India, which was drafted after a good deal of discussion in the constituent assembly by the country's ablest people of all communities, seeks to establish a Welfare State. The Preamble of the Constitution clearly indicates "general welfare" of the people as one of the objectives of the Union of India. The Preamble aims "to secure to all its citizens justice, social, economic, and political, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity."

The Indian constitution having been conceived and drafted in the mid-twentieth century an era of the concept of social Welfare State is pervaded with the modern outlook regarding the objectives and functions of the State. It embodies a distinct philosophy of government, and, explicitly, in articulate terms, declares that India will be organized as a social Welfare state, i.e. a state which renders social services to the people and promotes their general welfare. In the formulations and declarations of the social objectives contained in the Preamble, one can clearly discern the impact of the modern political philosophy, which regards the state as an organ to secure the good and welfare of the people.

CHAPTER 4.

SOCIAL JUSTICE AND FUNDAMENTAL RIGHTS.

Social Justice as a concept is based on equal distribution of Justice. Social Justice as a concept in India is related most specifically with equal distribution of rights without discrimination of gender, caste, creed or economic status. The purpose of social justice is to maintain or to restore equilibrium in the society and to envisage equal treatment of equal persons in equal or essentially equal circumstances. The social solidarity was to be brought about by the concept of social justice. In the Indian Constitution it finds place significantly in the Preamble, Fundamental Rights and Directive Principles of State Policy. The leaders of India's freedom movement visualized that in the new dispensation following political freedom, the people should have the fullest opportunity for advancement in the social and economic spheres and that the state should make suitable provisions for ensuring such process.

The fundamentals of the Indian Constitution are contained in the Preamble which secures its citizens, Justice, social, economic and political, Liberty of thought, expression, belief, faith and worship, Equality of status and opportunity, and to promote among them all Fraternity assuring the dignity of the individual and the unity of the nation. The theme of the objectives permeates throughout the entire constitution. It was to give effect to this objective the Fundamental Rights and the Directive Principles of the State policy was enacted in Part III and Part IV of the Constitution, and through them the dignity of the individual was sought to be achieved and maintained. The absolute concept of liberty and equality are very difficult to achieve in modern welfare society. That is why fundamental rights have not been provided in absolute terms. The form in which such rights have been have been provided is in the form of restrictions which the government is expected to follow in the governance of the country. However, the enjoyment of these rights is subjected to the interest of the people. The State may therefore, encroach on the domain of these rights for the common good or the common interest. The question whether a fundamental right be subjected to restrictions for the common good or public interest will depend upon the conditions and circumstances prevailing at a

particular time. The Constitution of India, instead of formulating fundamental rights in absolute terms, and depending upon the judiciary to come to the rescue of the legislature, permits the State to impose directly to impose limitations on the fundamental rights. It is interesting to note that under the Indian Constitution fundamental rights have been provided in different forms. Only a free society can ensure the all-round progress of its members which ultimately helps the advancement of human welfare. Therefore, every democracy pays special attention to securing this basic objective to the maximum extent without, at the same time, endangering the security of the State itself. The Fundamental Rights envisaged in Part III of the Constitution of India has a tremendous contribution in rendering social justice to the country at large and till date it thrives to maintain its constitutional goal, in guiding legislation aimed at social welfare for the common good and common interest of the people.

The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part III in our Constitution conferring those rights on the people.

Equality of status and of opportunity' the rubric chiselled in the luminous preamble of our vibrating and pulsating Constitution radiates one of the avowed objectives in our Sovereign, Socialist and Secular Democratic Republic. In every free country which has adopted a system of governance through democratic principles, the people have their fundamental inalienable rights and enjoy the recognition of inherent dignity and of equality analogous to the rights proclaimed in the 'Bill of Rights' in U.S.A., the 'Rights of Man' in the French Constitution of 1971 and 'Declaration of Human Rights' etc. Our Constitution is unquestionably unique in its character and assimilation having its notable aspirations contained in 'Fundamental Rights' in part III through which the illumination of Constitutional rights comes to us not through an artless window glass but refracted with the enhanced intensity and beauty by prismatic interpretation of the Constitutional

provisions dealing with equal distribution of justice in the social, political and economic spheres.[1]

Personal Liberty is one of the major concomitants of Fundamental Rights without which the rights enshrined in the Constitution will be mere illusory.

All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why liberty is called the very quintessence of a civilized existence. Origin of liberty' can be traced in the ancient Greek civilization. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 B.C., an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realize itself as fully as possible through the self-realization of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. [2]

According to Aristotle, as the state was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his Republic as the best source for the achievement of the self-realization of the people. [3]

Roscoe Pound, an eminent and one of the greatest American Law Professors aptly observed in his book[4] that whatever, `liberty' may mean today, the liberty is guaranteed by our bills of rights, is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority

[1] *Indra Sawhney v. Union Of India,* 1992 Supp (3) SCC 212.

[2] *Siddharam Satlingappa Mhetre v. State Of Maharashtra,* AIR 2011 SC 312.

[3] Ibid.

[4] Roscoe Pound , *'The Development of Constitutional Guarantee of Liberty'.*

of those who are designated or chosen in a politically organized society to adjust that society to individuals.

Blackstone in Commentaries on the Laws of England[5] aptly observed that personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law.

According to Dicey, a distinguished English author of the Constitutional Law in his treatise on Constitutional Law observed that, personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification.[6]

According to him, it is the negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual, and personal liberty in this sense is the antithesis of physical restraint or coercion.

Eminent English Judge Lord Alfred Denning observed: By personal freedom I mean freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person.... It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live.

Eminent former Judge of the Supreme Court, Justice H.R. Khanna in a speech[7] observed that liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body. Right to life and personal liberty under the Constitution.

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[5] Blackstone-'*Commentaries on the Laws of England'*, Vol. I, p.134.
[6] Dicey on '*Constitutional Law*', 9th Edn., pp.207-08.
[7] published in IJIL, Vol.18 (1978), p.133.

The Fundamental Rights represent the basic values enriched by the people of this country. The aim behind having elementary right of the individual such as the Right to Life and Liberty is not fulfilled as desired by the framers of the Constitution. It is to preserve and protect certain basic human rights against interference by the state. The inclusion of a Chapter in Constitution is in accordance with the trends of modern democratic thought. The object is to ensure the inviolability of certain essential rights against political vicissitudes. The framers of the Indian Constitution followed the American model in adopting and incorporating the Fundamental Rights for the people of India.

Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society.

This chapter is a study of various finding of the Supreme Court as to how the fundamental right as envisaged in our Constitution has strengthen the goal in imparting social justice to the citizens.

4.1. EXPRESS DECLARATION OF RIGHTS.

Article 25- Freedom of conscience and free profession, practice and propagation of religion.[8]
Article 26- Freedom to manage religious affairs.[9]

These two article embodied in the fundamental rights chapter professes secular constitutionalism of our constitution. It envisages social justice and expressly declares that no citizen in the country shall be deprived of his legitimate due irrespective of what religion he professes.

[8] V.N. Sukla, *Constitution of India*, Tenth edition, Eastern Book Company.
[9] ibid.

Religion is undefined by the constitution, is incapable of precise judicia definition either. In the background of the provisions of the constitution and the light shed by judicial precedent, it can at best be said that religion is a matter of faith. It is a matter of belief and doctrine. It concerns the conscience i.e. the spirit of man. It must be capable of overt expressions in work and deed, such as worship or ritual. So religion is a matter of belief and doctrine concerning the human spirit expressed overtly in the form of ritual and worship. Some religions are easily identifiable as religious, some are easily identifiable as not religious. There are many in the penumbral region which instinctively appear to some as religion and to others as not religions. There is no formula of general application. There is no knife-edge test.

Chinnappa Reddy, J. in *S.P.Mittal v Union of India*[10] attempted on to answer the question as What is Religion ? “Religion: Everyone has a religion, or at least, a view or a window on religion, be he a bigot or simple believer, philosopher or pedestrian, atheist or agnostic. Religion, like' democracy' and 'equality' is an elusive expression, which everyone understands according to his pre-conceptions. What is religion to some is pure dogma to others and what is religion to others is pure superstition to some others. Karl Marx in his contribution to the Critique of Hegel's Philosophy of Law described religion as the 'Opium of the people'. He said further "Basically religion is a very convenient sanctuary for bourgeois thought to flee to in times of stress. Bertrand Russell, in his essay 'Why I am not Christian', said, "Religion is based, I think, primarily and mainly upon fear." It is partly the terror of the unknown and partly, as I have said, the wish to feel that you have a kind of elder brother, who will stand by you in all your troubles and disputes. Fear is the basis of the whole thing-fear of the mysterious, fear of defeat, fear of death. Fear is the parent of cruelty, and, therefore, it is no wonder if cruelty and religion have gone hand in hand. As a worshipper at the alter of peace, I find it difficult to reconcile myself to religion, which throughout the ages, has justified war calling it a Dharma Uddha, a Jehad or a Crusade. I believe that by getting mixed up with religion, ethics has lost 'much of its point, much of its purpose and a major portion of its spontaneity'. I apprehend I share the views of those who have neither faith nor belief in religion and who consider religion as entirely unscientific and

[10] (1983)1 SCC 51

irrational. Chanting of prayer appears to me to be mere jingoism and observance of ritual, plain superstition. But my views about religion. My prejudices and my predilections, if they be such, are entirely irrelevant. So are the views of the credulous, the fanatic, the bigot and the zealot.

So also the views of the faithful, the devout, the Acharya, the Moulvi, the Padre and the Bhikshu each of whom may claim his as the only true or revealed religion. For our present purpose, we are concerned with what the people of the Socialist, Secular, Democratic Republic of India, who have given each of its citizens Freedom of conscience and the right to freely profess, practise and propogate religion and who have given every religious denomination the right to freely manage its religious affairs, mean by the expressions 'religion' and 'religious denomination'."

The Supreme Court in *S.R. Bommai v. Union of India*[11] has graciously explained the concept of secularism in our Constitution as follow, "India can rightly be described as the world's most heterogeneous society. It is a country with a rich heritage. Several races have converged in this sub-continent. They brought with them their own cultures, languages, religions and customs. These diversities threw up their own problems but the early leadership showed wisdom and sagacity in tackling them by preaching the philosophy of accommodation and tolerance. This is the message which saints and sufis spread in olden days and which Mahatma Gandhi and other leaders of modem times advocated to maintain national unity and integrity. The British policy of divide and rule, aggravated by separate electorates based on religion, had added a new dimension of mixing religion with politics which had to be countered and which could be countered only if the people realised the need for national unity and integrity. It was with the weapons of secularism and non-violence that Mahatma Gandhi fought the battle for independence against the mighty colonial rulers".

As early as 1908, Gandhiji wrote in Hind Swaraj: 'India cannot cease to be one nation, because people belonging to different religions live in it. In no part of

[11] (1994) 3 SCC 1.

the world are one nationality and one religion synonymous terms nor has it ever been so in India.'[12]

Gandhiji was ably assisted by leaders like Pandit Jawaharlal Nehru, Maulana Abul Kalam Azad and others in the task of fighting a peaceful battle for securing independence by uniting the people of India against separatist forces.

In 1945 Pandit Nehru wrote : 'I am convinced that the future government of free India must be secular in the sense that government will not associate itself directly with any religious faith but will give freedom to all religious functions." And this was followed up by Gandhiji when in 1946 he wrote in Harijan 'I swear by my religion. I will die for it. But it is my personal affair. The State has nothing to do with it. The State will look after your secular welfare, health, communication, foreign relations, currency and so on, but not my religion. That is everybody's personal concern.'[13]

The great statesman-philosopher Dr Radhakrishnan said 'When India is said to be a secular State, it does not mean that we reject reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the State assumes divine prerogatives. Though faith in the Supreme is the basic principle of the Indian tradition, the Indian State will not identify itself with or be controlled by any particular religion. We hold that no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges in national life or international relations for that would be a violation of the basic principles of democracy and contrary to the best interests of religion and Government. This view of religious impartiality, of comprehension and forbearance, has a prophetic role to play within the national and international life. No group of citizens shall arrogate to itself rights and privileges which it denies to others. No person should suffer any form of disability or discrimination because of his religion but all alike should be free to share to the

[12] ibid.
[13] ibid.

fullest degree in the common life. This is the basic principle involved in the separation of Church and State."[14]

The Supreme Court in *Keshvanand Bharti v. State of Kerela*[15] had held that secularism is already accepted as the basic feature of the Constitution. Notwithstanding the fact that the words 'Socialist' and 'Secular' were added in the Preamble of the Constitution in 1976 by the 42nd Amendment, the concept of Secularism was very much embedded in our constitutional philosophy. The term 'Secular' has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition and perhaps best left undefined. By this amendment what was implicit was made explicit. The Preamble itself spoke of liberty of thought, expression, belief, faith and worship. While granting this liberty the Preamble promised equality of status and opportunity. It also spoke of promoting fraternity, thereby assuring the dignity of the individual and the unity and integrity of the nation. While granting to its citizens liberty of belief, faith and worship, the Constitution abhorred discrimination on grounds of religion, etc., but permitted special treatment for Scheduled Castes and Tribes, vide Articles 15 and 16. Article 25 next provided, subject to public order, morality and health, that all persons shall be entitled to freedom of conscience and the right to profess, practice and propagate religion. Article 26 grants to every religious denomination or any section thereof, the right to establish and maintain institutions for religious purposes and to manage its own affairs in matters of religion. These two articles clearly confer a right to freedom of religion.

We are concerned with what these expressions are designed to mean in Articles 25 and 26 of the Constitution. Any Freedom or Right involving the conscience must naturally receive a wide interpretation and the expression 'religion' and 'religious denomination' must therefore, be interpreted in no narrow, stifling sense but is a liberal, expansive way. Etymology is of no avail. Religion is derived from 'religare' which means "to bind". Etymologically, therefore, every bond between two people is a religion, but that is not true. To say so is only to indulge in etymological deception. Quite obviously, religion is much more than a mere bond uniting people. Quite obviously, again, religion is not to be confined to

[14] ibid
[15] (1973) 4 SCC 225

the traditional, established, well-known or popular religions like Hinduism, Mahomedanism, Buddhism and Christianity. There may be and, indeed, there are, in this vast country, several religions, less known or even unknown except in the remote corners or in the small pockets of the land where they may be practised. A religion may not be wide-spread. It may have little following. It may not have even a name, as indeed most tribal religions do not have. We may only describe them by adding the suffix 'ism' to the name of the founder-teacher, the tribe, the area or the deity. But, all this is unsatisfactory. We are not arriving at any definition of religion. We are only making peripheral journeys and not getting any near.

[16]In ancient times in Gurukuls, emphasis used to be primarily on building the character of a student. Today, right from the schools up to the professional colleges, emphasis is on acquiring techniques and not values. We seem to have forgotten that skills acquired on computers tend to become outdated after sometime but values remain for ever. In other words, present day education is nothing but an information transmission process. Our educational system aims at only information based knowledge and the holistic views turning the student into a perfect human being and a useful member of society has been completely set aside. Swami Vivekananda aptly said, "Education is not the amount of information that is put in your brain and runs riot there, undigested, all your life. We must have life-building. Man making, character-making, assimilation of ideas. If education is identical with information, libraries are the greatest sages of the world and encyclopedias are rishis."

Truth (Satya), Righteous Conduct (Dharma), Peace (Shanti), Love (Prema) and Non-violence (Ahinsa) are the core universal values which can be identified as the foundation stone on which the value-based education programme can be built up. These five are indeed universal values and respectively represent the five domains of human personality, intellectual, physical, emotional, psychological and spiritual. They also are correspondingly co-related with the five major objectives of education, namely, knowledge, skill, balance, vision and identity.[17]

[16] *Aruna Roy v. Union of India*, AIR 2002 SC 3176.
[17] supra.

Religion was an all- pervasive phenomenon in ancient India. It was believed that multitudes of religion were like the beads adorning the necklace of God; all were equally important because God existed in every spirit and force of human welfare. An attitude of objectivity, logic and humanity and an approach of understanding, co-existence and tolerance permeated the secular spirit of ancient Indian thoughts. A distinctive openness is exhibited in Rig Veda which stated, "Truth is one, the learned may describe it variously". It is also enjoined, "Behave with others as you would with yourself. Look upon all the living beings as yours friends, for all of them resides one soul. All are but a part of universal soul". The Mauryan Emperor Ashoka, a Buddhist convert, took a very active step for spread of Buddhism without forceful conversion or persecution. The Satvahanas, Kushanas and the Gupta rulers paid equal patronage to all religions. The emphasis on dhyana in Hindu religion during Gupta period brought Hinduism, Jainism and Buddhism closer. In the South, the Chalukyas, Rastrakutas, Cholas and Hoysala rulers liberally patronised all the religions without discrimination[18].

A clear inference can be drawn from the above evidences that even the ancient text advocated the existence of freedom of religion which is guaranteed right under Article. 25, and Article 26, of the Indian Constitution.

Article 25 and Article 26 should be read together. The right guaranteed by Article 25 is an individual right as distinguished from the rights of an organized body like the religious denomination or any section thereof dealt with by Article 26. Both these Articles protect matters of religious doctrine or belief as well as acts done in pursuance of religion, rituals observances, ceremonies and modes of worship. These Articles embody the principles of religious tolerance that has been the characteristic feature of the Indian Civilization from the start of history, the instance and periods when these features were absent being merely temporary aberrations. Beside they serve to emphasize the secular nature of Indian democracy which the founding fathers considered should be the very basis of the Constitution.[19] Article 25(1) guarantees to every person, and not merely to the citizens of India, the freedom of conscience and the right freely to profess, practice and propagate religion. Freedom of conscience connotes a person's right to

[18] Romila Thapar, "A History of India", vol. 1, 1996 Rep. 1991, Penguin Books
[19] Per Ayyangar,J. in *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*, AIR 1962 SC 853.

entertain beliefs and doctrines concerning matters, which are regarded by him to be conducive to his spiritual well-being.[20]

Clause (2)(b) of Article 25 deals with two exceptions: (i) law providing for social welfare and social reforms, and (ii) the throwing open of all 'Hindu religious institution of a public character' to 'all classes and sections of Hindus'. It has been held by the Bombay High Court that an Act to prevent bigamous marriages was not violative to the religious freedom since it fell under clause 2(b). Likewise the provisions of the Hindu Marriage Act, 1956, are protected under sub-clause (b) of Article 25(2). Prohibition of evil practices such as 'sati' or the system of 'devdasi' could be justified under these clause.

In the case of *Adithayan v. The Travancore Devaswom Board* [21] the question that came for consideration before the Supreme Court was whether the appointment of a person, who is not a Malayala Brahmin, as "Santhikaran" or Poojari (Priest) of the Temple in question Kongorpilly Neerikode Siva Temple at Alangad Village in Ernakulam District, Kerala State, is violative of the constitutional and statutory rights of the appellant. A proper and effective answer to the same would involve several vital issues of great constitutional, social and public importance, having, to certain extent, religious overtones also. The Hon'ble Court held "there is no justification to insist that a Brahman or Malayala Brahman in this case, alone can perform the rites and rituals in the Temple, as part of the rights and freedom guaranteed under Article 25 of the Constitution and further claim that any deviation would tantamount to violation of any such guarantee under the Constitution. There can be no claim based upon Article 26 so far as the Temple under our consideration is concerned. Apart from this principle enunciated above, as long any one well versed and properly trained and qualified to perform the puja in a manner conducive and appropriate to the worship of the particular deity, is appointed as Santhikaran dehors his pedigree based on caste, no valid or legally justifiable grievance can be made in a Court of Law". Reflecting its idea on social justice it further went on to opine, "Any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights,

[20] *Ratilal Panachand Gandhi v. State of Bombay*, AIR 1954 SC 388.
[21] (2002)8 SCC 106.

dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by Courts in the country".[22]

In *A.S. Narayana Deekshitulu v. State of A.P.*[23] explaining the concept of religion in context of secularism the Apex Court held "that the word `religion' used in Articles 25 and 26 of the Constitution is personal to the person having faith and belief in the religion. The religion is that which binds a man with his Cosmos, his Creator or super force. Essentially, religion is a matter of personal faith and belief or personal relations of an individual with what the regards as Cosmos, his Maker or his Creator which, he believes, regulates the existence of insentient beings and the forces of the universe. Religion is not necessarily theistic. A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well- being. Right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right but is subject to legislation by the State limiting or regulating any activity - economic, financial, political or secular which are associated with the religious belief, faith, practice or custom. The are subject to reform as social welfare by appropriate legislation by the State. Though religious practices and performances of acts in pursuance of religious belief are, as must as, a part of religion, as faith or belief in a particular doctrine, that by itself is not conclusive or decisive. What are essential parts of religion or religious belief or matters of religion and religious practice is essentially a question of fact to be considered in the context in which the question has arisen and the evidence - factual or legislative presented in that context is required to be examined and a decision reached. In secularising the matters of religion which are not essentially and integrally parts of religion, secularism, therefore consciously denounces all forms of supernaturalism or superstitious beliefs or actions and acts which are not essentially or integrally matters of religion or religious belief or faith or religious practice. Non-religious or anti-religious practices are anti-thesis to secularism which seeks to contribute in some degree to the process of secularisation of the matters of religion or religious practices. A

[22] Ibid.
[23] (1996) 9 SCC 548.

balance, therefore, has to be struck between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs or religious practices guaranteed under the Constitution".

In a country like ours where discrimination on the ground of caste or religion is a taboo, taking lives of persons belonging to another caste or religion is bound to have a dangerous and reactive effect on the society at large. It strikes at the very root of the orderly society which the founding fathers of our Constitution dreamt of. Our concept of secularism is that the State will have no religion. The State shall treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual right of religion, faith and worship.[24]

The right to freedom of religion assured by Article 25 and Article 26 is expressly made subject to public order, morality and health. Therefore, it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order. These two Articles in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order.

In *Ramji Lal Modi v. State of U.P*[25] the Apex Court opined that it was absurd to suggest that insult to religion as an offence could have no bearing on public order so as to attract cl. (2) Of Art. 19 in view of the provisions of Arts.25 and 26 of the Constitution which, while guaranteeing freedom of religion, expressly made it subject to public order.

We have no doubt that it is in this sense. that the word 'propagate' has been used in Article 25 (1), for what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25 (1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no

[24] *Dara Singh v. Republic Of India*, (2011) 2 SCC 490.
[25] AIR 1957 SC 620

fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike[26].

In *The Commissioner, Hindu Religions Endowments Madras v. Sri Lakshmindra Thirtha Swamiar*[27] dealing with various aspects of Article 26 of the Constitution the Apex Court observed as follows: "The other thing that remains to be considered in regard to Article 26 is, what is the scope of clause (b) of the article which speaks of management of its own affairs in matters of religion? "The language undoubtedly suggests that there could be other affairs of a religious denomination or a section thereof which are not matters of religion and to which the guarantee given by this clause would not apply.

It will be seen that besides the right to manage its own affairs in matters of religion, which is given by clause (b), the next two clauses of article 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of a religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which clause (b) of the article applies freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down. Under Article 26(b), therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. Of course, the scale of expenses to be incurred in connection with these religious observations would be a

[26] *Stainislaus v. State of M.P*, (1977)1 SCC 677
[27] AIR 1954 SC 282

matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature; or it could not be the injunction of any religion to destroy The institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under article 26(b) it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under clause (d) of Article 26." [28]

The Supreme Court in *Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Assn*[29]., held that the Court may issue directions in respect of controlling noise pollution even if such noise was a direct result of and was connected with religious activities. It was further held:- "Undisputedly, no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice amplifiers or beating of drums. In our view, in a civilized society in the name of religion, activities which disturb old or infirm persons, students or children having their sleep in the early hours or during daytime or other persons carrying on other activities cannot be permitted. It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without there being any unnecessary disturbance by the neighbours. Similarly, the old and the infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick, people afflicted with psychic disturbances as well as children up to 6 years of age are considered to be very sensible (sic sensitive) to noise. Their rights are also required to be honoured.

[28] supra.
[29] AIR 2000 SC 2773.

In *Re. Noise Pollution*[30] entertaining a writ petition raising issues of wide ranging dimensions relating to noise pollution and the implications thereof, the Supreme Court on taking cognizance of the matters as public interest litigation, vide its order directed the implementation of the Laws for Restricting Voice of Loudspeakers and High Volume Producing Sound Systems".

Article 29- Protection of interest of minorities.

Article 30- Rights of minorities to establish and administer educational institutions.

Clause (1) of Article 29 gives protection of every section of the citizens having a distinct language, script or culture by guaranteeing a right to conserve the same. The right under this article is absolute. Clause (2) of Article 29 relates to admission into educational institutions which are maintained or aided by the State funds.

In *State of Bombay v. Bombay Education Society,*[31] the Hon'ble Supreme Court observes as follows: "No citizen shall be denied admission is such institutions on the ground only of religion, race, caste, language or any of them. It will be recalled that Article 15 also prohibits discrimination against citizen on ground of religion etc. But the scope of the two article is different. Firstly Article 15(1) protects all citizens against the state whereas the protection under Article 29(2) extends to the State or any body who denies the right conferred by it. Secondly Article 15 protects all citizens against discrimination generally, but Article 29(2) is a protection against a particular species of wrong, namely denial of admission into educational institutions maintained or aided by the State".

In *State of Madras v. Champakam Dorairajan,*[32] the Hon'ble Supreme Court has held that the right to admission into a educational institution is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens.

[30] (2005) 5 SCC 733.
[31] AIR 1954 SC 561.
[32] AIR 1951 SC 226.

In *re The Kerala Education Bill*,[33] Article 30(1) of the Constitution which deals with the right of minorities to establish and administer education institutions, came for consideration. The Kerala Educational Bill, 1957, which had been passed by the Kerala Legislative Assembly was reserved by the Governor for consideration by the President. The contention of the State of Kerala was that the minority communities may exercise their fundamental right under Article 30(1) by establishing educational institutions of their choice wherever they like and administer the same in their own way and need not seek recognition from the Government, but that if the minority communities desire to have state recognition they must submit to the terms imposed, as conditions precedent to recognition, on every educational institution. The claim of the educational institutions of the minority communities, on the other hand was that their fundamental right under Art. 30(1) is absolute and could not be subjected to any restriction whatever. This Court, however, did not accept the extreme views propounded by the parties on either side but tried to reconcile the two.

It observed[34]: Article 29(1) gives protection to any section of citizens residing in the territory of India having a distinct language, script or culture of its own right to conserve the same the distinct languages, script or culture of a minority community can best be conserved by and through educational institutions, for it is by education that their culture can be inculcated into the impressionable mind of the children of their community. It is through educational institutions that the language and script of the minority community can be preserved, improved and strengthened. It is, therefore, that Article 30(1) confers on all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. The minorities, quite understandably, regard it as essential that the education of their children should be in accordance with the teachings of their religion, and they hold, quite honestly, that such an education cannot be obtained in ordinary schools designed for all the members of the public but can only be secured in schools conducted under the influence and guidance of people well versed in the tenets of their religion and in the traditions of their culture.

[33] AIR 1958 SC 956.
[34] supra.

The minorities evidently desire that education should be imparted to the children of their community in an atmosphere congenial to the growth of their culture. Our Constitution makers recognised the validity of their claim and to allay their fears conferred on them the fundamental rights referred to above. But the conservation of the distinct languages, script or culture is not the only object of choice of the minority communities. They also desire that scholars of their educational institutions should go out in the world well and sufficiently equipped with the qualifications necessary for a useful career in life. But according to the Education Code now in operation to which it is permissible to refer for ascertaining the effect of the impugned provisions on existing state of affairs, the scholars of recognised schools are not permitted to avail themselves of the opportunities for higher education in the University and are not eligible for entering the public services. Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfill the real objects of their choice and-the rights under Article 30(1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to their educational institutions."

In *Sidhaibhai Sabhai v. State of Bombay* [35] dealing with Article 30(1) of the Constitution, the Apex Court held: "The right established by Article 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedom guaranteed by Article 19, it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institutions, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Article 30(1) will be but a "teasing illusion", a promise of unreality. Regulations which may lawfully be imposed

[35] AIR 1963 SC 540.

either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective an educational institution. Such regulation must satisfy a dual test-the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it."

In *State of Bombay v. Bombay Education Society*[36] the Apex Court has held that the right to establish an educational institution under Art. 30(1) is not confined to the purposes specified in Art. 29(1). In *D.A.V. College, v. State of Punjab,*[37] Reddy, J., speaking on behalf of the Court, observed that Article 29(1) is wider than article 30(1), in that, while any section of the citizens including the minorities can invoke the rights guaranteed under article 29(1), the right guaranteed under article 30(1) is only available to the minorities based on religion or language. He then went on to say that a reading of these two articles together would lead to the conclusion that a religious or linguistic minority has the right to establish and administer educational institutions; of its choice for effectively conserving its distinctive language, scriptor culture, which right, however, is subject to the regulatory power of the State for maintaining and facilitating the excellence of its standards and that while this is so, these two articles are not inter-linked nor do they permit of their being always read together.

In a land mark judgment[38] the Supreme Court has held that there, is no fundamental right to affiliation. But recognition or affiliation is necessary for a meaningful exercise of the right to establish and administer educational institutions. The Court opined that "Affiliation of minority institutions is intended to ensure the growth and excellence of their children and other students in the academic field. Affiliation mainly pertains to the academic and educational character of the institution. Therefore, measures which will regulate the courses of study, the qualifications and appointment of teachers, the conditions of

[36] AIR 1954 SC 561.
[37] (1971)2 SCC 269.
[38] *Ahmedabad St. Xavier's College Society v. State of Gujarat,* (1974)1 SCC 717.

employment of teachers, the health and hygiene of students, facilities for libraries and laboratories are all comprised in matters germane to affiliation of minority institutions. These regulatory measures for affiliation are for uniformity, efficiency and excellence in educational courses and do not violate any fundamental right of the minority institutions under Article 30." The Court further opined[39], that it will be wrong to read Art. 30 (1) as restricting the right of minorities to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities. If the scope of Article 30(1) is to establish and administer educational institutions to conserve language, script or culture of minorities, it will render Article 30 redundant. If the rights under Articles 29(1) and 30(1) are the same then the consequences will be that any section of citizens, not necessarily linguistic or religious minorities, will have the right to establish and administer educational institutions of their choice. The scope of Article 30 rests on linguistic or religious minorities and no other section of citizens of India has such a right. If the scope of Article 30(1) is made an extension of the right under Article 29(1) as the right to establish and administer educational institutions for giving religious construction or for imparting education in their religious teachings or tenets, the fundamental right of minorities to establish and administer educational institutions of their choice will be taken away.

The Apex Court in the case of *Frank Anthony Public School Employees' Association v. Union of India*[40] took the view that from the decided cases, it is clear, that there is a general and broad consensus about the content and dimension of the Fundamental Right guaranteed by Article 30(1) of the Constitution. The right guaranteed to religious and linguistic minorities by Article 30(1) is two fold, to establish and to administer educational institutions of their choice. The key to the Article lies in the words "of their own choice". These words indicate that the extent of the right is to be determined, not with reference to any concept of State necessity and general societal interest but with reference to the educational institutions themselves, that is, with reference to the goal of making the institutions "effective vehicles of education for the minority community or

[39] supra
[40] (1986)4 SCC 707.

other persons who resort to them". It follows that regulatory measures which are designed towards the achievement of the goal of making the minority educational institutions effective instruments for imparting education cannot be considered to impinge upon the right guaranteed by Article 30(1) of the Constitution. The question in each case is whether the particular measure, it in the ultimate analysis, designed to achieve such goal, without of course nullifying any part of the right of management in substantial measure. It further held that it cannot for a moment be suggested that surrender of the right under Article 30(1) is the price which the aided minority institutions have to pay to obtain aid from the Government.

In *St. Stephen's College v. University of Delhi*[41] that Supreme Court held that the minorities whether based on religion or language have the right to establish and administer educational institutions of their choice. The administration of educational institutions of their choice under Article 30(1) means 'management of the affairs of the institutions. This management must be free from control so that the founder or their nominees can mould the institution as they think fit, and in accordance with their ideas of

how the interests of the community in general and the institution in particular will be best served. But the standard of education are not a part of the management as such. The standard concerns the body politic and is governed by considerations of the advancement of the country and its people. Such regulations do not bear directly upon management although they may indirectly of affect it. The state, therefore has the right to regulate the standard of education and allied matters. Minority institutions cannot be permitted to fall below the standards of excellence expected of educational institutions. They cannot decline to follow the general pattern of education under the guise of exclusive right of management. While the management must be left to them, they may be compelled to keep in step with others. There is a wealth of authority on these principles.

A Coram of 11 Judges, not a common feature in the Supreme Court of India, sat to hear and decide *T.M.A.Pai Foundation v. State of Karnataka*[42] (hereinafter 'Pai Foundation', for short). It was expected that the authoritative

[41] (1992)1 SCC 558.
[42] (2002) 8 SCC 481

pronouncement by a Bench of such strength on the issues arising before it would draw a final curtain on those controversies. The subsequent events tell a different story. A learned academician observes that the 11-Judge Bench decision in Pai Foundation is a partial response to some of the challenges posed by the impact of Liberalisation, Privatisation and Globalisation (LPG); but the question whether that is a satisfactory response, is indeed debatable. It was further pointed out that 'the decision raises more questions than it has answered'. The principles laid down by the majority in Pai Foundation are so broadly formulated that they provide sufficient leeway to subsequent courts in applying those principles while the lack of clarity in the judgment allows judicial creativity ".

The prophecy had come true and while the ink on the opinions in Pai Foundation was yet to dry, the High Courts were flooded with writ petitions, calling for settlements of several issues which were not yet resolved or which propped on floor, post Pai Foundation. A number of Special Leave Petitions against interim orders passed by High Courts and a few writ petitions came to be filed directly in this Court. A Constitution Bench sat to interpret the 11-Judge Bench decision in *Pai Foundation* which it did vide its judgment dated 14.8.2003 in the case of *Islamic Academy of Education v. State of Karnataka,*[43] "Islamic Academy" for short). The 11 learned Judges constituting the Bench in Pai Foundation delivered five opinions. The majority opinion on behalf of 6 Judges was delivered by B.N. Kirpal, CJ. Khare, J (as His Lordship then was) delivered a separate but concurring opinion, supporting the majority. Quadri, J, Ruma Pal, J and Variava, J (for himself and Bhan, J) delivered three separate opinions partly dissenting from the majority. Islamic Academy too handed over two opinions. The majority opinion for 4 learned Judges has been delivered by V.N. Khare, CJ. S.B. Sinha, J, has delivered a separate opinion. The events following Islamic Academy judgment show that some of the main questions have remained unsettled even after the exercise undertaken by the Constitution Bench in Islamic Academy in clarification of the 11-Judge Bench decision in Pai Foundation.

A few of those unsettled questions as also some aspects of clarification were called for settlement by the Bench of 7 Judges in. *P.A. Inamdar v. State of*

[43] (2003) 6 SCC 697.

Maharashtra[44] wherein amongst other the Court sought to find the inter-relationship between Articles 19(1)(g), 29(2) and 30(1). It opined that the right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1) (g). Notwithstanding the fact that the right of a minority to establish and administer an educational institution would be protected by Article 19(1)(g) yet the Founding Fathers of the Constitution felt the need of enacting Article 30. The reasons are too obvious to require elaboration. Article 30(1) is intended to instill confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institution of their choice. Article 30(1) though styled as a right, is more in the nature of protection for minorities. But for Article 30, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under Clause (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious or linguistic minorities are concerned, educational institutions of their choice will enjoy protection from such legislation. However, such institutions cannot be discriminated against by the State solely on account of their being minority institutions. The minorities being numerically less qua non-minorities, may not be able to protect their religion or language and such cultural values and their educational institutions will be protected under Article 30, at the stage of law making. However, merely because Article 30(1) has been enacted, minority educational institutions do not become immune from the operation of regulatory measure because the right to administer does not include the right to mal-administer. To what extent the State regulation can go, is the issue. The real purpose sought to be achieved by Article 30 is to give minorities some additional protection. Once aided, the autonomy conferred by the protection of Article 30(1) on the minority educational institution is diluted as provisions of Article 29(2) will be attracted. Certain conditions in the nature of regulations can legitimately accompany the State aid.

It is for the first time in *Pai Foundation's case*[45] that the question of application of Article 30 to minority professional colleges arose. All earlier judgments of this court were only concerning education in schools and colleges

[44] (2004) 8 SCC 139.
[45] ibid

other than those imparting professional education. For the first time in Pai Foundation, the court held that running an educational institution is an 'occupation' and Article 19(1) (g) guarantees it as a fundamental right.

With regard to the ambit of the constitutional guarantee of protection of educational rights of minorities under Article 30, it can be understood that both religious and linguistic minority, as held in Pai Foundation, are to be determined at the State level. On this understanding of the concept of 'minority', Article 30 has to be harmoniously construed with Article 19(1)(g) and in the light of the Directive Principles of the State Policy contained in the Articles 38, 41 and 46. Rights of minorities cannot be placed higher than the general welfare of the students and their right to take up professional education on the basis of their merit. The real purpose of Article 30 is to prevent discrimination against members of the minority community and to place them on an equal footing with non-minority. Reverse discrimination was not the intention of Article 30. If running of educational institutions cannot be said to be at a higher plane than the right to carry on any other business, reasonable restriction similar to those placed on the right to carry on business can be placed on educational institutions conducting professional courses. For the purpose of these restrictions both minorities and non-minorities can be treated at par and there would not be any violation of Article 30(1), which guarantees only protection against oppression and discrimination of the minority from the majority. Activities of education being essentially charitable in nature, the educational institutions both of non-minority and minority character can be regulated and controlled so that they do not indulge in selling seats of learning to make money. They can be allowed to generate such funds as would be reasonably required to run the institute and for its further growth.

In the case of *P.A. Inamdar*[46], this Court held that there shall be no reservations in private unaided colleges and that in that regard there shall be no difference between the minority and non-minority institutions. However, by the Constitution (Ninety- third Amendment) Act, 2005, Article 15 is amended. It is given Article 15(5). The result is that *P.A. Inamdar*[47] has been overruled on two

[46] ibid
[47] ibid

counts: (a) whereas this Court in *P.A. Inamdar*[48] had stated that there shall be no reservation in private unaided colleges, the Amendment decreed that there shall be reservations; (b) whereas this Court in *P.A. Inamdar*[49] had said that there shall be no difference between the unaided minority and non-minority institutions, the Amendment decreed that there shall be a difference.

In *Ashok Kumar Thakur v. Union of India*[50] the question arose before the Supreme Court was that does the 93rd Amendment violate the Basic Structure of the Constitution by imposing reservation on unaided institutions? Answering in the affirmative the Court opined, Yes, it does. Imposing reservation on unaided institutions violates the Basic Structure by stripping citizens of their fundamental right under Article 19(1)(g) to carry on an occupation. *T.M.A. Pai*[51] and *Inamdar*[52] affirmed that the establishment and running of an educational institution falls under the right to an occupation. The right to select students on the basis of merit is an essential feature of the right to establish and run an unaided institution. Reservation is an unreasonable restriction that infringes this right by destroying the autonomy and essence of an unaided institution. The effect of the 93rd Amendment is such that Article 19 is abrogated, leaving the Basic Structure altered. To restore the Basic Structure, the Court opined that I sever the 93rd Amendment's reference to "unaided" institutions.

The Supreme Court *Sindhi Education Society v. Govt. (NCT Of Delhi)*[53], in deciding the question as to whether Rule 64(1)(b) of the Delhi School Education Rules 1973 and the orders/instructions issued thereunder would, if made applicable to an aided minority educational institution, violate the fundamental right guaranteed under Article 30(1) of the Constitution and are the respondents herein entitled to a declaration and consequential directions to that effect held that “State actions should be actio quaelibet it sua via and every discharge of its duties, functions and governance should also be within the constitutional framework. This principle equally applies to the Government while acting in the field of reservation

[48] ibid
[49] ibid
[50] (2008) 6 SCC 1.
[51] ibid
[52] ibid
[53] (2010) 8 SCC 49.

as well. It would not be possible for the Courts to permit the State to impinge upon or violate directly or indirectly the constitutional rights and protections granted to various classes including the minorities. Thus, the State may not be well within its constitutional duty to compel the linguistic minority institution to accept a policy decision, enforcement of which will infringe their fundamental right and/or protection. On the contrary, the minority can validly question such a decision of the State in law. The service in an aided linguistic minority school cannot be construed as `a service under the State' even with the aid of Article 12 of the Constitution. Resultantly, we have no hesitation in coming to the conclusion that Rule 64(1)(b) cannot be enforced against the linguistic minority school."

The Supreme Court referring to its earlier judgment in *T. Varghese George v. Kora K. George*[54] held that the right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-`-vis the majority. The right to establish and administer educational institution does not include the right to mal-administer.

Article 32 provides every citizen the right to constitutional remedies.

A right without a remedy does not have much substance. The Fundamental Rights guaranteed by the constitution would have been worth nothing had the Constitution not provided an effective mechanism for their enforcement. The significance of jurisdiction conferred by Article 32 is described by Dr. B.R. Ambedkar in the Constituent Assembly[55] as follows: "If you as me to name one Article in the Constitution that is most important, I would definitely say Article 32. "This is the most important article without which this Constitution would be a nullity". Further he has described as "the very soul of the Constitution and the very heart of it".

Thus, it can be said that Art. 32 mainly preserves the principle of constitutionalism by limiting the government against any arbitrary act. This right arms the citizen to bring into the notice of the Apex Court social inequalities and hence serves a vehicle to impart social justice by restricting the government of any

[54] (2012) 1 SCC 369.
[55] '*Constituent Assemble Debates*', Vol. IX, p.953

arbitrary act. Instance are numerous when the Apex Court has taken note of the rampant injustice and ill treatment of poor and downtrodden citizen and have called upon the States to undo the wrong and impart social justice to its people. Where a person or class of persons to whom legal injury is caused or legal wrong is done is by reason of poverty, disability or socially or economically disadvantaged position not able to approach the Court for judicial redress, any member of the public acting bonafide and not out of any extraneous motivation may move the Court for judicial redress of the legal injury or wrong suffered by such person or class of persons and the judicial process may be set in motion by any public spirited individual or institution even by addressing a letter to the court. Where judicial redress is sought of a legal injury or legal wrong suffered by a person or class of persons who by reason of poverty, disability or socially or economically disadvantaged position are unable to approach the court and the court is moved for this purpose by a member of a public by addressing a letter drawing the attention of the court to such legal injury or legal wrong, court would cast aside all technical rules of procedure and entertain the letter as a writ Petition on the judicial side and take action upon it.

In *Romesh Thappar v. State of Madras*[56], the Apex Court held that under the Constitution the Supreme Court is constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights, although such applications are made to the Court in the first in- stance without resort to a High Court having concurrent jurisdiction in the matter. The fundamental right to move this Court can therefore be appropriately be described as the cornerstone of democracy edifice raised by the Constitution. In the words of Dr. Ambedkar[57] "If I was asked to name any particular article in the Constitution as the most important, an article without which this Constitution would be a nullity-I would refer not to any article except this one. It is the very soul of the Constitution and the very heart of it."

[56] 1950 SCR 594.
[57] '*Constituent Assembly Debates*', Vol.VII, pg.953.

The Apex Court in *State of Madras v. V.G. Rao*[58] opined as follows "Our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts undercover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights ", as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set up are out to seek clashes with the legislatures in the country.

In *Bandhua Mukti Morcha v. Union of India*[59] a writ petition under Article 32 of the Constitution has been filed by way of public interest litigation seeking issue of a writ of mandamus directing the Government to take steps to stop employment of children in Carpet Industry in the State of Utter Pradesh; to appoint a Committee to investigate into their conditions of employment; and to issue such welfare directives as are appropriate for total prohibition on employment of children below 14 years and directing the respondent to give them facilities like education, health, sanitation, nutritious food, etc. The Hon'ble Supreme Court has held "Child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conductive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to the humanity. Mankind has best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the

[58] 1952 SCR 597.
[59] AIR 1984 SC 802.

innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood - socially, economically, physically and mentally - the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and goods citizenry.

The founding fathers of the Constitution, therefore, have bestowed the importance of the role of the child in its best for development. Dr. Bhim Rao Ambedkar, was for a head of his time in his wisdom projected these rights in the Directive Principles including the children as beneficiaries. Their deprivation has deleterious effect on the efficacy of the democracy and the rule of law. The Apex Court while issuing directives expressed "We are of the view that a direction needs to be given that the Government of India would convene a meeting of the concerned Ministers of the respective State Governments and their Principal Secretaries holding concerned Department, to evolve the principles of policies for progressive elimination of employment of the children below the age of 14 years in all employments governed by the respective enactments mentioned in M.C. Mehta's case[60] to evolve such steps consistent with the scheme laid down in M.C. Mehta's case, to provide (1) compulsory education to all children either by the industries itself or in co-ordination with it by the State Government to the children employed in the factories, mine or any other industry, organised or unorganised labour with such timings as is convenient to impart compulsory educations, facilities for secondary, vocational profession and higher education; (2) apart from education, periodical health check-up; (3) nutrient food etc.; (4) entrust the responsibilities for implementation of the principles. Periodical reports of the progress made in that behalf be submitted to the Registry of this Court. The Central Government is directed to convene the meeting within two months from the date of receipt of the order. After evolving the principles, a copy thereof is directed to be forwarded to the Registry of this Court.

[60] *M.C. Mehta v. State of Tamil Nadu*, (1996) 6 SCC 756.

In *Sheela Barse v. Union of India*[61] the petitioner filed an application before the Supreme Court praying that the respondents-States be directed: (a) to release all children detained in the jails in the respondent-States ; (b) to furnish 'complete information respecting all children detained in the States and the circumstances and the legal facts of such detention and the number of available juvenile courts and children homes; (c) to appoint district judges of the districts to visit jails, sub-jails and lock-ups to identify and release children in such illegal detention; (d) to requisition immediately necessary buildings and provide infrastructure and make immediate interim arrangements for `places of housing' of children sought directions to the respective States, Legal Aid Boards, District Legal Aid Committees through the appointment of ` duty counsel' to ensure protection of the right of the children etc.

The Hon'ble Court held[62] ". It is absolutely essential, and this is something which we wish to impress upon the State Governments with all the earnestness at our command, that they must set up Juvenile Courts, one in each districts and there must be a special cadre of Magistrates who must be suitably trained for dealing with cases against children".

There is no doubt that the right to move this Court conferred on the citizens of this country by Article 32 is itself a guaranteed right-and it holds the same place of pride in the Constitution as do the other provisions in respect of the citizens' fundamental rights. The fundamental rights guaranteed by Part III which have been made justiciable, form the most outstanding and distinguishing feature of the Indian Constitution. It is true that the said rights arc not absolute and they have to be adjusted in relation to the interests of the general public. But as the scheme of Article 19 illustrates the difficult task of determining the propriety or the validity of adjustments made either legislatively or by executive action between the fundamental rights and the demands of socioeconomic welfare has been ultimately left in charge of the High Courts and the Supreme Court by the Constitution. It is in the light of this position that the Constitution makers thought it advisable to treat the citizens' right to move this Court for the enforcement of their fundamental rights as being a fundamental

[61] (1988)4 SCC 226.
[62] supra

right by itself. The fundamental right to move this Court can, therefore be appropriately described as the comer-stone of the democratic edifice raised by the Constitution.

In *M.C. Mehta v. Union of India*[63] by way of public interest litigation a spirited citizen raised some seminal questions concerning the true scope and ambit of Article. 21 and 32 of the Constitution, the principles and norms for determining the liability of large enterprises engaged in manufacture and sale of hazardous products, the basis on which damages in case of such liability should be quantified and whether such large enterprises should be allowed to continue to function in thickly populated areas and if they are permitted so to function, what measures must be taken for the purpose of reducing to a minimum the hazard to the workmen and the community living in the neighbourhood.

[64]The Constitution makers thought it advisable to treat the citizens' right to move this Court for the enforcement of their fundamental rights as being a fundamental right by itself. The fundamental right to move this Court can, therefore be appropriately described as the comer-stone of the democratic edifice raised by the Constitution. A truly democratic Constitution recognizes not only certain important natural rights which are the attributes of a free citizen, but also sets up adequate machinery for protection against invasion of those rights. Our Constitution has in Chapter III enumerated certain fundamental rights such as equality before the law, with the concomitant guarantee against discrimination, right of freedom of speech, assembly, association, movement and residence, and to practice any profession or to carry on occupation, trade or business, freedom of conscience and the right to practice and propagate religion, freedom to manage religious affairs and cultural and educational 'rights. After enunciating the rights some in terms positive, some in negative, exercisable absolutely or subject to reasonable restrictions the Constitution has rendered all laws inconsistent therewith if preexisting, or made in contravention, thereof if enacted after the commencement of the Constitution, void to the extent of the inconsistency or contravention. For relief against infringement of these rights by action legislative or executive by the State, recourse may undoubtedly be had

[63] AIR 1984 SC 1086
[64] V.N.Shukla, *Constitution of India*, Tenth Edition, Eastern Book Company.

to the ordinary Courts by institution of civil proceedings for appropriate relief. But the Constitution has conferred upon the High Courts and the Supreme Court power to issue writs for the protection of those fundamental rights, and the Constitution has guaranteed by Article 32(1) the right to move this Court for enforcement of those rights. The right to move this Court for enforcement of the fundamental rights is therefore itself made a fundamental right. Law which is repugnant to the effective exercise of the right to move this Court in enforcement of the rights described in Chapter III therefore to the extent of inconsistency or contravention would be void. Is it that the exercise of the right is to be so unfettered, that any law which imposes any restriction in any form whatever against the exercise of that right direct or indirect must be regarded as void.

In *Munna v. State of U.P*[65] writ petitions were filed alleging on the basis of a news report in the Indian Express dated 2nd December, 1981 that one Mr. Madhu Mehta had visited the Kanpur Central Jail incognito and found several juvenile undertrial prisoners lodged there even though there was a Children's Home in Kanpur, and that these juvenile prisoners were being sexually exploited by adult prisoners. The inhibition against sending a child to jail does not depend upon any proof that he is a child under the age of 16 years but as soon as it appears that a person arrested is apparently under the age of 16 years this inhibition is attracted. The Court expressed its concern for protection of under trial children and held that the reason for this inhibition lies in the court solitude which the law entertains for juveniles below the age of 16 years. The law is very much concerned to see that juvenile do not come into contact with hardened criminals and their chances of reformation are not blighted by contact with criminal offenders. The law throws a clock of protection round juveniles and seeks to isolate them from criminal offenders, because the emphasis placed by the law is not on incarceration but on reformation. How anxious is the law to protect young children from contamination with hardened criminals is also apparent.

On the basis of a news item that migrant workmen employed in the Salal Hydro Electric Project were being denied the benefits of various labour laws, the Peoples' Union for Democratic Rights addressed a letter to an Hon'ble

[65] AIR 1982 SC 806.

Judge of the Court requesting that the same be treated as a writ Petition and justice be done to the workmen. The Court taking note of the issue in *Labourers, Salal Hydro Project v. State of J.K*[66] directed to faithfully enforce the labour laws in the interest of the deprived workmen, it held that the Central Government must also strictly enforce the requirement that payment of wages particularly to workmen employed either directly or through khatedars by the 'piece wagers' or sub-contractors is made in the presence of an authorised representative appointed by the National Hydro Electric Power Corporation or the Central Government and wages are paid directly to the workmen without the intervention of khatedars and free from any deductions whatsoever, except those authorised by law. It is not enough merely to go periodically and examine the muster rolls or muster sheets showing payment of wages, because even where wages are paid through khatedars and deductions are made, the muster rolls or muster sheets would invariably show payment of full wages and would not reject the correct position.

The Central Government must ensure, and that is the direction we give, that every payment of wages, whether it be normal wages or over-time wages, shall be made directly to the workmen, without any deductions in the presence of an authorised representative of the National Hydro Electric Power Corporation or the Central Government. When payment of overtime wages is made to the workmen, the Central Government must ask its authorised representative to check up with reference to the overtime work done by the workmen, whether they are receiving the full amount of over-time wages due to them or any part of it is being taken away by the khatedars. This evil can to a large extent be eliminated if payment of over-time wages is made directly to the workmen instead of routing it through the khatedars, it further held under Article 24 of the Constitution no child below the age of 14 years can be employed in 'construction work' which has been declared to be a hazardous employment in the Asiad Workers' case. This constitutional prohibition must be enforced.[67]

The children of construction workers living at or near the project site should be given facilities for schooling and this may be done either by the Central Government itself or if the Central Government entrusts the project work or any

[66] (1983) 2 SCC 181.
[67] ibid.

part thereof to a contractor, necessary provisions to this effect may be made in the contract with the contractor. There can be no doubt that the minimum rates of wages fixed by the Central Government include the element of weekly day of rest and that no extra wages are legally payable to the workmen for the weekly off days. The complaint made is not that extra wages are not being paid for the weekly off days but that weekly paid off days are not being given to the workmen, meaning thereby that the workmen are required to work even on their weekly paid off days These complaints have to be remedied by the Central Government by taking appropriate action and the only way in which this can be done effectively is by carrying out periodically detailed inspections. The Central Government will at once proceed to identify inter-state migrant workmen employed in the project work and adopt necessary measures for ensuring to them the benefits and advantages provided under the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979. It will also take immediate steps for ensuring that canteen, rest rooms and washing facilities are provided by the contractors and piece-wagers' or sub-contractors to the workmen employed by them.[68]

The Apex Court in *People's Union For Democratic Rights v. Union of India*[69] upon a Public Interest Litigation, in examined the scope and need for laws in case of violation of various labour laws in relation to workmen employed in the construction work connected with the Asian Games. It directed that whenever any construction work is being carried out either departmentally or through contractors, the government or any other governmental authority including a public sector corporation which is carrying out such work must take great care to see that the provisions of the labour laws are being strictly observed and they should not wait for any complaint to be received from the workmen in regard to nonobservance of any such provision before proceeding to take action against the erring officers or contractor, but they should institute an effective system of periodic inspections coupled with occasional surprise inspections by the higher officers in order to ensure that there are no violations of the provisions of labour laws and the workmen are not denied the rights and benefits to which they

[68] Ibid.
[69] (1982) 3 SCC 235.

are entitled under such provisions and if any such violations are found, immediate action should be taken against defaulting officers or contractors. That is the least which a government or a governmental authority or a public sector corporation is expected to do in a social welfare state.

[70]It opined that Public Interest Litigation which is strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief.

Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and indicate public interest which demands that violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. That would be destructive of the Rule of Law which forms one of the essential elements of public interest in any democratic form of Government. The poor too have civil and political rights and the Rule of law is meant for them also, though today it exists only on paper and not in reality. If the sugar barons and the alcohol kings have the Fundamental rights to carry on their business and to fatten their purses by exploiting the consuming public, certainly the "chamaras" to belonging to the lowest strata of society have Fundamental Right to earn on honest living through their sweat and toil. Large numbers of men, women and children who constitute the bulk of an population are today living a sub human existence in conditions of object poverty; utter grinding poverty has broken their back and sapped their moral fibre. They have no faith in the existing social and economic system. Nor can these poor and deprived sections of humanity afford to enforce their civil and political rights. The only solution of making civil and political rights meaningful to these large sections of society would be to remake the material conditions and restructure the

[70] Supra.

social and economic order so that they may be able to realise the economic, social and cultural rights. The time has now come when the courts must become the courts for the poor and struggling masses of this country. They must shed their character as upholders of the established order and the status quo. They must be sensitised to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations.[71]

The realisation must come to them that social justice is the signature tune of our Constitution and it is their solemn duty under the Constitution to enforce the basic human rights of the poor and vulnerable sections of the community and actively help in the realisation of the constitutional goals. This new change has to come if the judicial system is to become an effective instrument of social justice for without it, it cannot survive for long. Fortunately this change is gradually taking place and public interest litigation is playing a large part in bringing about this change. It is through public interest litigation that the problems of the poor are now coming to the forefront and the entire theatre of the law is changing. Having regard to the peculiar socio economic conditions prevailing in the country where there is considerable poverty, illiteracy and ignorance obstructing and impeding accessibility to the judicial process, it would result in closing the doors of justice to the poor and deprived sections of the community if the traditional rule of standing evolved by Anglo-Saxon jurisprudence that only a person wronged can sue or judicial redress were to be blindly adhered to and followed, and it is therefore Necessary to evolve a new strategy by relaxing this traditional rule of standing in order that justice may become easily available to the lowly and the lost.[72]

In a landmark judgment the Supreme Court in *Khatri v. State of Bihar,*[73] held that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to

[71] ibid.
[72] Supra note 51.
[73] (1983) 2 SCC 266.

be done by the State. It cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative liability. But even this right to free legal services would be illusory for an indigent accused unless the magistrate or the Sessions Judge before whom he is produced informs him of such right. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The Court further directed that the State and its police authorities should see to it that the constitutional, and legal requirement to produce an arrested person before a judicial magistrate within 24 hours of the arrest is scrupulously observed.

The Supreme Court in *Ram Jethmalani v. Union of India*[74], held that the basic structure of the Constitution cannot be amended even by the amending power of the legislature. Our Constitution guarantees the right, pursuant to Clause (1) of Article 32, to petition this Court on the ground that the rights guaranteed under Part III of the Constitution have been violated. This provision is a part of the basic structure of the Constitution. Clause (2) of Article 32 empowers this Court to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by Part III. This is also a part of the basic structure of the Constitution. In order that the right guaranteed by Clause (1) of Article 32 be meaningful, and particularly because such petitions seek the protection of fundamental rights, it is imperative that in such proceedings the petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially wheresuch information is in the possession of the State. To deny access to such information, without citing any constitutional principle or enumerated grounds of constitutional prohibition, would be to thwart the right granted by Clause (1) of Article 32.

The Bhopal Gas Tragedy is a glaring example of such imbalances and adverse impacts, where by court's intervention, poor and destitute have been provided relief and rehabilitation by resorting to Article 32 of the Constitution.[75]

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[74] (2011) 8 SCC 1.
[75] *Bhopal Gas Peedith Mahila Udyog Sangathan v. Union of India*, (2012) 8 SCC 326.

4.2. PROHIBITIONS WITHOUT ANY REFERENCE.

Article 17 provides abolition of untouchability.

The article enacts two declaration. Firstly, it announces that untouchability is abolished and its practice in any form is forbidden, and secondly it declares that the enforceability of any disabilities airsing out of untouchability shall be an offence punishable in accordance with law. In 1955 Parliament in exercise of the powers conferred under Article 35 enacted the Untouchability (Offences) Act.

Bharat Ratna Babasaheb Dr. B.R. Ambedkar in his book *"The untouchables"*[76] has stated that the problem of untouchability is a matter of class struggle. It is a struggle between caste Hindus and the Untouchables. This is not a matter of doing injustice against one man. This is a matter of injustice being done by one class against another. This struggle is related to social status. This struggle indicates how one class should keep its relationship with another class of people. The struggle starts as soon as you start claiming equal treatment with others. Had it not been so, there would have been no struggle over simple reason like serving chapatis, wearing good quality clothes, putting on the sacred thread, fetching water in a metal pot, sitting the bridegroom on the back of a horse, etc. In these cases you spend your own money. Why then do the high-caste Hindus get irritated? The reason for their anger is very simple. Your behaving on par with them insults them. Your status in their eyes is low, you are impure, you must remain at the lowest rung. Then alone will they allow you to live happily. The moment you cross your level the struggle starts. The instances given above also prove one more fact. Untouchability is not a short or temporary feature; it is a permanent one. To put it straight, it can be said that the struggle between the Hindus and the Untouchables is a permanent phenomenon. It is eternal, because the high caste people believe that the religion which has placed you at the lowest level of the society is itself eternal. No change according to time and circumstances is possible. You are at the lowest rung of the ladder today. You shall remain lowest forever.

According to him untouchability is an indirect form of slavery and only an extention of caste system. Caste system and untouchability stand together and will

[76] Dr. B.R. Ambedkar, "*The untouchables*", at page 28.

fall together. The idea of hoping to eradicate untouchability without destroying caste system is an utter futility. The problem to the Dalits is discrimination of high order next to the problem of recovering their manhood. In every nook and corner of the country, the Dalits face handicaps, suffer discrimination and are meted out injustice as a daily routine.

Neither the Constitution nor the Act defined 'Untouchability'. Reasons are obvious. It is not capable of precise definition. It encompasses acts/practices committed against Dalits in diverse forms. Mahatma Gandhi ji in his famous book *'My philosophy of Life'* stated that "untouchability means pollution by the touch of certain person by reason of their birth in a particular state of family. It is a phenomenon peculiar to Hinduism and has got no warrant in reasons or sastras".[77]

Empirical study conducted by Socialogists, in the Chapter "*Consciousness of Freedom among India's Untouchables*", said that the Dalits are "world's most oppressed minorities". At p. 160 he stated that severe economic domination usually has been sufficient to keep the untouchables in line, but evidence exists that the ultimate sanction was the use and threat of physical force. The numerically larger and wealthier dominant high castes are quite capable of and in fact did crush the slightest perceived resistance to their will. It was further stated that since independence, and particularly since 1970's as Untouchables have more openly resisted discrimination, reports of terrorism against them have increased both in number and in ferocity; gouging out the eyes of Untouchables in full view of assembled villagers who are terrified into silence, burning groups of Untouchables to death, chopping of their hands or feet, raping women, destroying whole villages are routine. In conclusion he stated that "Indian independence is a watershed event precisely because it both embodied this ideal of a new order and in fact has set in motion widespread and momentous changes that have affected virtually every Indian citizen, [78]

In *Venkataramana Devaruand v. State of Mysore*[79] the Supreme Court hald that a fundamental distinction between excluding persons from temples

[77] Mahatma Gandhi , '*My philosophy of Life*' edited by A.T. Hingorani, 1961 Edn. at p. 146,
[78] *Social and Economic Development in India*, a Reassessment edited by Dilip K. Basu and Richard Sision, Sage Publication, New Delhi, 1986 Edition,
[79] AIR 1958 SC 255.

open for purposes of worship to the Hindu public in general on the ground that they belong to the excluded communities and excluding persons from denominational temples on the ground that they are not objects within the benefit of the foundation. The former will be hit by Article 17 and the latter protected by Article 26.

The preamble of the Indian Constitution imbued among its people with pride of being its citizens in an intergrated Bharat with fraternity, dignity of person and equality of status. But castism sectional and religious diversities and parochialism are disintegrating the people. Social stratification need restructure. Democracy meant fundamental changes in the social and economic life of the people, absence of inequitous conditions, inequalities and discrimination. There can be no dignity of person without equality of status and opportunity. Denial of equal opportunities in any walk of social life is denial of equal status and amounts to prevent equal participation in social intercourse and deprivation of equal access to social means. Humane relations based on equality, equal protection of laws without discrimination would alone generate amity and affinity among the heterogeneous sections of the Indian society and a feeling of equal participants in the democratic polity. Adoption of new ethos and environment are, therefore, imperatives to transform the diffracted society into high degree of mobility for establishing an egalitarian social order in Secular Socialist Democratic Bharat Republic. "Untouchability" of the Dalits stands an impediment for its transition and is a bane and blot on civilised society.[80]

Article 17 of the Constitution of India, in Part III, a Fundamental Right, made an epoch making declaration that "untouchability" is 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. In exercise of the power in second part of Article 17 and Article 35(a)(ii), the Untouchability (Offences) Act 1955 was made, which was renamed in 1976 as "Protection of Civil Rights Act", for short 'the Act'. Abolition of untouchability in itself is complete and its effect is all pervading applicable to state actions as well as acts of omission by individuals, institutions, juristic or body of persons. Despite its abolition it is being

[80] *State Of Karnataka v. Appa Balu Ingale*, AIR 1993 SC 1126.

practised with impunity more in breach. More than 75% of the cases under the Act are ending in acquittal at all levels. Apathy and lack of proper perspectives even by the courts in tackling the naughty problem is obvious. For the first time after 42 years of the Constitution came into force this first case has come up to this Court to consider the problem. The Act is not a penal law simpliciter but bears behind it monstrous untouchability relentlessly practised for centuries dehumanising the Dalits, constitution's animation to have it eradicated and to assimilate 1/5th of Nation's population in the main stream of national life. Therefore, I feel that it would be imperative to broach the problem not merely from the perspectives of criminal jurisprudence, but more also from sociological and constitutional angulations. While respectfully agreeing with my learned brother Kuldip Singh, J. on his reasoning, conclusions and conviction, it is expedient, therefore, to have the case considered from the above back drop and address ourselves to the questions that arose for decision.[81]

Article 18 provides for abolition of titles.

This article is a mere prescription of prohibition observable and enforceable by the persons and bodies concerned merely as a political obligation to the democratic State. The eminent constitutional lawyer, Sir Jennings, describing the nature of obligation created by Article 18, observes, " The rule in Article 18, incorrectly summarized by the marginal note as abolition of titles, that no title, not being a military or academic distinction, shall be conferred by the State, is apparently part of a 'right to equality'. It seems to be no breach of the right to equality if Sir John Brown becomes Dr John Brown, or General John Brown, or Pandit John Brown, or Mr. Justice John Brown or Rotarian John Brown, or even Sri John Brown, M.B.E , or if he rolls around a gold plated car or loads his wife with jewellery and silk saries, but if becomes an impecunious knight, the right to equality is broken. In whom is this right vested? It cannot be Sir John Brown, it is nither in rem nor in personam, neither corporeal nor incorporeal. It is in fact not a

[81] Per. K. Ramaswamy, J. in *State Of Karnataka v. Appa Balu Ingale,* AIR 1993 SC 1126.

right at all, but a restriction on executive and legislative power.[82] It is not at all a fundamental right and must be removed from Part III of the Constitution of India.

Article 23 provides for prohibition of traffic in human beings and forced labour.

This Article embodies two declaration. First, that traffic in human beings, beggar and other similar forms of forced labour are prohibited. The prohibition applies not only to State but also to private persons, bodies and organizations. Secondly any contravention of the provisions shall be an offence punishable in accordance with law. Traffic in human beings means to deal in men and women like goods, such as to sell or let or otherwise dispose them of. It would include traffic in women and children for immoral or other purposes. The Immoral Traffic (Prevention) Act 1956 is a law made by Parliament under Article 35 of the Constitution for the purpose of punishing acts which results in traffic of human beings. Slavery is not expressly mentioned but there is no doubt that the expression 'traffic in human beings' would cover it. Under the existing law whoever imports, exports, removes, buys, sell or disposes of any person as a slave or accepts, receives or detains against his will any person as a slave shall be punished with imprisonment. In pursuance of Article 23 the bonded labour system has also been abolished and declared as illegal by the Bonded Labour System (Abolition) Act, 1976.

In a landmark judgment the Supreme Court in *People's Union For Democratic Rights v. Union of India*[83] held that Article 23 is not limited in its application against the State but it prohibits "traffic in human beings and begar and other similar forms of forced labour" practised by anyone else. The prohibition against "traffic in human being and begar and other similar forms of forced labour" is clearly intended to be a general prohibition, total in its effect and all pervasive in its range and it is enforceable not only against the State but also against any other person indulging in any such practice. The word "begar" in Article 23 is not a word of common use in English language, but a word of Indian origin which like many other words has found its way in English vocabulary. It is a form of forced labour

[82] Jenning: Some Characteristic of the Indian Constitution, (1953).
[83] AIR 1982 SC 1473

under which a person is compelled to work without receiving any remuneration. Begar is thus clearly a film of forced labour. It is not merely 'begar' which is constitutionally prohibited by Article 23 but also all other similar forms of forced labour. Article 23 strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values. To contend that exacting labour by passing some remuneration, though it be inadequate will not attract the provisions of Article 23 is to unduly restrict the amplitude of the prohibition against forced labour enacted in the Article.

The Constitution makers did not intend to strike only at certain forms of forced labour leaving it open to the socially or economically powerful sections of the community to exploit the poor and weaker sections by resorting to other forms of forced labour. There could be no logic or reason in enacting that if a person is forced to give labour or service to another without receiving any remuneration at all, it should be regarded as a pernicious practice sufficient to attract the condemnation of Article 23, but if some remuneration is paid for it, then it should be outside the inhibition of that Article. To interpret Article 23 as contended would be reducing Article 23 to a mere rope of sand, for it would then be the easiest thing in an exploitative society for a person belonging to a socially or economically dominant class to exact labour or service from a person belonging to the deprived and vulnerable section of the community by paying a negligible amount of remuneration and thus escape the rigour of Article 23.[84]

In a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, a contract of service may appear on its face voluntary but it may, in reality, be involuntary, because while entering into the contract the employee by reason of his economically helpless condition, may have been faced with Hobson's choice, either to starve or to submit to the exploitative terms dictated by the powerful employer. It would be a travesty of justice to hold the employee in such a case to the terms of the contract and to compel him to serve the employer even though he may not wish to do so. That would aggravate the inequality and injustice from which the employee even otherwise suffers on account of his economically disadvantaged position and lend

[84] Supra Note 61.

the authority of law to the exploitation of the poor helpless employee by the economically powerful employer. Article 23 therefore, provides that no one shall be forced to provide labour or service against his will, even though it be under a contractor of service. What Article 23 prohibits is 'forced labour' that is labour or service which a person is forced to provide." 'Force' which would make such labour or service 'forced labour' may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternative and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it would be 'forced labour'. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour of service provided by him would be clearly 'forced labour'. The word 'force' must therefore be construed to include not only physical or legal force but force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. Of course, if a person provides labour or service to another against receipt of the minimum wage, it would not be possible to say that the labour or service provided by him is 'forced labour' because he gets what he is entitled under law to receive. No inference can reasonably be drawn in such a case that he is forced to provide labour or service for the simple reason that would be providing labour or service against receipt of what is lawfully payable to him just like any other person who is not under the force of any compulsion. Article 23 is

intended to abolish every form of forced labour. The words "other similar forms of forced labour" are used in Article 23 not with a view to importing the particular characteristic of 'begar' that labour or service should be exacted without payment of any remuneration but with a view to bringing within the scope and ambit of that Article all other forms of forced labour and since 'begar' is one form of forced labour, the Constitution makers used the words "other similar forms of forced labour". If the requirement that labour or work should be exacted without any remuneration were imported in other forms of forced labour. they would straight-away come within the meaning of the word 'begar' and in that event there would be no need to have the additional words "other similar forms of forced labour." These words would be rendered futile and meaningless and it is a well recognised rule of interpretation that the court should avoid a construction which has the effect of rendering any words used by the legislature superfluous redundant. The object of adding these words was clearly to expand the reach and content of Article 23 by including, in addition to 'begar', other forms of forced labour within the prohibition of that Article. Every form of forced labour, 'begar' or otherwise, is within the inhibition of Article 23 and it makes no difference whether the person who is forced to give his labour or service to another is remunerated or not. Even if remuneration is paid, labour supplied by a person would be hit by Article 23 if it is forced labour, that is, labour supplied not willingly but as a result of force or compulsion. Article 23, strikes at every form of forced labour even if it has its origin in a contract voluntarily entered into by the person obligated to provide labour or service, for the reasons, namely; (i) it offends against human dignity to compel a person to provide labour or service to another if he does not wish to do so, even though it be breach of the contract entered into by him; (ii) there should be no serfdom or involuntary servitude in a free democratic India which respects the dignity of the individual and the worth of the human person. Social Welfare legislation like the Contract Labour (Regulation and Abolition) Act 1970, Equal Remuneration Act, 1976, Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979, Minimum Wages Act, 1948, etc have taken an important role in rendering social justice to the citizen of all classes in the country.

In *Labourers, Salal Hydro Project v. State of J & K*[85], the Supreme Court examined the implementation of the labour laws benefits and facilities provided for workmen under Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act,1979, Contract Labour (Regulation and Abolition) Act, 1970, Minimum Wages Act, 1948, Prohibition of child labour in construction work under Art. 24 and issued directives to the State and Center asking them to implement these social welfare legislation in true letter and spirit.

The Supreme Court upon examining the constitutionality of the Rajasthan Famine Relief Works Employees (Exemption from Labour Laws) Act, 1964 in *Sanjit Roy v. State of Rajasthan*[86] opined that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the meaning of the words 'forced labour' and attracts the condemnation of Article 23. Every person who provides labour or service to another is entitled at the least to the minimum wage and if anything less than the minimum wage is paid to him, he can complain of violation of his fundamental right under Article 23 and ask the court to direct payment of the minimum wage to him so that the breach of Article 23 may be abated. The constitutional validity of the Exemption Act in so far as it excludes the applicability of the Minimum Wages Act, 1948 providing that minimum wage may not be paid to a workman employed in any famine relief work, cannot be sustained in the face of Article 23. Article 23 mandates that no person shall be required or permitted to provide labour or service to another on payment of anything less than the minimum wage. Whenever any labour or service is taken by the State from any person, whether he be affected by drought and scarcity conditions or not, the State must pay, at the least, minimum wage to such person.

When the State undertakes famine relief work, it is no doubt true, that it does so in order to provide relief to persons affected by drought and scarcity conditions but, none-the-less it is work which enures for the benefit of the State representing the society and if labour or service is provided by the affected persons for carrying out such work, the State cannot pay anything less than the minimum wages to the affected persons. It is not as if dole or bounty is given by the State to

[85] (1983) 2 SCC 181.
[86] (1983) 1 SCC 525.

the affected persons in order to provide relief to them against drought and scarcity conditions nor is the work to be carried out by the affected persons worthless or useless to the society so that under the guise of providing work what the State in effect and substance seeks to do is to give dole or bounty to the affected persons. The State cannot be permitted to take advantage of the helpless condition of the affected persons and extract labour or service from them on payment of less than the minimum wage. No work of utility and value can be allowed to be constructed on the blood and sweat of persons who are reduced to a state of helplessness on account of drought and scarcity conditions.

The law laid in *Asiad Workers case*[87] and followed in *Sanjit Roy's case*[88] has been fully endorsed by the Supreme Court in *Bandhua Mukti Morcha v. Union of India*[89] where the Court declared bonded labour as a crude form of forced labour prohibited by Article 23. The Court has also held that faliur of the State to identify the bonded labourers, to release them from their bondage and to rehabilitate them as envisaged by the Bonded Labour System (Abolition) Act, 1976, violates Article 21 and Article 23 of the Constitution[90].

In a case[91] before the Supreme Court, the State of Gujrat have strongly opposed the right of the prisoners to claim minimum wages under the Minimum Wages Act. They say the prisoners have no right to claim wages at all except those provided under the provisions of the prisons Act, 1894 and the rules made thereunder and non-payment of wages to prosoners undergoing sentence of imprisonment with hard labour could not be violative of Article 23 of the Constitution. In support of the submission States have referred to the Constitutions of various countries and to the Universal Declaration of Human Rights and Convenants on Civil and political rights. States are, however, agreed that the prisoners are entitled to certain wages as prescribed but only by way of incentive/bonus/honorarium/gratuity/reward/stipend or the like. The amount so paid and by whatever name called has to bear some reasonable nexus to the work

[87] Ibid.
[88] Ibid.
[89] (1984) 3 SCC 161.
[90] *Neerja Chaudhary v. State of M.P.*, (1984) 3 SCC 243.
[91] *State of Gujrat v. Hon'ble High Court of Gujrat*, (1998) 7 SCC 392.

performed by the prisoners and wages cannot be arbitrary to be paid as a dole or as a pittance.

Negating the view the Supreme Court opined that putting prisoner to hard labour and not paying wages to him would be violative of clause (1) of Article 23 of the Constitution and this violation is saved only under clause (2) thereof which provides that nothing in Article 23 shall prevent the State from imposing compulsory service for public purposes.

In dealing with a question of regularization of casual and adhoc service the Supreme Court in *State of Karnataka v. Uma Devi (3)* [92] expressed that Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated equals. Thus, any public employment has to be in terms of the constitutional scheme. A sovereign government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary appointments or engaging workers on daily wages. Going by a law newly enacted, The National Rural Employment Guarantee Act, 2005, the object is to give employment to at least one member of a family for hundred days in an year, on paying wages as fixed under that Act. But, a regular process of recruitment or appointment has to be resorted to, when regular vacancies in posts, at a particular point of time, are to be filled up and the filling up of those vacancies cannot be done in a haphazard manner or based on patronage or other considerations. Regular appointment must be the rule.

It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the employees permanent, would be violative of Article 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic features, has included Articles

[92] (2006) 4 SCC 1.

14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the Constitution of India, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The acceptance of the argument on behalf of the respondents would really negate the rights of the others conferred by Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality.

Article 24 provided 'Prohibition of employment of children in factories, etc.'

Under the Constitution employment of children below the age of 14 in any factory or mine or other hazardous occupation is forbidden. Obviously this provision is in the interest of health and strength of young person. But as seen in view of our socio-economic realities the Constitution makers could not prohibit the employment of children generally.

In a landmark judgment the Supreme Court in *Peoples Union for Democratic Rights v. Union of India*[93] the court held that Article 24 of the Constitution provides that no child below the age of 14 shall be employed to work in any factory or mine or engaged in any other hazardous employment. This is a constitutional prohibition which, even if not followed up by appropriate legislation, must operate propiro vigore and construction work being plainly and indubitably a hazardous employment, it is clear that by reason of this Constitutional prohibition, no child below the age of 14 years can be allowed to

[93] (1982)3 SCC 235.

be engaged in construction work. Therefore, notwithstanding the absence of specification of construction industry in the Schedule to the Employment of Children Act 1938, no child below the age of 14 years can be employed in construction work and the Union of India as also every state Government must ensure that this constitutional mandate is not violated in any part of the Country.

Article 24 of the Constitution embodies a Fundamental Right which is plainly and indubitably enforceable against every one and by reason of its compulsive mandate, no one can employ a child below the age of 14 years in a hazardous employment. Since, construction work is a hazardous employment, no child below the age of 14 years can be employed in constructions work and therefore, not only are the contractors under a constitutional mandate not to employ any child below the age of 14 years, but it is also the duty of the Union of India, the Delhi Administration and the Delhi Development Authority to ensure that this constitutional obligation is obeyed.

The Supreme Court in *Bandhua Mukti Morcha v. Union of India*[94] in its golden words opined "Child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conductive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to the humanity. Mankind has best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood - socially, economically, physically and mentally - the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and goods citizenry. The founding fathers of the

[94] (1984) 3 SCC 161

Constitution, therefore, have bestowed the importance of the role of the child in its best for development. Dr. Bhim Rao Ambedkar, was for a head of his time in his wisdom projected these rights in the Directive Principles including the children as beneficiaries. Their deprivation has deleterious effect on the efficacy of the democracy and the rule of law.

Various welfare enactments made by the Parliament and the appropriate State Legislatures are only teasing illusions and a promise of unreality unless they are effectively implemented and make the right to like to the child driven to labour a reality, meaningful and happy. Article 24 of the Constitution prohibits employment of the child below the age of 14 years in any factory or mine or in any other hazardous employment, but it is a hard reality that due to poverty child is driven to be mployedin a factory, mine or hazardous employment. Pragmatic, realistic and constructive steps and actions are required to be taken to enable the child belonging to poor, weaker sections, Dalit and Tribes and minorities, enjoy the childhood and develop its full blossomed personality - educationally, intellectually and culturally - with a spirit of inquiry, reform and enjoyment of leisure. The child labour, therefore, must be eradicated through well-planned, poverty- focussed allievation, development and imposition of trade actions in employment may drive the children and mass them up into destitution and other mischievous environment, making them vagrant, hard criminals and social risk etc. Therefore, while exploitation of the child must be progressively banned, other simultaneously alternatives to the child should be evolved including providing education, health care, nutrient food, shelter and other means of livelihood with self-respect and dignity of person. Immediate ban of child labour would be both unrealistic and counter-productive. Ban of employment of children must begin from most hazardous and intolerable activities like slavery, bonded labour, trafficking, prostitution, pornography and dangerous forms of labour and the like. Illiteracy has many adverse effects in democracy governed by rule of law. A free educated citizen could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop spirit of tolerance and reform. Therefore, education is compulsory. Primary education to the children, in particular, to the child from poor, weaker sections, Dalits and Tribes and minorities is mandatory. The basic education and

employment- oriented vocational education should be imparted so as to empower the children with these segments of the society to retrieve them from poverty and, thus, develop basic abilities, skills and capabilities to live meaningful life for economic and social empowerment. Compulsory education, therefore, to these children is one of the principal means and primary duty of the State for stability of the democracy, social integration and to eliminate social tensions.

Child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conductive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society.[95]

The Court in *Labourers, Salal Hydro Project v.State of J & K* [96] held that under Article 24 of the Constitution no child below the age of 14 years can be employed in 'construction work' which has been declared to be a hazardous employment in the Asiad Workers' case. This constitutional prohibition must be enforced. The children of construction workers living at or near the project site should be given facilities for schooling and this may be done either by the Central Government itself or if the Central Government entrusts the project work or any part thereof to a contractor, necessary provisions to this effect may be made in the contract with the contractor. It further the expressed that the problem of child labour is a difficult problem and it is purely on account of economic reasons that parents often want their children to be employed in order to be able to make two ends meet. The possibility of augmenting their meagre earnings through employment of children is very often the reason why parents do not send their children to schools and there are large drop outs from the schools. This is an economic problem and it cannot be solved merely by legislation. So long as there is poverty and destitution in this country, it will be difficult to eradicate child labour. But even so an attempt has to be made to reduce, if not eliminate the incidence of child labour, because it is absolutely essential that a child should be able to receive proper education with a view to equipping itself to become a useful member of the society and to play a

[95] Supra Note 72.
[96] (1983) 2 SCC 181

constructive role in the socioeconomic development of the country. We must concede that having regard to the prevailing socioeconomic conditions, it is not possible to prohibit child labour altogether and in fact, any such move may not be socially or economically acceptable to large masses of people. That is why Article 24 limits the prohibition against employment of child labour only to factories, mines or other hazardous employments Clearly, construction work is a hazardous employment and no child below the age of 14 years can therefore be allowed to be employed in construction work by reason of the prohibition enacted in Article 24 and this constitutional prohibition must be enforced by the Central Government.

In *M.C Mehta v. State of T. N*[97] Hansaria, J. referred these beautiful poetry,

"I am the child.
All the world waits for my coming.
All the earth watches with interest to see what I shall become.
Civilization hangs in the balance,
For what I am, the world of tomorrow will be.
I am the child.
You hold in your hand my destiny.
You determine, largely, whether I shall succeed or fail,
Give me, I pray you, these things that make for happiness.
Train me, I beg you, that I may be a blessing to the world".

The Court further opined that "Our Constitution makers, wise and sagacious as they were, had known that India of their vision would not be a reality if the children of the country are not nurtured and educated. For this, their exploitation by different profit makers for their personal gain had to be first indicted. It is this need, which has found manifestation in Article 24, which is one of the two provisions in Part IV of our Constitution on the fundamental right against exploitation. The farmers were aware that this prohibition alone would not permit the child to contribute its mite to the nation building work unless it receives at least basic education.

[97] (1996) 6 SCC 756.

In the case of *Bandhu Mukti Morcha v. Union of India*[98] the Supreme Court had held that while exploitation of the child must be progressively banned, other simultaneously alternatives to the child should be evolved including providing education, health care, nutrient food, shelter and other means of livelihood with self-respect and dignity of person. Immediate ban of child labour would be both unrealistic and counter-productive. Ban of employment of children must begin from most hazardous and intolerable activities like slavery, bonded labour, trafficking, prostitution, pornography and dangerous forms of labour and the like. Illiteracy has many adverse effects in a democracy governed by rule of law. A free educated citizen could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop spirit of tolerance and reform. Therefore, education is compulsory. Primary education to the children, in particular, to the child from poor, weaker sections, Dalits and Tribes and minorities is mandatory. The basic education and employment- oriented vocational education should be imparted so as to empower the children with these segments of the society to retrieve them from poverty and, thus, develop basic abilities, skills and capabilities to live meaningful life for economic and social empowerment. Compulsory education, therefore, to these children is one of the principal means and primary duty of the State for stability of the democracy, social integration and to eliminate social tensions.

Article 21 A was enacted in the Constitution of India to provide free and compulsory education to a child under 14 years of age.

One can safely say that the legislations brought this provision introducing free education to children in lines with the benevolent object of Article 24.

The 86th Amendment in the Constitution of India was made in 2002 introducing the provision of Article 21-A, declaring the right to free and compulsory education of the children between the age of 6 to 14 years as a fundamental right. Correspondingly, the provisions of Article 45 have been amended making it an obligation on the part of the State to impart free education to the children. Amendment in Article 51-A of the Constitution inserting the clause-

[98] AIR 1997 SC 2218

'k' has also been made making it obligatory on the part of the parents to provide opportunities for education to their children between the age of 6 to 14 years.

The directive principle contained in Article 45 has made a provision for free and compulsory education for all children upto the age of 14 years within 10 years of promulgation of the Constitution of India but the nation could not achieve this goal even after 50 years of adoption of the provision. The task of providing education to all children in this age group gained momentum after National Policy of Education (NPE) was announced in 1986. It was felt that though the Government of India in partnership with State Governments had made strenuous efforts to fulfill the mandate and though significant improvements were seen in various educational indicators, the ultimate goal of providing universal and quality education still remained unfulfilled. In order to fulfill that goal, it was felt that an explicit provision should be made in the Part of the Constitution relating to Fundamental Rights. Right to Education is now a guaranteed fundamental right under Article 21A. It commands that the State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine. The State as at present is under the constitutional obligation to provide education to all children of the age of 6 to 14 years. The State by virtue of Article 21A is bound to provide free education, create necessary infrastructure and effective machinery for the proper implementation of the right and meet total expenditure of the schools to that extent. Right to Education guaranteed by Article 21A would remain illusory in the absence of State taking adequate steps to have required number of schools manned by efficient and qualified teachers. Before teachers are allowed to teach the children, they are required to receive appropriate and adequate training from a duly recognized training institute. [99]

Right to education flows directly from Article 21 and is one of the most important fundamental rights.

In *Ashoka Kumar Thakur v. Union of India*[100], while deciding the issue of reservation, the Supreme Court made a reference to the provisions of Articles 15(3)

[99] *State Of U.P. v. Bhupendra Nath Tripathi*, (2010) 13 SCC 203.
[100] (2008) 6 SCC 1.

and 21A of the Constitution, observing that without Article 21A the other fundamental rights are rendered meaningless. Therefore, there has to be a need to earnestly on implementing Article 21A. Without education a citizen may never come to know of his other rights. Since there is no corresponding constitutional right to higher education – the fundamental stress has to be on primary and elementary education, so that a proper foundation for higher education can be effectively laid.

The Supreme Court in *State of Tamil Nadu v. K. Shyam Sunder*,[101] opined that, "In the post constitutional era, attempts have been made to create an egalitarian society by removing disparity among individuals and in order to do so, education is the most important and effective means. There has been an earnest effort to bring education out of commercialism/merchantilism. The right of a child should not be restricted only to free and compulsory education but should be extended to have quality education without any discrimination on economic, social and cultural grounds".

Education is an issue, which has been treated at length in our Constitution. It is a well accepted fact that democracy cannot be flawless; but, we can strive to minimize these flaws with proper education. Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs.[102]

Directing all the States and the Union Territories to ensure that toilet facilities are made available in all the schools the Supreme Court in *Environmental & Consumer Protection Foundation v. Delhi Administration*[103] opined that it is imperative that all the schools must provide toilet facilities. Empirical researches have indicated that wherever toilet facilities are not provided in the schools, parents do not send their children (particularly girls) to schools. It clearly violates the right to free and compulsory education of children guaranteed under Article 21-A of the Constitution.

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[101] (2011) 8 SCC 737.
[102] *Bhartiya Seva Samaj Trust v. Yogeshbhai Ambalal Patel,* (2012) 9 SCC 310.
[103] (2011) 13 SCC 1.

Unlike other fundamental rights, the right to education places a burden not only on the State, but also on the parent or guardian of every child, and on the child herself. Article 21A, places one obligation primarily on the State, which reads as follows, “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.”

By contrast, Article 51A(k), which reads as follows, places burden squarely on the parents. Fundamental duties - it shall be the duty of every citizen of India who is the parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

The Constitution directs both burdens to achieve one end: the compulsory education of children, free from the fetters of cost, parental obstruction, or State inaction. The two articles also balance the relative burdens on parents and the State. Parents sacrifice for the education of their children, by sending them to school for hours of the day, but only with a commensurate sacrifice of the State's resources. The right to education, then, is more than a human or fundamental right. It is a reciprocal agreement between the State and the family, and it places an affirmative burden on all participants in our civil society.[104]

Articles 21 and 21-A of the Constitution require that India's school children receive education in safe schools. In order to give effect to the provisions of the Constitution, we must ensure that India's schools adhere to basic safety standards without further delay. The Constitution likewise provides meaning to the word “education” beyond its dictionary meaning. Parents should not be compelled to send their children to dangerous schools, nor should children suffer compulsory education in unsound buildings. Likewise, the State's reciprocal duty to parents begins with the provision of a free education, and it extends to the State's regulatory power. No matter where a family seeks to educate its children, the State must ensure that children suffer no harm in exercising their fundamental right and

[104] *Avinash Mehrotra vs Union Of India*, (2009) 6 SCC 398.

civic duty. States thus bear the additional burden of regulation, ensuring that schools provide safe facilities as part of a compulsory education.[105]

It has become necessary that the Government set a realistic target within which it must fully implement Article 21A regarding free and compulsory education for the entire country. The Government should suitably revise budget allocations for education. The priorities have to be set correctly. The most important fundamental right may be Article 21A, which, in the larger interest of the nation, must be fully implemented. Without Article 21A, the other fundamental rights are effectively rendered meaningless. Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education. This is ultimately why the judiciary must oversee Government spending on free and compulsory education.[106]

In a decision of far reaching implication the Supreme Court in *Society for Unaided Private School of Rajasthan v. Union of India*[107] has opined that Article 21A has used the expression "such manner" which means the manner in which the State has to discharge its constitutional obligation and not offloading those obligations on unaided educational institutions. If the Constitution wanted that obligation to be shared by private unaided educational institutions the same would have been made explicit in Article 21A. Further, unamended Article 45 has used the expression "state shall endeavour.....for" and when Article 21A was inserted, the expression used therein was that the "State shall provide" and not "provide for" the duty, which was directory earlier made mandatory so far as State is concerned. Article 21 read with 21A, therefore, cast an obligation on the State and State alone. The State has necessarily to meet all expenses of education of children of the age 6 to 14 years, which is a constitutional obligation under Article 21A of the Constitution. Children have also got a constitutional right to get free and compulsory education, which right can be enforced against the State, since the obligation is on the State. Children who opt to join an unaided private educational institution cannot claim that right as against the unaided private educational

[105] Ibid.
[106] *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.
[107] (2012) 6 SCC 1.

institution, since they have no constitutional obligation to provide free and compulsory education under Article 21A of the Constitution.

Needless to say that if children are voluntarily admitted in a private unaided educational institution, children can claim their right against the State, so also the institution. Article 51A(k) of the Constitution states that it shall be the duty of every citizen of India, who is a parent or guardian, to provide opportunities for education to his child. Parents have no constitutional obligation under Article 21A of the Constitution to provide free and compulsory education to their children, but only a constitutional duty, then one fails to see how that obligation can be offloaded to unaided private educational institutions against their wish, by law, when they have neither a duty under the Directive Principles of State policy nor a constitutional obligation under Article 21A, to those 25% children, especially when their parents have no constitutional obligation.

Article 28 provided freedom of attendance at religious instructions or religious worship in certain educational education.

Clause 1 of the Article provides that no religious instruction shall be forwarded to any educational institution wholly maintained out of State funds.

I explaining the reasons for prohibiting religious instructions in educational institution wholly maintained by the State, Dr Ambedkar, Chairman of the Drafting, said:

" I take the liberty of saying that the Draft as it stands, strikes the mean which I hope will be accepted by the House. There are three reasons in my judgment which militate against the acceptance of the view, namely, that there ought to be no ban on religious instructions.

The first reason is this. We have accepted this proposition which is embodied in Article 27, that public funds raised by taxes shall not be utilized for the benefit of any particular community. For instance, if we permit any particular religious instructing, say is a school established by a district or local board gives religious instructions on the ground that the majority of the students studying in

that school are Hindus; the effect would be that such action would militate against the provision contained in Article 27.

The Second difficulty is much more real than the first, namely, the multiplicity of religion that we have in this country. For, instance, take a city like Bombay which contains a heterogeneous population believing in different creeds. Suppose, for instance, there was a school in the city of Bombay maintained by the municipality. Obviously, such a school would contain children of Hindus, there will be pupils belonging to the Christian community, Zoroastrian community, or the Jewish community. The educational institution are required to treat all these children on a footing of equality and provide religious instructions to all denominations.

The third thing which I would like to mention in this connection is that unfortunately the religion which prevails in this country are not merely non- social, so far as their mutual relation is concerned, they are anti-social, one religion claiming that its teaching constitute the only path for salvation, that all other religions are wrong. The muslims believe that anyone who dpes not believe in the dogmas of Islam is a Kaffer, not entitled to brotherly treatment with the Muslims. The Christian have a similar belief. In view of this it seems to me that we should be considerably disturbing the peaceful atmosphere of an institution if these controversies with regard to the truthful character of any particular religion and the erroneous character of the other were brough into juxtaposition in the school itself. I, therefore, say that in laying down in Article 28(1) that in State institution there shall be no religious instructions, we have in my judgment travelled the path of complete safety.[108]

In *D.A.V. College, Jullundur v. State of Punjab,*[109] Section 4 of the Guru Nanak University Act, which enjoyed the State to make provision for the study and research on the life and teachings of Guru Nanak, was questioned on the ground that as the University was maintained wholly on the State funds, Section 4 of the Act offended Article 28(1) and was not saved by clause (2) thereof. The Court did not accept this argument because what Section 4 enjoyed the University was to

[108] Dr Ambedkar: Constituent Assembly Debates, Vol.7, pp. 883-884.
[109] AIR 1971 SC 1737.

encourage an academic study of the life and teachings of Guru Nanak, which need not necessarily amount to religious instructions or promotion of any particular religion.

The Supreme Court in *Bachan Bachao Andolan v. Union of India*[110] dealt with a matter of great significance. The petition had been filed in public interest under Article 32 of the Constitution in the wake of serious violations and abuse of children who are forcefully detained in circuses, in many instances, without any access to their families under extreme inhuman conditions. There are instances of sexual abuse on a daily basis, physical abuse as well as emotional abuse. The children are deprived of basic human needs of food and water.

It was brought into the notice of the Court about gross violation of statutory provisions of law like Employment of Children's Act, 1938, The Children (Placing of Labour) Act, 1933, The Child Labour (Prohibition and Regulation) Act, 1986, Minimum Wages Act, 1976, The Prevention of Immoral Traffic Act, Equal Remuneration Act, 1976 and Rules made thereunder and the Bonded Labour System (abolition) Act, 1976 read with rules made their under, the Factories Act, 1948, Motor Transport Workers Act, 1961 etc. Existing labour laws and legitimacy of contracts of employment for children. The legitimacy of contracts of employment for children and working conditions.

Learned Solicitor General further brought into light that there was a blatant violation of Child Labour (Prohibition and Regulation) Act, 1986, Children Pledging of Labour Act, 1933, the Bonded Labour System Abolition Act, 1976, the Factories Act, 1948, the Plantation Labour Act, 1951, the Mines Act, 1952, the Merchant Shipping Act, 1958, the Apprentices Act, 1961, the Motor Transport Workers Act, 1961, the Bidi and Cigar Workers (Conditions of Employment) Act, 1966, the West Bengal Shops and Establishment Act, 1963.[111]

[110] (2011) 5 SCC 1
[111] supra

The Honb'ble Supreme Court taking serious note into the matter ordered to implement the fundamental right of the children under Article 21A as it is imperative that the Central Government must issue suitable notifications prohibiting the employment of children in circuses within two months from today. The Court further directed to conduct simultaneous raids in all the circuses to liberate the children and check the violation of fundamental rights of the children. The rescued children be kept in the Care and Protective Homes till they attain the age of 18 years. The State was also directed to talk to the parents of the children and in case they are willing to take their children back to their homes, they may be directed to do so after proper verification. It direct the government to frame proper scheme of rehabilitation of rescued children from circuses.[112]

4.3 Rights in Specific Form of Restriction on State Action.

Article 14 provides equality before law. It says that 'The State shall not deny to any person equality before the law or the equal protection of laws within the territory of India'.

The makers of the Indian Constitution were not satisfied with the kind of undertaking of the right of equality. They knew of the wide spread social and economic inequalities in the country sanctioned for thousand of years by public policies and exercise of public powers supported by religion and other social norms and practice. Such inequalities could not be removed, minimized or taken care of by a provision like Article 14 alone. Therefore, they expressly abolished and prohibited some of the existing inequalities not only in public but even in private affairs and expressly authorized the State to take necessary steps to minimize and remove them. Article 14 is a provision in the Constitution which cannot be divorced with any of the social welfare legislation promoting social justice. Article 14 connotes two concept of equality one, equality before law and the other equal protection of law. The word 'law' in the former expression is used in its generic sense in a philosophical sense and whereas the word 'laws' is the latter expression denotes specific laws.

[112] supra

In State of *W.B. v. Anwar Ali Sarkar*[113] the Apex Court held that a rule of procedure laid down by law comes as much within the purview of Art. 14 of the Constitution as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for rebel and for defence with like protection and without discrimination. If it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position, it is not incumbent upon him before he can claim relief on the basis of fundamental rights to assert and prove that, in making the law, the legislature was actuated by a hostile or inimical intention against a particular person or class, nor would the operation of Article 14 be excluded merely because it is proved that the legislature had no intention to discriminate, though discrimination was the necessary consequence of the Act. The Court further opined that Article 14 is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic and, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all embracing scope and meaning, for to do so would be to violate its magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.

In *Sri. Srinivasa Theatre v. Govt. of T.N*[114] explaining the concept of Article 14 the Court held that Article 14 of the Constitution enjoins upon the State not to deny any persons 'Equality before law' or 'the equal protection of law' within the territory of India. The two expressions do not mean the same thing even if there may be much in common. Their meaning and content has to be found and determined having regard to the context and scheme of our Constitution. The word "law" in the former expression is used in a generic sense - a philosophical sense - whereas the word "laws" in the latter expression denotes specific laws in force. Equality before law is a dynamic concept having many facets. One facet - the most commonly acknowledge – is that there shall be no privileged person or class and that none shall be above law. A facet which is of immediate relevance herein is the obligation upon the State to bring about,

[113] AIR 1952 SC 75.
[114] (1992) SCC 643.

through the machinery of law, a more equal society envisaged by the preamble and part IV of our Constitution. For equality before law can be predicate meaningfully only in an equal society i.e., in a society contemplated by Article 38 of the Constitution.

It is well settled that the equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To put it simply, all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left.

In *D.S. Nakara v. Union of India*[115] the Apex Court has held that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is attracted where equals are treated differently without any reasonable basis. The principle underlying the guarantee is that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same. Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation. The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question. In other words, there ought to be causal connection between the basis of classification and the object of the statute. The doctrine of classification was evolved by the Court for the purpose of sustaining a legislation or State action

[115] (1983) 1 SCC 305.

designed to help weaker sections of the society. Legislative and executive action may accordingly be sustained by the court if the State satisfies the twin tests of reasonable classification and the rational principle correlated to the object sought to be achieved. A discriminatory action is liable to be struck down unless it can be shown by the Government that the departure was not arbitrary but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

The preamble to the Constitution envisages the establishment of a socialist republic. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave.

In *Maneka Gandhi v. Union of India*[116] the Supreme Court opined that Article 14 is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic and, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all embracing scope and meaning, for to do so would be to violate its magnitude.

In *E.R. Royappa v. State of T.N*[117], the Supreme Court proupounding a new approach of Article 14 held that equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. Equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other to the whim and caprice of an absolute monarch. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omni-presence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be right and just and fair and not arbitrary, fanciful or oppressive.

[116] (1978) 1 SCC 248
[117] (1974) 4 SCC 3.

In *Ajay Hasia v. Khalid Mujib Sehravardi*[118] the Supreme Court with the unanimous opinion of a Constitution bench held that Article 14 must not be identified with the doctrine of classification. What Article 14 strikes at is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions, namely, (1) that the classification is founded on an intelligible differentia and (2) that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action, the impugned legislative or executive action, would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever, therefore, there is arbitrariness in State action whether it be the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.

The Apex Court in *Ramana Dayaram Shetty v. International Airport Authority of India*[119] held that where a corporation is an instrumentality or agency of Government it would be subject to some constitutional or public law limitations on Government. The rule inhibiting arbitrary action by Government must apply equally where such corporation is dealing with the public and it cannot act arbitrarily and c into relationship with any person it likes at its sweet will. Its action must be in conformity with some principles which meets the test of reason and relevance. It is well established that Article 14 requires that action must not be arbitrary and must be based on some rational and relevant principle which is non-discriminatory. It must not be guided by extraneous or irrelevant considerations. The State cannot act arbitrarily in enter into relationship,

[118] (1981) 1 SCC 722.
[119] (1979) 3 SCR 1014.

contractual or otherwise, with a third party. Its action must conform to some standard or norm which is rational and non-discriminatory.

In *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar*[120] the Supreme Court enunciated the following principals that may be called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws enshrined under Article 21.

(a) that a law may be constitutional even though it relatesto a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;
(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest ;
(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation;
(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

[120] (1959) SCR 279.

The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and -violative of the equal protection of the laws.

A close perusal of the decisions of this Court in which the above principles have been enunciated and applied by this Court will also show that a statute which may come up for consideration on a question of its validity under Art. 14 of the Constitution.

The Supreme Court in *Sudhir Chandra Sarkar v. Tata Iron & Steel Co. Ltd.*[121]referring to the principles adopted in *Western India Match Company Ltd. v. Workmen*[122], held that our Constitution envisages a society governed by rule of law. Absolute discretion uncontrolled by guidelines which may permit denial of equality before law is the anti-thesis of rule of law. Absolute discretion not judicially reviewable inheres the pernicious tendency to be arbitrary and is, therefore, violative of Article 14. Equality before law and absolute discretion to grant or deny benefit of the law are diametrically opposed to each other and cannot co-exist. Therefore also the conferment of absolute discretion by Rule 10 of the Gratuity Rules to give or deny the benefit of the rules cannot be upheld and must be rejected as unenforceable.

Article 14 has been invoked to prohibit sexual harassment of working women on the ground of violation of the right of gender equality[123].

Earmarking of seats for children belonging to a specified category who face financial barrier in the matter of accessing education satisfies the test of classification in Article 14[124].

One of the reasons for deletion of the right to property from Part III of the Constitution vide the Constitution (Forty-fourth Amendment) Act, 1978 was that the economic liberties of freedom of property came in direct conflict with egalitarian values including inter-generational equity. This aspect needs to be kept

[121] AIR 1984 SC 1064.
[122] (1974)1 SCR 434.
[123] *Vishaka v. State of Rajasthan,* AIR 1997 SC 3011.
[124] *Society of Unaided Private School of Rajasthan v. Union of India,* (2012) 6 SCC 1.

in mind as in this case the substantive challenge to the Constitution (Thirty- fourth Amendment) Act, 1974 is based on the right to property in the garb of over-arching principles like separation of powers, rule of law and abrogation of the power of judicial review. The doctrine of classification under Article 14 has several facets and none of those facets have been abrogated by the Constitution (Thirty-fourth Amendment) Act, 1974. Equality is a comparative concept. A person is treated unequally only if that person is treated worse than others, and those others (the comparison group) must be those who are similarly situated.[125]

In *K.C. Vasanth Kumar v. State of Karnataka*[126], Venkatramaiah J. observed:

"Article 14 of the Constitution consists of two parts. It asks the State not to deny to any person equality before law. It also asks the State not to deny the equal protection of the laws. Equality before law connotes absence of any discrimination in law. The concept of equal protection required the State to mete out differential treatment to persons in different situations in order to establish an equilibrium amongst all. This is the basis of the rule that equals should be treated equally and unequals must be treated unequally if the doctrine of equality which is one of the corner-stone of our Constitution is to be duly implemented. In order to do justice amongst unequals, the State has to resort to compensatory or protective discrimination. Article 15(4) and Article 16(4) of the Constitution were enacted as measures of compensatory or protective discrimination to grant relief to persons belonging to socially oppressed castes and minorities."

Affirmative action is employed to eliminate substantive social and economic inequality by providing opportunities to those who may not otherwise gain admission or employment. Articles 14, 15 and 16 allow for affirmative action. To promote Article 14 egalitarian equality, the State may classify citizens into groups, giving preferential treatment to one over another. When it classifies, the State must keep those who are unequal out of the same batch to achieve constitutional goal of egalitarian society.[127]

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[125] *Glanrock Estate (P) Ltd. v The State Of Tamil Nadu,* (2010) 10 SCC 96.
[126] AIR 1985 SC 1495.
[127] *Ashok Kumar Thakur v. Union of India,* (2008) 6 SCC 1.

The new developments of equality also include increasing emphasis on positive equality or affirmative action. In several decisions the Court has emphasized that equality is a positive right and requires the State to minimize the existing inequalities and to treat unequals or under privilege with special care as envisaged in the Constitution.

Article 15 of the Constitution provides prohibition on ground of religion, race, caste, sex or place of birth.

Article 14 embodies the general principal of equality before law. A specific application of the same principle is provided in Article 15. Article 15 concretize and enlarges the scope of Article 14. The article is aimed to provide social justice by prohibiting discrimination of citizens on ground of religion, race, caste, sex or place of birth.

Invalidating an Act of the State legislature which provides for election on the basic of separate electorates of members of different religious communities the Supreme Court in *Nain Sukh Das v. State of Uttar Pradesh*[128] held that 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 article 15 (1) of the Constitution. The constitutional mandate to the State not to discriminate against any citizen on the ground, inter- alia, of religion clearly extends to political as well as to other rights, and any election held after the Constitution in, pursuance of such a law subject to clause (4) must be held void as being repugnant to the Constitution.

The Supreme Court in *Yusuf Abdul Aziz v. The State of Bombay*[129], which held that section 497 of the Penal Code does not offend Articles 14 and 15 of the Constitution. In R.C Poudyal v. Union of India, the Supreme Court upheld reservation of one seat in the State assembly in favour of Sangha on the ground that Sangha is merely not a religious institution but historically a political and social institution. Therefore such reservation does not violate Article 15(1) .

[128] AIR 1953 SC 384.
[129] AIR 1954 SC 321.

The Supreme Court in *Thota Sesharathamma v. Thota Manikyamma*[130] held that the Constitution of India accords socio-economic and political justice, equality of status and of opportunity assuring the dignity of person with stated freedoms. Article 14 guarantees equality. In other words frowns upon discrimination on any ground. Article 15(1) abolishes discrimination and removed disability, liability or restriction on grounds of sex and ensures equality of status. To enliven and alongate this constitutional goal to render socioeconomic justice, to relieve Hindu female from degradation, disabilities, disadvantages and restrictions under which Hindu females have been languishing over centuries and to integrate them in national and international life.

Bharat Ratna Dr. Baba Saheb Ambedkar, the first Law Minister and rounding father of the Constitution drafted Hindu Code Bill. The Hindu, Marriage Act, Adoption and Maintenance Act, Minority and Guardianship Act and Succession Act 1956. They ensue equal status and socio-economic justice to Hindu female. In a socialist democracy governed by rule of law, law as a social engineering should bring about transformation in-the social structure. Whenever a socio-economic legislation or the rule or instruments touching the implementation of welfare measures arise for consideration, this historical evidence furnishes as the foundation and all other relevant material would be kept at the back of the court's mind.

Art. 15(3) relieves from the rigour of Art. 15(1) and charges the State to make special provision to accord to women socioeconomic equality. Article 15(3) treats women as a class, mitigates the rigour of absolute equality enshrined in Article 14 and its species Article 15(1) & 16(1) and enjoins the State to make any special provision to remedy past injustice and to advance their status, socio economic and political.

The Court[131] further made a scholarly research on the writes of women and observed as follows: "In Vedic society woman enjoyed equal status economically, socially and culturally with men. The initiation to education upanayanam was performed in Vedic period to the girls as well as boys. Women studied the

[130] (1994) SCC 312.
[131] supra

Vedas, even composed Vedic rhymes. They participated in public life freely. Vishvavara, Apala, Lopamudra and Shashayasi are only few examples in the initial Vedic period. Thereafter Ghosha, Maitrai and Gargi occupied price of place for equality in intellectual excellence and equal status with men. Selfishness and male chauvinism made woman to gradually degrade and were given no voice even in the settlement of their marriages or so on. She was denied participation in public affairs. Though Yajnavalkya was a proponent to her economic status but ultimately Manu Smriti took firm hold and in Manu stated that woman had no right to study the Vedas. Thereby, denied the right to education, fundamental human right to acquire knowledge and cultural and intellectual excellence. He stated that woman must not seek separation from father, husband or son and bondaged her for ever. The husband was declared to be one with the wife that the wife can seek no divorce but allowed immunity to a male to discard an unwanted wife. All through the ages till Hindu Marriage Act, 1955 was made a male was allowed polyandry. Manu further stated that a wife, a son and a slave are declared to have no property and if they happened to acquire it would belong to male under whom she is in protection. Thus she was denuded or her right to property or incentive to decent and independent living and made her a dependent only to rare children and bear the burdens. When she becomes a widow, she was declared to have only maintenance and if in possession of her husband's property or coparcenery, to be a widow's estate with reversionery right to the heirs of last male holder. Fidality was a condition precedent to receive maintenance. He prescribed corporeal punishment to a wife who commits faults, should be beaten with a rope or a split bamboo. If she was murdered it was declared to be an Upapattaka that is a minor offence. I did not adhere to literal translation but attempted to portray their sweep and deep incursion on social order. Thus laid firm foundation to deny a Hindu female of equality of status, opportunity and dignity of person with no independent right to property and made her a subservient, socially, educationally and culturally. Widows were murdered by inhuman Sati and now by bride burnings.

Gautam Budha gave her equality of status and opportunity. Efforts of social reformers like Raja Ram Mohan Ray, Kandukuri Veeresalingam and a host of other enlightened made the British Rulers gradually to make statute law, given

her right to separate residence and maintenance and a right over property of her husband or joint family for maintenance and a charge by a decree of court. Mahatma Gandhiji, the father of the nation, in Young India on October 17, 1929 had written thus: "I am uncompromising in the matters of women's rights. In my opinion she should live under no legal disability, no suffering by men, we should treat the daughters and sons on the footing of perfect equality". Shri Ravindra Nath Tagore, the Noble laureate in his speech in 1913 reprinted in "To the Women" at page 18 stated "that women is the champion of man, gifted with equal mental capacity. She has a right to participate in any minutest activity of men and she has equal right of freedom and liberty with him".

This Court in *Pratap Singh v. Union of India*[132], held that Section 14 of the Hindu Succession Act, 1956 does not discriminate on grounds of sex and is intra vires of Article 15(3).The preferential treatment accorded, thereby was held to be not violative of Arts. 14 and 15(1). Sub-section (2) of secion 14 of the Act attempts to denude the object of sub-section (1) and emasculates its efficacy. It should, therefore, be' read as an exception or a proviso to sub-section (1) of section 14. The interpretation of the' proviso or an exception should not be to allow to 'eat away the vital veins of full ownership accorded by sub-section (1) of s. 14 when this Court upheld the validity of section 14(1) on the envil of Art; 15(3)what should be the message thus intended to convey? It would mean that the court would endeavour to give full effect to legislative and constitutional vision of socio-economic equality to female 'citizen by granting full ownership of property to a Hindu female. As a fact Article 15(3) as a fore runner to common code does animate 'to 'make law to accord socio economic equality to every female citizen of India, irrespective of religion, race cast or region.

In *Kalawatibai v. Soiryabai*[133] the mother of the parties, a Hindu widow gifted adverse possession as against the other co-owner unless it was so asserted and acquiesced by the respondent. Therefore, the decree for partition was upheld and the suit for injunction was dismissed. The ratio therein does not assist the appellant. Thus I hold that' the Act revolutionised the status of a 'Hindu female; used section 14(1) of the Hindu Succession Act, 1956, as a tool to undo past

[132] (1985) Supp. 2 SCR 773.
[133] (1991) 3 SCC 410.

injustice to elevate her to equal status with dignity of person on par with man; extinguished pre-existing limitation of woman's estate, or widow's estate known to Shastric law removed all the fetters to blossom the same into full Ownership. The discrimination suffered by Hindu female under Shastric law was exterminated by legislative fiat. The social change thus envisaged must be endeavoured to be given full vigour, thrust and efficacy. Section 14(1) enlarges the restricted estate into full ownership when the Hindu female has pre-existing right to maintenance etc.

In *Bai Tahira v. Ali Hussain Fissalli Chothia*[134] explaining the benevolent feature of Article 15 (3) held that the welfare laws must be so read as to be effective delivery systems of the salutary objects sought to be served by the Legislature and when the beneficiaries are the weaker sections, like destitute women, the spirit of Article 15(3) must be in light of the meaning of the section.

The Constitution is a pervasive omnipresence brooding over the meaning and transforming the values of every measure.

The Apex Court in *Government of Andhra Pradesh v. P.B. Vijayakumar*[135] held that the power conferred by Article 15(3) is wide enough to cover the entire range of State activity including employment under the State. The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women. To say that under Article 15(3), job opportunities for women cannot be created would be to out at the very root of the underlying inspiration behind this Article. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power

[134] (1979) 2 SCC 316
[135] AIR 1995 SC 1648.

conferred under Article 15(3), is not whittled down in any manner by Article 16. What then is meant by "any special provision for women" in Article 15(3)? This "special provision", which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation.

It is important to note that in the case of *P.A. Inamdar v.State of Maharastra* [136], this Court held that there shall be no reservations in private unaided colleges and that in that regard there shall be no difference between the minority and non-minority institutions. However, by the Constitution (Ninety-third Amendment) Act, 2005, Article 15 is amended. It is given Article 15(5). The result is that *P.A. Inamdar*[137] has been overruled on two counts: (a) whereas this Court in *P.A. Inamdar*[138] had stated that there shall be no reservation in private unaided colleges, the Amendment decreed that there shall be reservations; (b) whereas this Court in *P.A. Inamdar*[139] had said that there shall be no difference between the unaided minority and non-minority institutions, the Amendment decreed that there shall be a difference. Article 15(5) is an enabling provision and it is for the respective States either to enact a legislation or issue an executive instruction providing for reservation except in the case of minority educational institutions referred to in Article 30(1). The intention of the Parliament is that the minority educational institution referred to in Article 30(1) is a separate category of institutions which needs protection of Article 30(1) and viewed in that light we are of the view that unaided minority school(s) needs special protection under Article 30(1). Article 30(1) is not conditional as Article 19(1)(g). In a sense, it is absolute as the Constitution framers thought that it was the duty of the Government of the day to protect the minorities in the matter of preservation of culture, language and script via establishment of educational institutions for religious and charitable purposes.

In *Ashok Kumar Thakur v. Union of India*[140] the question arose before the Supreme Court was that does the 93rd Amendment violate the Basic Structure of

[136] (2004) 8 SCC 139
[137] ibid
[138] ibid
[139] ibid
[140] (2008) 6 SCC 1.

the Constitution by imposing reservation on unaided institutions? Answering in the affirmative the Court opined, Yes, it does. Imposing reservation on unaided institutions violates the Basic Structure by stripping citizens of their fundamental right under Article 19(1)(g) to carry on an occupation. *T.M.A. Pai's case*[141] and *Inamdar*[142] affirmed that the establishment and running of an educational institution falls under the right to an occupation. The right to select students on the basis of merit is an essential feature of the right to establish and run an unaided institution. Reservation is an unreasonable restriction that infringes this right by destroying the autonomy and essence of an unaided institution. The effect of the 93rd Amendment is such that Article 19 is abrogated, leaving the Basic Structure altered. To restore the Basic Structure, I sever the 93rd Amendment's reference to "unaided" institutions.

Article 16 ensures equality of opportunity in matters of public employment.

Article 16 is an instance of the application of the general rule of equality before law laid down in Article 14 and of the prohibition of discrimination in Article 15 (1) with respect to the opportunity for employment or appointment to any office under the State.

Explaining the relationship between Article 14, 15 and 16 the Supreme Court in *Gzula Dasaratha Rama Rao v. State of A.P,*[143] held that Article 14 enshrines the fundamental right of equality before the law or the equal protection of the laws within the territory of India. It is available to all, irrespective of whether the person claiming it is a citizen or not. Article 15 prohibits discrimination on some special grounds-religion, race, caste, sex, place of birth or any of them. It is available to citizens only, but is not restricted to any employment or office under the State. Article 16 clause (1), guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and clause (2) prohibits discrimination on certain grounds in respect of any such employment or appointment. It would thus appear that Article

[141] (2002) 8 SCC 481
[142] ibid
[143] AIR 1961 SC 564.

14 guarantees the general right of equality, Article. 15 and 16 are instances of the same right in favour of citizens in some special circumstances. Article 15 is more general than Art. 16, the latter being confined to matters relating to employment or appointment to any office under the State. It is also worthy of note that Article 15 does not mention 'descent' as one of the prohibited grounds of discrimination, whereas Article 16 does. We do not see any reason why the full ambit of the fundamental right guaranteed by Article 16 in the matter of employment or appointment to any office under the State should be cut down by a reference to the provisions in Part XIV of the Constitution which relate to Services or to provisions in the earlier Constitution Acts relating to the same subject.

Again the Supreme Court in *State of Kerela v. N.M. Thomas*[144] held that Articles 14, 15 and 16 form part of a string of constitutionally guaranteed rights. These rights supplement each other. Article 16 is an incident of guarantee of equality contained in Article 14. Both Articles 14 and 16(1) permit reasonable classification having a nexus to the objects to be achieved. Under Article 16 there can be a reasonable classification of the employees in matters relating to employment or appointment. Under Article 16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class.

The expression 'matter relating to employment' must include all matters in relation to employment both prior and subsequent to the employment which are incidental to the employment and form part of the terms and conditions of the employment. Thus the guarantee in Clause 1 of Article 16 will cover (a) initial appointments, (b) promotions, (c) termination of employment, (d) matters relating to salary, periodical increments, leave, gratuity, pension, age of superannuation etc. Principle of equal pay for equal work is also covered by equality of opportunity in Article 16(1). Terminating the service of a temporary employee may itself constitute denial of equal protection and offend the equality clause in Article 14 and 16(1).

[144] (1976) 2 SCC 310.

In *Krishan Chander Nayar v. Central Tractor Organisation*[145] the Court held that arbitrary imposition of a ban against a person's entry into Government service amounts to an infringement of his right to equality of opportunity guaranteed by Article 16(1)of the Constitution. That Article guarantees not merely the right to make an application for State employment but also a consideration on merits of that application when made.

In deciding the scope and ambit of the fundamental right of equality of opportunity guaranteed under Article 16 the Supreme Court in *General Manager, Southern Railway v. Rangachari,*[146] held that it is necessary to bear in mind that in construing the relevant Article a technical or pedantic approach must be avoided. We must have regard to the nature of the fundamental right guaranteed and we must seek to ascertain the intention of the Constitution by construing the material words in a broad and general way. If the words used in the Article are wide in their import they must be liberally construed in all their amplitude. Thus construed it would be clear that matters relating to employment cannot be confined only to the initial matters prior to the act of employment. The narrow construction would confine the application of Article 16(1) to the initial employment and nothing else but that clearly, is only one of the matters relating to employment. The other matters relating to employment would inevitably be the provision as to the salary and periodical increments therein, terms as to leave, as to gratuity, as to pension and as to the age of superannuation. These are all matters relating to employment and they are, and must be, deemed to be included in the expression "matters relating to employment" in Article 16(1). Article 16(2) provides that 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. This sub-Article emphatically brings out in a negative form what is guaranteed affirmatively by Article 16(1). Discrimination is a doubleedged weapon; it would operate in favour of some persons and against others and Article 16(2) prohibits discrimination and thus assures the effective enforcement of the fundamental right of equality of opportunity guaranteed by Article 16(1). The words "in respect of any

[145] AIR 1962 SC 602.
[146] AIR 1962 SC 36.

employment" used in Article 16(2) must, therefore, include all matters relating to employment as specified in Article 16(1). Therefore that promotion to selection posts 'is included both under Article 16(1) and (2).

In holding that the principal of equal pay for equal work is also covered by equality of opportunity in Article 16(1) the Apex Court in *Randhir Singh v. Union of India*[147] observed that it is true that the principle of "equal pay for equal work" is not expressly declared by our Constitution to be a fundamental right. But it certainly is a Constitutional goal. Article 39 (d) of the Constitution proclaims "equal pay for equal work for both men and women" as a Directive Principle of State Policy. "Equal pay for equal work for both men and women" means equal pay for equal work for every one and as between the sexes. Directive Principles have to be read into the fundamental rights as a matter of interpretation. Article 14 of the Constitution enjoins the State not to deny any person equality before the law or the equal protection of the laws and Article 16 declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. These equality clauses of the Constitution must mean something to everyone. To the vast majority of the people the equality clauses of the Constitution would mean nothing if they are unconcerned with the work they do and the pay they get. To them the equality clauses will have some substance if equal work means equal pay. Questions concerning wages and the like, mundane they may be, are yet matters of vital concern to them and it is there, if at all that the equality clauses of the Constitution have any significance to them. The preamble to the Constitution declares the solemn resolution of the people of India to constitute India into a Sovereign Socialist Democratic Republic. Again the word 'Socialist' must mean something. Even if it does not mean 'to each according to his need', it must at least mean 'equal pay for equal work'. From a construction of Articles 14 and 16 in the light of the Preamble and Article 39(d), it is clear that the principle "equal pay for equal work" is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.

[147] (1982) 1 SCC 618.

In a landmark judgment reflecting the dynamic concept of equality enshrined in Article 16 in *Akhil Bharatiya Soshit Karamchari Sangh v. Union Of India*[148] held that Article 16(1), Article 16(2) expressly forbids discrimination on the ground of caste and here the question arises as to whether the Scheduled Castes and Tribes are castes within the meaning of Article 16(2). Assuming that there is discrimination, Article 16(2) cannot be invoked unless it is predicated that the Scheduled Castes are "castes". There are sufficient indications in the Constitution to suggest that the Scheduled Castes are not mere castes. They may be something less or something more and the time badge is not the fact that the members belong to a caste but the circumstance that they belong to an indescribably backward human group. Articles 14 to 16 form a Code by themselves and contain a constitutional fundamental guarantee. The Directive Principles which are fundamental in the governance of the country enjoin upon the State the duty to apply that principle in making laws. Article 46 obligates the State the 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. Article 46 read with Article 16(4) makes it clear that the exploited lot of the harijan groups in the past shall be extirpated with special care by the State.

The preamble to the Constitution of India proclaims the resolution of the people to secure to all its citizens justice, social, economic and political, equality of status and opportunity and to promote fraternity assuring the dignity of the individual. The right to equality before the law and equality of opportunity in the matter of public employment are guaranteed as fundamental rights. The State is enjoined upon by the Directive Principles to promote the welfare of the people, to endeavour to eliminate inequalities in status, facilities and opportunities and special provisions have been made, in particular, for the protection and advancement of the Scheduled Castes and Scheduled Tribes in recognition of their low social and economic status and their failure to avail themselves of any opportunity of self-advancement. In short the constitutional goal is the establishment of a socialist democracy in which justice-economic, social and political is secure and all men are equal and have equal opportunity. Inequality

[148] (1981) 1 SCC 246.

whether of status, facility or opportunity is to end, privilege is to cease and exploitation is to go. The under-privileged, the deprived and the exploited are to be protected and nourished so as to take their place in an egalitarian society. State action is to be towards those ends. It is in this context that Article 16 has to be interpreted when State action is questioned as contravening Article 16. [149]

Doctrine of protective discrimination envisaged in Article 16 would bring within its ambit all such people who are backward not only in a State or Union Territory but also throughout the length and breadth of the country as envisaged under clause (1) of Article 16 thereof. [150]

A Constitution, such as ours, must receive generous interpretation so as to give an its citizens the full measure of justice so proclaimed. While interpreting the Constitution the expositors must concern themselves not so much with words as with the spirit and sense of the Constitution which could be found in the Preamble the Directive Principles and other such provisions. At one time it was assumed that because the fundamental rights are enforceable in a court of law while Directive Principles are not, the former were superior to the latter, that way of thinking has become obsolete. The current thinking is that while Fundamental Rights are primarily aimed at assuring political freedom to the citizens against excessive State action, the Directive Principles are aimed at securing social and economic freedoms by appropriate State action. The Directive Principles are made unenforceable in a limited sense because no Court can compel a Legislature to make laws. But that does not mean that they are less important than Fundamental Rights or that they are not binding on the various organs of the State. They are all the same fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

The Directive Principles should serve the Courts as a Code of Interpretation. Every law attacked on the ground of infringement of Fundamental Right should be examined to see if the impugned law does not advance one or other of the Directive Principles or if it is not in the discharge of some of the

[149] supra
[150] *Subhash Chandra v. Delhi Subordinate Service Selection Board*, (2009) 15 SCC 458.

undoubted obligations of the State towards its citizens flowing out of the Preamble, the Directive Principles and other provisions of the Constitution. Reservation of posts and all other measures designed to promote the participation of the Scheduled Castes and Scheduled Tribes in public services at all levels are a necessary consequence flowing from the Fundamental Rights guaranteed by Article 16(1). This very idea is emphasized further by Article 16(4) which is not in the nature of an exception to Article 16(1) but a facet of that Article.

In *B. Venkataramana v. State of Tamil Nadu*[151] reservation of posts in favour of Hindus, Muslims and Christians were held to be violative of Article 16 (2). The Court held that the ineligibility created by the Communal G. O. does not appear to us to be sanctioned by cl. (4) of Artsicle 16 & is 13 an infringement of the fundamental right guaranteed to the petnr. as an individual citizen under Article 16 (1)& (2). The Communal G. O., in our opinion, is repugnant to the provisions of Article 16 and is as such void & illegal.

The judgments of the Supreme Court in the case of *Union of India v. Virpal Singh Chauhan*[152] and *Ajit Singh Januja (No.1) v. State of Punjab*[153] , which led to the issue of the O.M. dated 30th January, 1997, have adversely affected the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes category in the matter of seniority on promotion to the next higher grade. The Government servants belonging to the Scheduled Castes and the Scheduled Tribes had been enjoying the benefit of consequential seniority on their promotion on the basis of rule of reservation. This has led to considerable anxiety and representations have also been received from various quarters including Members of Parliament to protect the interest of the Government servants belonging to Scheduled Castes and Scheduled Tribes. The Government has reviewed the position in the light of views received from various quarters and in order to protect the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes, it has been decided to negate the effect of O.M. dated 30th January 1997 immediately. Mere withdrawal of the O.M. dated 30th will not meet the desired purpose and review or revision of seniority of the Government servants

[151] AIR 1951 SC 229.
[152] (1995) 6 SCC 684.
[153] AIR 1996 SC 1189.

and grant of consequential benefits to such Government servants will also be necessary.

This will require amendment to Article 16(4A) of the Constitution to provide for consequential seniority in the case of promotion by virtue of rule of reservation. It is also necessary to give retrospective effect to the proposed constitutional amendment to Article 16(4A) with effect from the date of coming into force of Article 16(4A) itself, that is, from the 17th day of June, 1995 as a concequent thereof the Government introduced the "The Constitution (Eighty-Fifth Amendment) Act, 2001. This amendment was further challenged in the case of *M. Nagaraj v. Union of India*[154] and the Court held the amendments constitutional and not violative to the basic structure of the Constitution.

In *Indra Sawhney case*[155] the Supreme Court made reference of *State of AP v. USV Balram*[156], where it has been indicated that Clause (4) of Article 16 is not in the nature of an exception to Clauses (1) and (2) of Article 16 but an instance of classification permitted by Clause (1). It has also been indicated in the said decision that Clause (4) of Article 16 does not cover the entire field covered by Clauses (1) and (2) of Article In *Indra Sawhney case*[157] this Court has also indicated that in the interests of the Backward clauses of citizens, the State cannot reserve all the appointments under the State or even a majority of them. The doctrine of equality of opportunity in Clause (1) of Article 16 is to be reconciled in favour of backward clauses under Clause (4) of Article 16 in such a manner that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality.

In *Jitendra Kumar Singh v. State of U.P*[158] the Supreme Court opined that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture; all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as `vertical reservations' and horizontal

[154] AIR 2007 SC 71.
[155] AIR 1993 SC 477.
[156] 1972 AIR 1375.
[157] Ibid.
[158] (2010) 3 SCC 119.

reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped under clause (1) of Article 16 can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments.

Article 21 of the Constitution provides protection of life and personal property. No person shall be deprived of his life or personal liberty accept according to the procedure established by law.

The Supreme Court in *A.K. Gopalan v. State of Madras*[159] while examining the origin of the expression it held that the expression had its roots in the expression "per legem terrae" (law of the land) used in Magna Charta in 1215. In the reign of Edward III, however, the words "due process of law" were used in a statute guaranteeing that no person will be deprived of his property or imprisoned or indicted or put to death without being brought in to answer by due process of law. The expression was afterwards adopted in the American Constitution and also in the Constitutions of some of the constituent States, though some of the States preferred to use the words "in due course of law" or "according to the law of the land." In the earliest times, the American Supreme Court construed "due process of law" to cover matters of procedure only, but gradually the meaning of the expression was widened so as to cover substantive law also, by laying emphasis on the word "due." It seems plain that the Constituent Assembly did not adopt this expression on account of the very elastic meaning given to it, but preferred to use the words "according to procedure established by law".

[159] (1950) SCR 88.

The Supreme Court in *Additional District Magistrate, Jabalpur v. S. S. Shukla*[160] held that Article 21 is our Rule of Law regarding life and liberty. No other Rule of Law can have separate existence as a distinct right. The negative language of Fundamental Right incorporated in Part III imposes limitations on the power of the State and declares the corresponding guarantees of the individual to that fundamental right. Limitation and guarantee are complementary. The limitation of State action embodied in a Fundamental Right couched in a negative form is the measure of the protection of the individual. Article 21 of the Constitution is primarily a protection against illegal deprivations by the executive action of the State's agents or officials although, read with other Articles, it could operate also as a protection against unjustifiable legislative action purporting to authorise deprivations of personal freedom. Article 21 was only meant, on the face of it, to keep the exercise of executive power, in ordering deprivations of life or liberty, within the bounds of power prescribed by procedure established by legislation Article 21 furnishes the guarantee of "Lex", which is equated with statute law only, and not of "jus" or a judicial concept of what procedural law ought really to be. The whole idea in using this expression was to exclude judicial interference with executive action in dealing with lives and liberties of citizens and others living in our country on any ground other than that it is contrary to procedure actually prescribed by law which meant only statute law. According to well established canons of statutory construction, the express terms of "Lex" (assuming, of course, that the "Lex" is otherwise valid), prescribing procedure, will exclude "Jus" or judicial notions of "due process" or what the procedure ought to be.

In examining the safeguard to the citizens enshrined under Article 21 the Supreme Court in *Kharak Singh v. State of U.P.*[161] referred that the protection under Article 21 is only against State action and not against private individuals and the protection, it secures, it is a limited one. The only safeguard enacted by Article 21 is that a person cannot be deprived of his persona liberty except according to procedure prescribed by "State made" law. It is clear on plain natural construction of its language that Article 21 imports two requirements

[160] (1976) Suppl. SCR 172.
[161] (1964) 1 SCR 332.

first, there must be a law authorising deprivation of personal liberty and secondly, such law must prescribe a procedure. The first requirement is indeed implicit in the phrase "except according to procedure prescribed by law". When a law prescribes a procedure for depriving a person of personal liberty, it must a fortiori authorise such deprivation. Article 21, thus, provides both substantive as well as procedural safeguards. Two other ingredients of Article 21 are that there must not only be a law authorising deprivation of personal liberty there must also be a procedure prescribed by law or in other words law must prescribe a procedure.

In *Indira Nehru Gandhi v. Shri Rai Narain*[162] the Supreme Court held that according to Article 21 no one can be deprived of his right to personal liberty except in accordance with the procedure established by law. Procedure for the exercise of power of depriving a person of his right of personal Liberty necessarily postulates the existence of the substantive power. When Article 21 is in force, law relating to deprivation of life and personal liberty must provide both for the substantive power as well as the procedure for the exercise of such power. When right to move in court for enforcement of right guaranteed by Article 21 is suspended, it would have the effect of dispensing with the necessity of prescribing procedure for the exercise of substantive power to deprive a person of his life and personal liberty, it cannot have the effect of permitting an authority to deprive a person of his life or personal liberty without the existence of such substantive power.

In considering the effect of Presidential order suspending the right of a person to move court for enforcement of right guaranteed by Article 21 the Supreme Court[163] opined that the suspension of the right to move a court for the enforcement of the right contained in Article 21 cannot have the effect of debarring an aggrieved person from approaching the courts with the complaint regarding deprivation of life or personal liberty by an authority on the score that no power has been vested in the authority to deprive a person of life or liberty. The pre-supposition of the existence of substantive power to deprive a person of his life or personal liberty in Article 21 even though that article only mentions the

[162] (1976) 2 SCR 347.
[163] Ibid.

procedure, would not necessarily point to the conclusion that in the event of the suspension of the right to move any court for the enforcement of Article 21, the suspension would also dispense with the necessity of the existence of the substantive power The co-existence of substantive power and procedure established by law for depriving a person of his life and liberty which is implicit in Article 21 would not lead to the result that even if there is suspension of the right regarding procedure, suspension would also operate upon the necessity of substantive power. What is true of a proposition need not be true of the converse of that proposition. The suspension of the right to make any court for the enforcement of the right contained in Article 21 may have the effect of dispensing with the necessity of prescribing procedure for the exercise of substantive power to deprive a person of his life or personal liberty, it can in no case have the effect of permitting an authority to deprive a person of his life or personal liberty without the existence of substantive power. The close bond which is there between the existence of substantive power of depriving a person of his life or personal liberty and the procedure for the exercise of that power, if the right contained in Article 21 were in operation, would not necessarily hold good if that right were suspended because the removal of compulsion about the prescription of procedure for the exercise of the substantive power would not do away with the compulsion regarding the existence of that power.

The Supreme Court in the case of *Maneka Gandhi v. Union of India*[164] held that natural law rights were, meant to be converted into our Constitutionally recognised fundamental rights, at least so far as they are expressly mentioned, so that they are to be found within it and not outside it. To take a contrary view would involve a conflict between natural law and our Constitutional law. I am emphatically of opinion that a divorce between natural law and our Constitutional law will be disastrous. It will defeat one of the basic purposes of our Constitution. The implication of what I have indicated above is that Article 21 is also a recognition and declaration of rights which inhere in every individual. Their existence does not depend on the location of the individual. Indeed, it could be argued that what so inheres is inalienable and cannot be taken away at all. This may seem theoretically correct and logical. But, in fact, we are often met with

[164] (1978) 1 SCC 248.

denials of what is, in theory, inalienable or "irrefragible". Hence, we speak of "deprivations" or "restrictions" which are really impediments to the exercise of the "inalienable" rights' Such deprivations or restrictions or regulations of rights may take place, within prescribed limits, by means of either statutory law or purported actions under that law.

The degree to which the theoretically recognised or abstract right is concretised is thus determined by the balancing of principles on which an inherent right is based against those on which a restrictive law or orders under it could be imposed upon its exercise. We have to decide in each specific case, as it arises before us, what the result of such a balancing is.

In *Olga Tellis v. Bombay Municipal Corporation*[165] while examining whether pavement and slum dwellers Forcible eviction and removal of their hutments under Bombay Municipal Corporation Act deprives them of their means of livelihood and consequently right to life and whether Right to life would include right to livelihood, the Court held that the sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to live, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes

like livable, must be deemed to be an integral component of the right to life.

[165] (1985) 3 SCC 545.

If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.

In the judgment of *Francis Coralie v. Union Territory of Delhi*[166], Bhagwati, J, held: " We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingle with fellow human beings."

Again in *Bandhua Mukti Morcha v. Union of India*[167], Bhagwati, J, held: Article 21 mandates that no person shall be deprived of his life or personal liberty except according to the "procedure established by law" which this Court has interpreted to mean "due process of law". The bare of the poverty is the root of the child labour and they are being subjected to deprivation of their meaningful right to life, leisure, food, shelter, medical aid and education. Every child shall have without any discrimination on the ground of cast, birth, colour, sex, language, religion, social origin, property or birth alone, in the matter of right to health, well being, education and social protection.

Illiteracy has many adverse effects in a democracy governed by rule of law. A free educated citizen could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop spirit of tolerance and reform. Therefore, education is compulsory. Primary education to the children, in particular, to the child from poor, weaker sections, Dalits and Tribes and minorities is mandatory. The basic education and employment oriented vocational education should be imparted so as to empower the children with these segments of the society to retrieve them from poverty and, thus, develop

[166] (1981) 1 SCC 608.
[167] (1984) 3 SCC 161.

basic abilities, skills and capabilities to live meaningful life for economic and social empowerment. Compulsory education, therefore, to these children is one of the principal means and primary duty of the State for stability of the democracy, social integration and to eliminate social tensions.

The Supreme Court, further upholding the right of the people in hill areas for a suitable approach road in State of *Himachal Pradesh v. Umed Ram Sharma*[168] held that every person is entitled to life as enjoined in Article 21 of the Constitution. He has the right under Article 19(l)(d) to move freely throughout the territory of India and he has also the right under Article 21 to his life and that right under article 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself. Therefore, there should be road for communication in reasonable conditions in view of constitutional imperatives and denial of that right would be denial of the life as understood in its richness and fullness by the ambit of the Constitution.

In *Unni Krishnan v. State of A.P*[169] the Supreme court in deciding one of the most relevant and important issue held that the Right to education is not stated expressly as a Fundamental Right in Part III of the Constitution of India. However, having regard to the fundamental significance of education to the life of an individual and the nation, right to education is implicit In and flows from the right to life guaranteed by Article 21. That the right to education has been treated as one of transcendental importance in the life of an individual has been all over the world. Without education being provided to the citizen of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. The Constitution would fail. It goes without saying that the limits of economic capacity are, ordinarily speaking matters within the subjective satisfaction of the State. Therefore, it is not correct to say that reading the right to education into Article 21, this Court would be enabling each and every citizen of this, country to approach the courts to compel the State to provide him such education as he chooses. The right to free education is available only to children until they complete the age of 14 years. Thereafter, the obligation of the State to

[168] (1986) 2 SCC 86.
[169] (1993) 1 SCC 645.

provide education is subject to the limits of its economic capacity and development.

The Apex Court in *Saroj Rani v. Sudarshan Kumar Chadha*[170] held that Section 9 of the Hindu Marriage Act is not violative of Article 14 or Article 21 of the Constitution if the purpose of the decree for restitution of conjugal rights in the said Act is understood in its proper perspective and if the method of execution in cases of disobedience is kept in view. It is significant that unlike a decree of specific performance of contract a decree for restitution of conjugal rights, where the disobedience to such a decree is willful i.e. is deliberate, might be enforced by attachment of property. Where the disobedience follows as a result of a willful conduct i.e. where conditions are there for a wife or a husband to obey the decree for restitution of conjugal rights but disobeys the same in spite of such conditions, then only the properties have to be attached, is provided for. This is so to enable the Court in appropriate cases when the Court has decreed restitution for conjugal rights to offer inducement for the husband or wife to live together and to settle up the matter amicably. It serves a social purpose, as an aid to the prevention of break-upof marriage.

Right to free legal aid at the cost of the State to an accused who cannot afford legal service for reasons of poverty, indulgence or incommunicado situation is part of fair, just and reasonable procedure under Article 21.[171]

In *Kartar Singh v. State of Punjab,*[172], a Constitution Bench considered the right to speedy trial and opined that the delay is dependent on the circumstances of each case, because reasons for delay will vary. This Court held:

"The right to a speedy trial is a derivation from a provision of Magna Carta. This principle has also been incorporated into the Virginia Declaration of Rights of 1776 and from there into the Sixth Amendment of the Constitution of United States of America which reads, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...". It may be pointed out, in this connection, that there is a Federal Act of 1974 called 'Speedy Trial Act' establishing a set of time-

[170] (1984) 4 SCC 90.
[171] *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 98.
[172] (1994) 3 SCC 569.

limits for carrying out the major events, e.g., information, indictment, arraignment, in the prosecution of criminal cases. The right to a speedy trial is not only an important safeguard to prevent undue and oppressive incarceration, to minimise anxiety and concern accompanying the accusation and to limit the possibility of impairing the ability of an accused to defend himself but also there is a societal interest in providing a speedy trial".

The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309 of the Code of Criminal Procedure.[173]

In directing that children be provided suitable conditions in homes the Supreme Court in the case of *Sheela Barse v. Secretary, Children Aid Society*[174] has held that in recent years, children and their problems have been receiving attention both of the Government as also of the society but we must say that the problems are of such enormous magnitude that all that has been done till now is not sufficient. If there be no proper growth of children of today, the future of the country will be dark. It is the obligation of every generation to bring up children who will be citizens of tomorrow in a proper way. Today's children will be the leaders of tomorrow who will hold the country's banner high and maintain the prestige of the Nation. If a child goes wrong for want of proper attention, training and guidance, it will indeed be a deficiency of the society and of the Government of the day. A problem child is indeed a negative factor. Every society must, therefore, devote full attention to ensure that children are properly cared for and brought up in a proper atmosphere where they could receive adequate training, education and guidance in order that they may be able to have their rightful place in the society when they grow up.

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[173] supra
[174] (1987) 3 SCC 50.

The Supreme Court in *Vikram Deo Singh Tomar v. State of Bihar*[175] held that the right under Article 21 included right of female inmates of `Care Homes' established by State to live with human dignity. Directing the State the Court ordered that the State Government should provide suitable alternative accommodation expeditiously for housing the inmates of the present "Care Home". It is necessary meanwhile to put the existing building, in which the inmates are presently housed, into proper order immediately, and for that purpose to renovate the building and provide sufficient amenities by way of living room, bathrooms and toilets within the building, and also to provide adequate water and electricity. A suitable range of furniture, including Cots must be provided at once, and an adequate number of blankets and sheets, besides clothing, must be supplied to the inmates. The Welfare Department of the State Government will take immediate steps to comply with these directions. Every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen under Article 21 of the Constitution. And, so, in the discharge of its responsibilities to the people, the State recognises the need for maintaining establishments for the care of those unfortunates, both women and children, who are the castaways of an imperfect social order and for whom, therefore, of necessity provision must be made for their protection and welfare. Both common humanity and considerations of law and order require the State to do so. To abide by the constitutional standards recognised by well accepted principle, it is incumbent upon the State when assigning women and children to these establishments, to provide at least the minimum conditions ensuring human dignity. India is a welfare State governed by a Constitution which lays special emphasis on the protection and well-being of the weaker sections of society and seeks to improve their economic and social status. It shows a particular regard for women and children, and notwithstanding the pervasive ethos of the doctrine of equality it contemplates special provision being made for them by law.

Bhagwati J. in *Hussianinara Khatoon (I) v. Home Secretary, Bihar,*[176] held that a procedure which keeps such large number of people behind bars without

[175] (1988) Supp. SCC 734.
[176] (1980) 1 SCC 81.

trials so long cannot possible be regarded reasonable, just and fair so as to be in conformity with the requirement of Article 21. He further said, that although the right to speedy trial is not specifically mentioned as a fundamental right, it is implicit in the broad sweep and content of Article 21.

In the case of *Gulzar Ahmed Azmi v. Union of India*,[177] the petitioners have preferred this writ petition under Article 32 read with Article 21 of the Constitution seeking constitution of committee headed by retired Judge of Supreme Court with aid of competent investigating officers and experts to ascertain truth about Muslim youths alleged to have falsely been implicated in various bomb blast cases since 2002. Dismissing the said writ petition the Court held that it was premature to express which of accused was innocent and had been falsely implicated. There were various measures available to protect interest of persons claiming to be innocent and it would be open for them to demonstrate it before court concerned. It would be futile to entrust statutory duty of investigation to a supernumerary body headed by retired Judge of Supreme Court would lead to creation of parallel body without any statutory sanction.

The Supreme Court in a number of decisions has laid down exemplary cost on the wrong doers while exercising public duties in applications brought before it under Article 32 complaining violation of right to life enshrined under Article 21 of the Constitution.

The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by the Supreme Court or under Article 226 by the High Courts for established infringement of the indefeasible right guaranteed under Article 21 is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 32 or 226 seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State

[177] (2012) 10 SCC 731.

which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen.[178]

The factors governing the quality of life have been included in the expression "life" contained in Article 21 by reason of creative interpretation of the said provision by this Court, is it possible to argue that Article 21 does not provide for an absolute immunity? Article 21 does not only refer to the necessity to comply with procedural requirements, but also substantive rights of a citizen. It aims at preventive measures as well as payment of compensation in cases human rights of a citizen are violated.[179]

In the case of *Budhadev Karmaskar v. State Of West Bengal*[180], the Supreme Court laudable proceeded with the aim at looking possible ways for providing a life of dignity to the sex workers in our country by giving them some technical skills through which they can earn their livelihood instead of by selling their bodies. The legal background of these orders is Article 21 of the Constitution, in which the word `life' has been interpreted by this Court to mean a life of dignity, and not just an animal life.

The right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. The State should provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State. It cannot avoid

[178] Referring to Dr. A.S. Anand J., (as his Lordship then was) in *Mehmood Nayyar Azam vs State Of Chattisgarh*, (2012) 8 SCC 1.
[179] *Bombay Dyeing & Mfg. Co. Ltd v. Bombay Environmental Action Group*, (2006) 3 SCC 434.
[180] (2011) 11 SCC 538.

its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative liability.[181]

Right to free legal aid is a basic tenant under Article 21 of the Constitution. Upholding the right the Supreme Court had provided free legal assistance in appeal before it for the appellants in the famous case of *Mohd. Ajmal Amir Kasab v. State of Maharastra.* [182]

The requirement of providing free and adequate legal representation to an indigent person and a person accused of an offence. In that case, it was reiterated that an accused need not ask for legal assistance – the Court dealing with the case is obliged to inform him or her of the entitlement to free legal aid. This Court observed that it was now "settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21 of the Constitution[183].

In a case before it the Supreme Court has set aside the conviction and sentence of an accused on the view that since the requirements of law were not met in that case, and in the absence of the accused person being provided with legal representation at State cost, it was held that there was a violation of the fundamental right of the accused under Article 21 of the Constitution. The trial was held to be vitiated on account of a fatal constitutional infirmity.[184]

Article 22 of the Constitution provides protection against arrest and detention in certain cases.

Clause (1) provides that no person who is arrested shall be detained in custody without being informed, of soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

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[181] *Khatri v. State Of Bihar*, (1981) 1 SCC 627.
[182] (2012) 9 SCC 1.
[183] *Suk Das v. Union Territory of Arunachal Pradesh*, (1986) 2 SCC 401
[184] *Rajoo v. State of Madhya Pradesh*, (2012) 8 SCC 553.

Article 22 was initially taken to be the only safeguard against the legislature in respect of laws relating to deprivation of life and liberty protected by Article 21.

Clause (2) provides Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

The Supreme Court in *A.K. Gopalan v. State of Madras*[185] while examining Article 22 has opined that Article 22 has gone to the extent of even providing that Parliament may by law lay down the procedure to be followed by an advisory board. On all important points that could arise in connection with the subject of preventive detention provision has been made in Article 22 and that being so, the only correct approach in examining the validity of a law on the subject of preventive detention is by considering whether the law made satisfied the requirements of Article 22 or in any way abridges or contravenes them and if the answer is in the affirmative, then the law will be valid, but if the answer is in the negative, the law would be void. In expressing the view that Article 22 is in a sense self-contained on the law of preventive detention I should not however be understood as laying down that the framers of the article in any way overlooked the safeguards laid down in Article 21. Article 21, in my opinion lays down substantive law as giving protection to life and liberty in as much as it says that they cannot be deprived except according to the procedure established by law; in other words, it means that before a person can be deprived of his life or liberty as a condition precedent there should exist some substantive law conferring authority for doing so and the law should further provide for a mode of procedure for such deprivation. This article gives complete' immunity against the exercise of despotic power by the executive. It further gives immunity against invalid laws which contravene the Constitution. It gives also further guarantee that in its true concept there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty. It negatives the idea of

[185] AIR 1950 SC 27.

fantastic, arbitrary and oppressive forms of proceedings. The principles therefore underlying Article 21 have been kept in view in drafting Article 22. A law properly made under Article 22 and which is valid in all respects under that article and lays down substantive as well as adjective law on this subject would fully satisfy the requirements of Article 21, and that being so, there is no conflict between these two articles.

However the Court in *Maneka Gandhi v. Union of India*[186] taking a different view and elaborating the Article has held that the questions relating to either deprivation or restrictions of personal liberty, concerning laws falling outside Article 22 remain really unanswered by the *Gopalan's case*[187]. The field of 'due process' for cases of preventive detention is fully covered by Article 22 but other parts of that field not covered by Article 22 are 'unoccupied' by its specific provisions. In what may be called unoccupied portions of the vast sphere of personal liberty, the substantive as well as procedural laws made to cover them must satisfy the requirements of both Arts 14 and 19 of the Constitution.

In *State of M.P. v. Shobharam*[188] the Supreme Court, deciding on the question whether the constitutional right under Article 22 (1) would be attracted, at the trial when the accused were on bail, held that Under Article 22(1) a person arrested has the constitutional right to consult a legal practitioner concerning his arrest and, a person who has been arrested as well as one who though not arrested runs the risk of loss of personal liberty as a result of a trial, have the constitutional right to be defended by an advocate of their choice. But in a trial under a law which does not provide for an order resulting in the loss of his personal liberty, he is not entitled to the constitutional right, because, the Article is concerned only with giving protection to personal liberty. The Act does not give any power to deprive any one of his personal liberty either by way of arrest before the trial or by way of sentence of imprisonment as a result of the trial nor does it deprive an arrested person of his constitutional right to take steps against the arrest or to defend himself at a trial which might occasion the loss of his personal liberty. The

[186] (1978) 1 SCC 248.
[187] Supra.
[188] AIR 1966 SC 1910.

fact that the respondents were arrested under another statute, namely, the Criminal Procedure Code cannot make either the section or the Act void.

The State and its police authorities should see to it that the constitutional, and legal requirement to produce an arrested person before a judicial magistrate within 24 hours of the arrest is scrupulously observed. The provision inhibiting detention without remand is a very healthy provision which enables the magistrates to keep check over the police investigation and it is necessary that the magistrates should try to enforce this requirement and where it is found to be disobeyed come down heavily upon the police.[189]

If the police officer is forbidden from keeping an arrested person beyond twenty four hours without order of a magistrate, what should happen to the arrested person after the said period? It is a constitutional mandate that no person shall be deprived of his liberty except in accordance with the procedure established in law. Close to its heels the Constitution directs that the person arrested and detained in custody shall be produced before the nearest magistrate within 24 hours of such arrest. The only time permitted by Article 22 of the Constitution to be excluded from the said period of 24 hours is "the time necessary for going from the place of arrest to the court of the magistrate". Only under two contingencies can the said direction be obviated. One is when the person arrested is an "enemy alien". Second is when the arrest is under any law for preventive detention. In all other cases the Constitution has prohibited peremptorily that "no such person shall be detained in custody beyond the said period without the authority of a magistrate".[190]

Right under Article 22(2) is available only against illegal detention by police. It is not available against custody in jail of a person pursuant to a judicial order. Article 22(2) does not operate against the judicial order.[191]

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[189] *Khatri v. State Of Bihar*, (1981) 1 SCC 627

[190] *Manoj v. State Of Madhya Pradesh*, (1999) 3 SCC 715.

[191] *Pragyna Singh Thakur vs State Of Maharashtra*, (2011) 10 SCC 445.

4.4. RIGHTS REQUIRING STATE ACTION.

Clause (4) of Article 15 provides that “Nothing in this Article or in clause (2) of Article 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 Schedule Caste and the Schedule Tribe”.

The constitutional stultification of an integrated India through misuse of 'reservation' power provided for in Article 15 and 16 meant for the direct 'dalits' the pollution, by the political executive, of our founding creed of an egalitarian order by playing casteification politics and the morbid dilution of 'backwardness' marring the dream of a secular republic by the nightmare of a feudal vivisection of the people-if this picture drawn by be true, even in part, the basic task of transforming the economic order through social justice will be baulked through destructive communal disputes among the masses. Maybe, this may weaken the social revolution, leave an indelible stain and incurable wound on the body politic and justify the censure by history of the engineers of our political power and electoral processes. "Is caste the largest political party?" Has protective discrimination, so necessary in an insufferably unequal society, created a Frankenstein's monster ? Have we no dynamic measures to drown social, economic and educational backwardness of whole masses except the traditional self-perpetuating quasi-apartheidisation called 'reservation' ? Surely, our democratic, secular socialist republic is no wane moon but a creative power rooted in equal manhood, an egalitarian reservoir of vast human potential, a demographic distribution of talent benumbed by brahman centuries of social injustice but now seeking human expression under a new dispensation where 'chill penury' shall no longer 'repress their noble rage'. Caste, undoubtedly, in a deep-seated pathology to eradicate which the Constitution took care to forbid discrimination based on caste, especially in the field of education and services under the State. The rulings of this court, interpreting the relevant Articles, have hammered home the point that it is not constitutional to base identification of backward classes on caste alone qua caste. If a large number of castes masquerade as backward classes and perpetuate that division in educational campuses and public offices, the whole process of a caste-free society will be reversed. Is a

caste system being created and perpetuated by over-indulgent concessions, even at promotional levels, to the Scheduled Castes and the Scheduled Tribes, which are only a species of castes. "Each according to his ability" is being substituted by "each according to his caste", and underscore the unrighteous march of the officials belonging to the SCs & STs over the humiliated heads of their senior and more meritorious brothers in service. The after-math of the caste-based operation of promotional preferences is stated to be deterioration in the over-all efficiency and frustration in the ranks of members not fortunate enough to be born SCs & STs. Indeed, the 'inefficiency' bogie was so luridly presented that even the railway accidents and other operational calamities and managerial failures were attributed to the only villain of the piece viz., the policy of reservation in promotions. A constitutionally progressive policy of advantage in educational and official career based upon economic rather than social backwardness was commended as more in keeping with the anti-caste, pro-egalitarian tryst with our constitutional destiny.

Clause (4) was added by the Constitution (First Amendment) Act, 1951, as a result of the decision of the Supreme Court in the *State of Madras v. Champakam Dorairajan*[192].

In a land mark judgment the Supreme Court in *M. R. Balaji v. State of Mysore*[193] held that Article 15 (4) authorises the State to make special provision for the advancement of socially and educationally backward classes of citizens as distinguished from the Scheduled Castes and Scheduled Tribes. Some backward classes may, by presidential order, be included in Scheduled Castes and Tribes, and in that sense the backward classes for whose improvement provision is made in Art. 15 (4) are comparable to Scheduled Castes and Scheduled Tribes. The backwardness under Article 15 (4) must be social and educational. It is not either social or educational, but it is both social and educational. Though caste in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or dominant test. There are certain sections of Indian society such as Christians, Jains, Muslims, etc., who do not believe in caste system, and the test of caste does not apply to them. Moreover, social backwardness is in the ultimate analysis the

[192] AIR 1951 SC 226.
[193] AIR 1963 SC 649.

result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically socially backward. Moreover, the occupation of citizens and the place of their habitation also result in social backwardness. The problem of determining who are socially backward classes, is undoubtedly very complex, but the classification of socially backward citizens on the basis of their castes alone is not permissible under Art. 15(4).

In determining the educational backwardness of a class of citizens, the literacy test supplied by the Census Reports is not adequate. It is doubtful if the test of the average of the student population in the last three high school classes is appropriate in determining educational backwardness. In any case, the State is not justified in including, in the list of backward classes castes or communities whose average of student population per thousand is slightly above or very near or just below the State average. The legitimate view to take is that the classes of citizens whose average is well or substantially below the State average can be treated as educationally backward. It is not for this Court to lay down any hard and fast rule in this matter. It is the duty of the State to decide the matter in a manner which is consistent with the requirements of Article 15 (4). The division of backward classes into two categories of backward classes and more backward classes is not warranted by Article 15 (4). Article 15 (4) authorises special provision being made for the really backward classes but by introducing two categories, what is intended is to devise measures for all classes of citizens who are less advanced as compared to the most advanced classes in the State. That is not the scope of Art. 15 (4). The object of making a special provision for the advancement of castes or communities is to carry out the Directive Principle enshrined in Article 46. Unless the educational and economic interests of the weaker sections of the people are promoted quickly and liberally, the ideal of establishing social and economic equality cannot be attained. Article 15 (4) authorises the State to take adequate steps to achieve the object.

The Constitutional validity of tests for determining backwardness under Articles 15(1) and (4) and29(2) came for consideration before the Supreme Court

in *State of Uttar Pradesh v. Pradip Tandon*[194]and the court held that reservation in favour of candidates from rural areas is unconstitutional. The reservations for the hill and Uttrakhand areas are severable and are valid. Art. 15(1) states that the State shall not discriminate against any citizen grounds only of religion, race, caste, sex, place of birth or any of them. Article 29(2) states 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.

The Constitution does not enable the State to bring socially and educationally backward areas within the protection of Article 15(4). The backwardness contemplated under Article 15(4) is both social and educational. Article 15(4) speaks of backwardness of classes of citizens and, therefore, socially and educationally backward classes of citizens in Article 15(4) could not be equated with castes'.

Neither caste nor race nor religion can be made the basis of classification for the Purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination on grounds only of religion, race and caste, caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1). When a classification takes recourse to caste as one of the criteria in determining socially and educationally backward classes the expression classes" in that case violates the rule of expression unius est exclusio alterius. The socially and educationally backward classes of citizens are groups other than, groups based on caste.

The place of habitation and its environment is also a determining factor in judging the social and educational backwardness. Backwardness is judged by economic basis that each region has its own measurable possibilities for the Maintenance of human number, standards of living and fixed property. From an economic point of view the classes of citizens are backward when they do not make effective use of resources. Neglected opportunities and people in remote

[194] (1971) 1 SCC 267.

places raise walls of social backwardness of people. People in the hill like Uttrakhand areas illustrate the educationally backward classes of citizens because lack of educational facilities keep them stagnant and they have neither meaning and values nor awareness for education.

Gajendragadkar J. in *M. R. Balaji v. State of Mysore*[195], opined that: "When Art 15(4) refers to the special provision for the advancement of certain classes or scheduled castes or scheduled tribes, it must not be ignored that the provision which is authorised to be made is a special provision it is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Art. 15(4) authorises special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Art. 15(4). It would be extremely unreasonable to assume that in enacting Art.15(4) the Parliament intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tries was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored."

Article 15(4) speaks about "socially and educationally backward classes of citizens" while Article 16(4) speaks only of "any backward class of citizens." However, it is now settled that the expression "backward class of citizens" in Article 16(4) means the same thing as the expression "any socially and educationally backward class of citizens" in Article 15(4). In order to qualify for being called a 'backward class citizen' he must be a member of a socially and educationally backward class. It is social and educational backwardness of a Class which is material for the purposes of both Article 15(4) and 16(4). Many State Governments had found it difficult to determine which class of citizens can be properly regarded as socially and educationally backward.

[195] AIR 1963 SC 649.

Reservation should and must be adopted to advance the prospects of weaker sections of society, but while doing so, care should be taken not to exclude admission to higher educational centres of deserving and qualified candidates of other communities. Reservations under Article 15 (4) and 16 (4) must be within reasonable limits. The interests of weaker sections of society, which are a first charge on the States and the Centre, have to be adjusted with the interests of the community as a whole. Speaking generally and in a broad way, a special provision should be less than 50%. The actual percentage must depend upon the relevant prevailing circumstances in each case.

The object of Article 15 (4) is to advance the interests of the society as a whole by looking after the interests of the weaker elements in society. If a provision under Article 15 (4) ignores the interests of society, that is clearly outside the scope of Article 15 (4). It is extremely unreasonable to assume that in enacting Article 15 (4), Parliament intended to provide that where the advancement of the backward classes or the Scheduled Castes and Tribes were concerned, the fundamental right of the citizens constituting the rest of the society were to be completely and absolutely ignored. Considerations of national interest and the interests of the community and the society as a whole have already to be kept in mind. [196]

Article 15 was amended and Art. 15 (4) was added in view of the judgment of this Court in the *State of Madras v. Smt. Champakam Dorairajan*[197]. Article 15 (4) is a proviso or an exception to Articles 15 (1) and 29 (2). If an order is justified by the provisions of Article 15 (4), its validity cannot be questioned on the ground that it violates Article 15 (4) or Article 29 (2).

It is true that the Constitution contemplates the appointment of a commission whose report and recommendations can be of assistance to the authorities concerned for taking adequate steps for the advancement of backward classes, but this does not mean that the appointment of the commission and the subsequent steps that would follow it are a condition precedent to any action being taken under Article 15 (4). The special provisions contemplated under Article 15

[196] *M. R. Balaji v. State of Mysore,* AIR 1963 SC 649.
[197] AIR 1951 SC 226.

(4) can be made by the Union or the States by an executive order. It cannot be said that the President alone can make special provision for the advancement of the backward classes.[198]

Article 15 (4) authorises the State to make special provision for the advancement of socially and educationally backward classes of citizens as distinguished from the Scheduled Castes and Scheduled Tribes. Some backward classes may, by presidential order, be included in Scheduled Castes and Tribes, and in that sense the backward classes for whose improvement provision is made in Article 15 (4) are comparable to Scheduled Castes and Scheduled Tribes. The backwardness under Article 15 (4) must be social and educational. It is not either social or educational, but it is both social and educational. Though caste in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or dominant test. There are certain sections of Indian society such as Christians, Jains, Muslims, etc., who do not believe in caste system, and the test of caste does not apply to them. Moreover, social backwardness is in the Ultimate analysis the result of poverty to a very large extent.

It was pointed out in *Indira Sawhney v. Union of India*[199], that reservations are not to be made on the basis of population of a particular category. Reservation for education is to be made under Article 15(4) keeping in view the social and educational backwardness and the need to provide adequate educational opportunities.

In a case challenging the quota system for various categories in Andaman and Nicobar Island the Supreme Court in *Parents Association v. Union Of India*[200] opined that we may make it clear, even at the outset, that the 'quotas' fixed in the various proceedings, except the quota fixed for Tribals, do not fall under Article 15(4) at all. The question of the validity of the quotas for the Central Government servants, the pre-1942 and post 1942 settlers and the 10 year old is to be considered on the basis of Article 14 and not under Article 15(4).

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[198] Ibid.
[199] 1992 Suppl (3) SCC 217.
[200] (2000) 2 SCC 657.

Taking a different view the Supreme Court in the case of *Subhash Chandra v. Delhi Subordinate Services Selection Board*,[201] examined the relation ship between Article 15(4) and 16(4). The Court opined that the equality clause contained in Articles 14, 15 and 16 constitutes a set of fundamental rights of all persons whether they are citizens of India or not. Whereas in terms of Article 14 of the Constitution of India all persons similarly situated are entitled to enforcement of their fundamental right of equality before the law and equal protection of the laws. Articles 15 and 16 although aim at equality but also provide for certain exceptions. In terms of the aforementioned provisions, enabling provisions have been made so as to enable the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes as provided for in clause (4) of Article 15 of the Constitution of India and for 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 of the State as provided for in clause (4) of Article 16 thereof. We may at the outset notice the distinction between clause (4) of Article 15 and clause (4) of Article 16 of the Constitution. The words `backward classes' and `Scheduled Castes and Scheduled Tribes' find place in clause (4) of Article 15 but only the words `backward class of citizens' find place in clause (4) of Article 16. It is, however, beyond any doubt or dispute that the term `backward class of citizens' contained in clause (4) of Article 16 includes Scheduled Castes and Scheduled Tribes for all intent and purport.

The principle behind Article 15(4) is that a preferential treatment can be given validly when the socially and educationally backward classes need it. This article enables the State Government to make provisions for upliftment of Scheduled Castes and Scheduled Tribes including reservation of seats for admission to educational institutions. It was also held that Article 15(4) is not an exception but only makes a special application of the principle of reasonable classification. Article 15(4) does not make any mandatory provision for reservation and the power to make reservation under Article 15(4) is discretionary and no writ

[201] (2009) 15 SCC 458

can be issued to effect reservation. Such special provision may be made not only by the Legislature but also by the Executive. [202]

In *AIIMS Student's Union vs. AIIMS*[203], while considering the similar issue, it was held, that when protective discrimination for promotion of equalisation is pleaded, the burden is on the party who seeks to justify the ex facie deviation from equality. The basic rule is equality of opportunity for every person in the country, which is a constitutional guarantee. A candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance when we reach the higher levels and education like postgraduate courses. Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped -- the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation.

It is a well-accepted premise in our legal system that ideas such as `substantive equality' and` distributive justice' are at the heart of our understanding of the guarantee of `equal protection before the law'. The State can treat unequals differently with the objective of creating a level- playing field in the social, economic and political spheres. The question is whether `reasonable classification' has been made on the basis of intelligible differentia and whether the same criteria bears a direct nexus with a legitimate governmental objective. When examining the validity of affirmative action measures, the enquiry should be governed by the standard of proportionality rather than the standard of `strict scrutiny'. Of course, these affirmative action measures should be periodically reviewed and various measures are modified or adapted from time to time in keeping with the changing

[202] *Gulshan Prakash v. State Of Haryana*, (2010) 1 SCC 477.
[203] (2002) 1 SCC 428.

social and economic conditions. Reservation of seats in Panchayats is one such affirmative action measure enabled by Part IX of the Constitution.[204]

In *Ashok Kumar Thakur v. Union of India*[205] answering to the queries whether Articles 15(4) and 15(5) mutually contradictory, such that 15(5) is unconstitutional?

The Court opined that I am able to read them harmoniously.

Article 15(5) is specific in that it refers to special provisions that relate to admission in educational institutions, whereas 15(4) makes no such reference to the type of entity at which special provisions are to be enjoyed.

Because 15(5) is later in time and specific to the question presented, it must neutralize 15(4) in regard to reservation in education. Constitutional articles are to be read harmoniously, not in isolation. Our interpretation is harmonious because Article 15(4) still applies to other areas in which reservation may be passed.

[206]Does Article 15(5)'s exemption of minority institutions from the purview of reservation violate Article 14 of the Constitution?

Given the inherent tension between Articles 29(2) and 30(1), I find that the overriding constitutional goal of realizing a casteless/classless society should serve as a tie-breaker. We will take a step in the wrong direction if minority institutions (even those that are aided) are subject to reservation.

Minority aided institutions were subject to a limited form of reservation. In order to preserve the minority character of the institution, reservation could only be imposed to a reasonable extent. Minority aided institutions could select their own students, contingent upon admitting a reasonable number of non-minority students per the percentage provided by the State Government. This conclusion was derived from two conflicting constitutional articles. Of course, I am only concerned with minority aided institutions because I have already determined that the State shall

[204] *Union of India v. Rakesh Kumar,* (2010) 4 SCC 50.
[205] (2008) 6 SCC 1.
[206] Supra Note 132.

not impose reservation on unaided institutions (minority or non-minority). Article 30(1) provides that "all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice." Article 29(2) states 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." In other words, 30(1) by itself would allow minority aided institutions to reject all non-minority candidates, and 29(2) by itself would preclude the same as discrimination based solely on religion. Yet neither provision exists by itself. Rather than disturb the Constitution, this Court struck a compromise and diluted each provision in order to uphold both.

[207]At what point is a student no longer Educationally Backward and thus no longer eligible for special provisions under 15(5)?

Once a candidate graduates from a university, the said candidate is educationally forward and is ineligible for special benefits under Article 15(5) of the Constitution for post graduate and any further studies thereafter.

[208]Would it be reasonable to balance OBC reservation with societal interests by instituting OBC cut-off marks that are slightly lower than that of the general category?

It is reasonable to balance reservation with other societal interests. To maintain standards of excellence, cut off marks for OBCs should be set not more than 10 marks out of 100 below that of the general category.

The insertion of Clause (5) of Article 15, the 93rd Constitutional Amendment has empowered the State to enact legislations that may have very far reaching beneficial consequences for the nation. In point of fact, each and every one of the beneficial consequences we have discussed as being possible, would enhance the social justice content of the equality code, provide for enhancements of social and economic welfare at the lower end of the social and economic spectrum which can only behoove to the benefit of all the citizens thereby promoting the values inherent in Article 21, promote more informed, reasoned and

[207] Supra Note 132.
[208] Supra Note 132.

reasonable debate by individuals belonging to various deprived segments of the population in the debates and formation of public opinion about choices being made, and the course that political and institutional constructs are taking in this country. Consequently we find that clause (5) of Article 15 strengthens the social fabric in which the Constitutional vision, goals and values could be better achieved and served. Or in terms of the analogy to Ship of Theseus, Clause (5) of Article 15 may be likened to a necessary replacement and in fact an enhancement in the equality code, so that it makes our national ship, the Constitution, more robust and stable.[209] Clause (5) of Article 15 does not violate the basic structure of the Constitution.

Clause (4) of Article 16 provides that "Nothing in this Article shall prevent the State from making any provisions for the reservation of appointments or posts in favour of any backward class of citizen which, in the opinion of the State, is not adequately represented in the service under the State.

Discrimination is the essence of classification. Equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved.

Swami Vivekananda in one of his letters addressed to his disciples in Madras dated 24.1.1894 has stated thus: Caste or no caste, creed or no creed, or class, or caste, or nation, or institution which bars the power of free thought and action of an individual - even so long as that power does not injure others - is devilish and must go down.[210]

The preamble to the Constitution of India proclaims the resolution of the people to secure to all its citizens justice, social, economic and political,

[209] *Indian Medical Association v. Union of India,* (2011) 7 SCC 179.
[210] *'The Complete Works of Swami Vivekananda,* Vol. V page 29'.

equality of status and opportunity and to promote fraternity assuring the dignity of the individual. The right to equality before the law and equality of opportunity in the matter of public employment are guaranteed as fundamental rights. The State is enjoined upon by the Directive Principles to promote the welfare of the people, to endeavour to eliminate inequalities in status, facilities and opportunities and special provisions have been made, in particular, for the protection and advancement of the Scheduled Castes and Scheduled Tribes in recognition of their low social and economic status and their failure to avail themselves of any opportunity of self-advancement. In short the constitutional goal is the establishment of a socialist democracy in which justice-economic, social and political is secure and all men are equal and have equal opportunity. Inequality whether of status, facility or opportunity is to end, privilege is to cease and exploitation is to go. The under-privileged, the deprived and the exploited are to be protected and nourished so as to take their place in an egalitarian society. State action is to be towards those ends. It is in this context that Article 16 has to be interpreted when State action is questioned as contravening Article 16.

The provision of preferential treatment for members of backward classes including Scheduled Castes and Scheduled Tribes is that contained in clause (4) of Article 16. There is no scope for spelling out such preferential treatment from the language of clause (1) of Article 16 because the language of that clause does not warrant any preference to any citizen against another citizen. The language of Article 16(4) indicates that but for this clause it would not have been permissible to make any reservation of appointments or posts in favour of any backward class of citizens.

In State of Madras v. Champakkam Dorairajan[211] a seven-Judge Bench of this Court in that case referred to clause (4) of article 16 of the Constitution and observed:

"If the argument founded on article 46 were sound then clause (4) of article 16 would have been wholly unnecessary and redundant. Seeing, however, that clause (4) was inserted in article 16, the omission of such an express provision from article 29 cannot but be regarded as significant. It may wellbe that the

[211] AIR 1951 SC 226.

intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds. The protection of backward classes of citizens may require appointment of members of backward classes in State services and the reason why power has been given to the State to provide for reservation of such appointments for backward classes may under those circumstances be understood. That consideration, however, was not obviously considered necessary in the case of admission into an educational institution and that may well be the reason for the omission from article 29 of a clause similar to clause (4) of article 16."

In *Triloki Nath State Of Jammu & Kashmir*[212] the Supreme Court has held that the expression 'backward class' is not used as synonymous with 'backward caste' or 'backward community'. The expression 'class' in its ordinary connotation may mean a homogenous section of the people grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like; but, for purposes of Article 16(4) in determining whether a section forms a class a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution. The members of an entire caste or community may in the social, economic and educational scale of values at a given time, be backward and may, on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class.

A Nine-Judge Bench of the Supreme Court in *Indra Sawhney vs. Union of India*[213] referred to as the "Mandal case" authoritatively interpreted various aspects of Article 16(4) of theConstitution of India. While holding that Article 16(4) aims at group backwardness this Court came to the conclusion that socially advanced members of backward class- `creamy layer' - have to be excluded from the said` class'. It was held that the `class' which remains after excluding the `creamy layer' would more appropriately serve the purpose and object of Article 16(4).The protective discrimination in the shape of job

[212] AIR 1967 SC 1283.
[213] (1992) Suppl. (3) SCC 217.

reservations under Article 16(4) has to be programmed in such a manner that the most deserving section of the backward class is benefitted. Means-test by which `creamy layer' is excluded, ensures such a result. The process of identifying backward class cannot be perfected to the extent that every member of the said class is equally backward. There are bound to be disparities in the class itself. Some of the members of the class may have individually crossed the barriers of backwardness but while identifying the class they may have come within the collectivity. It is often seen that comparatively rich persons in the backward class are able to move in the society without being discriminated socially. The members of the backward class are differentiated into superior and inferior. The discrimination which was practiced on them by the higher class is in turn practiced by the affluent members of the backward class on the poorer members of the same class. The benefits of social privileges like job reservations are mostly chewed up by the richer or more affluent sections of the backward class and the poorer and the really backward sections among them keep on getting poorer and more backward. It is only at the lowest level of the backward class where the standards of deprivation and the extent of backwardness may be uniform. The jobs are so very few in comparison to the population of the backward classes that it is difficult to give them adequate representation in the State services. It is, therefore, necessary that the benefit of the reservation must reach the poorer and the weakest section of the backward class. Economic ceiling to cut off the backward class for the purpose of job reservations is necessary to benefit the needy sections of the class. The means-test is, therefore, imperative to skim-off the affluent section of the backward class.

Pursuant to the directions by this Court in *`Mandal Case'*[214] Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) issued office memorandum dated September 8,1993 providing for 27% reservation for the Other Backward Classes. Para 2(c) of the memorandum excludes the persons/sections mentioned in column 3 of the Schedule to the said memorandum. In other words, the Schedule consists of the `creamy layer'.

[214] Supra.

The Supreme Court in *Ashoka Kumar Thakur v. State of Bihar* [215]after carefully examining the criteria for identifying the `creamy layer' laid down by the government of India in the Schedule, quoted above, and we are of the view that the same is in conformity with the law laid down by this Court in `Mandal case', held, " We have no hesitation in approving the rule of exclusion framed by the Government of India in para 2(c) read with the Schedule of the Office Memorandum quoted above. This Court, in `Mandal Case' has clearly and authoritatively laid down that the affluent part of a backward class called `creamy layer' has to be excluded from the said class and the benefit of Article 16(4) can only be given to the "class" which remains after the exclusion of the `creamy layer'. The backward class under Article 16(4) means the class which has no element of `creamy layer' in it. It is mandatory under Article 16(4) as interpreted by this Court - that the State must identify the `creamy layer' in a backward class and thereafter by excluding the `creamy layer' extent the benefit of reservation to the `class' which remains after such exclusion. This Court has laid down, clear and easy to follow, guidelines for the identification of `creamy layer'.

R.M. Sahai, J. held that the exclusion of `creamy layer' is a social purpose. Any legislation or executive action to remove such persons individually or collectively cannot be constitutionally invalid. The learned Judge elaborated his conclusions as under:-

"More backward and backward is an illusion. No constitutional exercise is called for it. What is required is practical approach to the problem. The collectivity or the group may be backward class but the individuals from that class may have achieved the social status or economic affluence. Disentitle them from claiming reservation. Therefore, while reserving posts for backward classes, the departments should make a condition precedent that every candidate must disclose the annual income of the parents beyond which one could not be considered to be backward. What should be that limit can be determined by the appropriate State. Income apart, provision should be made that wards of those backward classes of persons who have acheived a particular status in society either political or social or economic or if their parents are in higher services

[215] (1995) 5 SCC 403.

then such individuals should be precluded to avoid monopolisation of the services reserved for backward classes by a few. Creamy layer, thus, shall stand eliminated."

A bench of three learned Judges of the Supreme Court in *State of U.P. v. Pradip Tandon*[216] had to consider whether the scheme of reservation of seats in medical colleges in favour of hill and Uttarakhand areas of State of U.P. was sustainable as per Article 15(1)(4) and Article 29(2) of the Constitution of India. Upholding the said scheme on 19th November 1974 this Court speaking through Chief Justice Ray observed as under:

" The hill and uttarakhand areas in Uttar Pradesh are instance of socially and educationally backward classes of citizens for these reasons. Backwardness is judged by economic basis that each region has its own measurable possibilities for the maintenance of human numbers, standards of living and fixed property. From an economic point of view the classes of citizens are backward when they do not make effective use of resources. When large areas of land maintain a parse, disorderly and illiterate population whose of social backwardness is observed. When effective territorial specialisation is not possible in the absence of means of communication and technical processes as in the hill and Uttrakhand areas the people (residing there) are socially backward classes of citizens. Neglected opportunities and people in remote places raise walls of social backwardness of people. Educational backwardness is ascertained with reference to these factors. Where people have traditional apathy for education on account of social and environmental conditions or occupational handicaps, it is an illustration of educational backwardness. The hill and Uttrakhand areas are inaccessible. There is lack of educational institutions and educational aids. People in the hill and Uttrakhand areas illustrate the educationally backward classes of citizens because lack of educational facilities keep them stagnant and they have either meaning and values nor awareness for education."

It is, therefore, obvious that residents of hills and Uttarakhand areas were treated as socially and educationally backward classes of citizens entitled to benefit under Articles 15(1),15(4) and 29(2) of the Constitution. But simply on this basis

[216] AIR 1975 SC 563.

it cannot be urged that this class of citizens could be condemned as socially and educationally backward class of citizens till eternity, however, much they may like to be stigmatized as educationally and socially backward class of citizens. This class is always required to be judged in the light of the existing fact situation at a given point of time. There cannot be a class of citizens which can be treated perpetually to be a socially and educationally backward class of citizens, Every citizen has right to develop socially and educationally.

The Supreme Court in *Subhash Chandra v. Delhi Subordinate Services Selection Board*,[217] opined that Article 16(4) is an enabling provision and confers a discretionary power on the State to make reservation in the matter of appointments in favour of backward classes of citizens which in its opinion are not adequately represented either numerically or qualitatively in services of the State. But it confers no constitutional right upon the members of the backward classes to claim reservation. Article 16(4) is not controlled by a Presidential Order issued under Article 341(1) or Article 342(1) of the Constitution in the sense that reservation in the matter of appointment on posts may be made in a State or Union territory only for such Scheduled Castes and Scheduled Tribes which are mentioned in the schedule appended to the Presidential Order for that particular State or Union territory. This Article does not say that only such Scheduled Castes and Scheduled Tribes which are mentioned in the Presidential Order issued for a particular State alone would be recognized as backward classes of citizens and none else. If a State or Union territory makes a provision where under the benefit of reservation is extended only to such Scheduled Castes or Scheduled Tribes which are recognized as such, in relation to that State or Union territory then such a provision would be perfectly valid. However, there would be no infraction of clause (4) of Article 16 if a Union territory by virtue of its peculiar position being governed by the President as laid down in Article 239 extends the benefit of reservation even to such migrant Scheduled Castes or Scheduled Tribes who are not mentioned in the schedule to the Presidential Order issued for such Union territory.

It can also be no longer disputed that reservation under Article 16 (4) of the Constitution of India aims at group backwardness. It provides for group right.

[217] (2009) 15 SCC 458.

Article 16 (1) of the Constitution of India guarantees equality of opportunity to all citizens in matters relating to employment. However, in implementing the reservation policy, the State has to strike a balance between the competing claims of the individual under Article 16(1) and the reserved categories falling within Article 16(4). A Constitution Bench of this Court in the case of *Indra Sawhney case*[218], this Court reiterated the need to balance the Fundamental Right of the individual under Article 16(1) against the interest and claim of the reserve category candidates under Article 16(4) of the Constitution. It needs no emphasis to say that the principal aim of Article 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provision have to be harmonized keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article The provision under Article 16(4) conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society.

It is relevant to point out that Dr. Ambedkar[219] himself contemplated reservation being confined to a minority of seats. No other member of the Constituent Assembly suggested otherwise. It is thus, clear that reservation of a majority of seats were never envisaged by the found Fathers.

With regard to the rule of 50% reservation the Supreme Court in *Jitendra Kumar Singh v. State of U.P,*[220] expressed that we are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification at this juncture is required. All reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as `vertical reservations' and horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes under Article 16(4) may be called vertical reservations whereas reservations in favour of physically handicapped under clause (1) of

[218] AIR 1993 SC 477
[219] Dr. Ambedkar, speech in *Constituent Assembly Debates*, set out in para 28
[220] (2010) 3 SCC 119

Article 16 can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations, what is called interlocking reservations.

In *Ashok Kumar Gupta v. State of U.P.*[221], it has been laid down that the right to promotion is only a "statutory right" while the rights covered by Articles 16(4) and 16(4A) are "fundamental rights". It reads as follows:- "It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or class of posts depends upon the operation of the conditions of service. Article 16(4) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as a fundamental right where they do not have adequate representation consistently with the efficiency of administration. Article 16(4) has come into force from 17.6.1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right."

Equality has two facets "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for Backward Classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognise the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions

[221] (1997) 5 SCC 201.

are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between "equality in law" and "equality in fact". If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of "guided power". We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred".[222]

4.5 POSITIVE DECLARATION OF RIGHTS.

Article 19 embodies the “Right to Freedom” clause in the Constitution.

It provides protection of certain rights regarding freedom of speech, etc. Article 19 of the Constitution guarantees to the citizen of India the six fundamental freedoms which are exercisable by them throughout and in all parts of the territory of India. These are (a) freedom of speech and expression, (b) freedom of assembly, (c) freedom of Association, (d) freedom of movement, (e) freedom of residence and settlement, and (f) freedom of profession, occupation, trade or business.

However it must be remembered that a free man has far more and wider rights than those stated in Article 19 (1) of the Constitution. For example, a free

[222] *Ashoka Kumar Thakur v. Union Of India*, (2008) 6 SCC 1

man can eat what he likes subject to rationing laws, work as much as he likes or idle as much as he likes. He can drink anything he likes subject to the licensing laws and smoke and do a hundred and one things which are not included in Article 19. If freedom of person was the result of Article 19, then a free man would only have the seven rights mentioned in that article. But obviously the free man in India has far greater rights."

The freedoms enumerated in Article 19(1) and those great and basic rights which are recognized as the natural rights inherent in the status of a citizen and these rights form a mechanism to impart social justice in this welfare State.

Article 19(1)(a) secures to every citizens the freedom of speech and expression. This clause should be read with clause (2) which provides that the said right shall not prevent the operation of law relating to the matters specified therein.

Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law, so that they may not conflict with public welfare or general morality. Article 19 uses the expression ' 'freedom" and mentions the several forms and aspects of it which are secured to individuals, together with the limitations that could be placed upon them in the general interests of the society. The right to the safety of one's life and limbs and to enjoyment of personal liberty, in the sense of freedom from physical restraint and coercion of any sort, are the inherent birthrights of a man. The essence of these rights consists in restraining others from interfering with them and hence they cannot be described in terms of "freedom" to do particular things. There is also no question of imposing limits on the activities of individuals so far as the exercise of these rights is concerned. For these reasons, these rights have not been mentioned in Article 19 of the Constitution. An individual can be deprived of his life or personal liberty only by action of the State, either under the provisions of any penal enactment or in the exercise of any other coercive process vested in it under law. What the Constitution does therefore is to put restrictions upon the powers of the State, for protecting the rights of the individuals. The restraints on State authority operate as guarantees of individual freedom and secure to the people the

enjoyment of life and personal liberty which are thus declared to be inviolable except in the manner indicated in these articles.

Das. J. in *A.K Gopalan v. State of Madras*[223] in deciding whether law relating to preventive detention infringes Fundamental Right as to freedom of movement, opined that Article 19 (1) postulates a legal capacity to exercise the rights guaranteed by it and if a citizen loses the freedom of his person by reason of lawful detention as a result of a conviction for an offence or otherwise he cannot claim the right s under- sub-clauses (a) to (e) and (g) of Article 19(1) likewise if a citizen's property is compulsorily acquired under Article 31, he cannot claim the right under sub clause (f) of Article 19 (1) with respect to that property. In short the rights under sub-clauses (a) to (e) and (g) end where lawful detention begins and therefore the validity of a preventive detention Act cannot be judged by Article 19 (5).

In *Hari Khemu Gawali v. Deputy Commissioner of Police, Bombay*[224] the Court, held that Article 19 of the Constitution has guaranteed the several rights enumerated under that article to all citizens of India. After laying down the different rights to freedom in clause(1), clauses (2) to (6) of that article recognize the right of the State to make laws putting reasonable restrictions on those rights in the interest of the general public, security of the State, public order, decency or morality and for other reasons set out in those sub-clauses, so that there has to be a balance between individual rights guaranteed under Article 19(1) and the exigencies of the State which is the custodian of the interests of the general public, public order, decency or morality and all other public interests which may compendiously be described as social welfare. For preventing a breach of the public peace or the invasion of private rights the State has sometimes to impose certain restrictions on individual rights. It therefore becomes the duty of the State not only to punish the offenders against the penal laws of the State but also to take preventive action. "Prevention, is better than cure" applies not only to individuals but also to the activities of the State in relation to the citizens of the State.

[223] AIR 1950 SC 27.
[224] AIR 1956 SC 559.

The *Bank Nationalization Case*[225] has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected.

Bhagwati, J. in the *Express Newspapers case*[226] speaking for the Court said that the freedom of speech and expression includes freedom of propagation of ideas which freedom is ensured by the freedom of circulation and that the liberty of the press is an essential part of the right to freedom of speech and expression and that the liberty of the press consists in allowing no previous restraint upon publication.

Describing the impugned Act in the Express Newspapers case as a measure which could be legitimately characterised to affect the press this Court said that if the intention or the Proximate effect and operation of the Act was such as to bring it within the mischief of Article 19(1) (a) it would certainly be liable to be struck down.

The Supreme Court in *Bennett Coleman & co. v. Union of India*,[227] held that although, our Constitution does not contain a separate guarantee of Freedom of the Press, apart from the freedom of expression and opinion contained in Article. 19(1) (a) of the Constitution, yet it is well recognised that the Press provides the principal vehicle of expression of their views to citizens. It has been said : "Freedom of the Press is the Ark of the Covenant of Democracy because public criticism is essential to the working, of its institutions. Never has criticism been more necessary than today, when the weapons of propaganda are so strong and so subtle. But, like other liberties, this also must be limited." The extent of permissible limitations on freedom of expression is also indicated by our Constitution which contains the fundamental law of the land. To that law all Governmental policies, rules and regulations, orders and directions, must conform

[225] *R.C. Cooper v. Union of India*, (1970) 1 SCC 248.
[226] *Express Newpapers (P) Ltd. v. Union of India*, AIR 1958 SC 578.
[227] (1972) 2 SCC 788.

so that there is "a Government of laws and not of men" , or, in other words, a Government whose policies are based on democratic principles and not on human caprice or arbitrariness. Article 19(2) of the Constitution requires that Governmental action which affects freedom of speech and expression of Indian citizens should be founded on some "law" and also that such "law" should restrict freedom of expression and opinion reasonably only "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, Public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence." Although, the ambit of restrictions which can be imposed by "law" on freedom to carry on any occupation, trade, or business, guaranteed by Article 19 (1) (g) of the Constitution, is wider than that of restrictions on freedom of speech and expression, yet, these restrictions have also to be limited to those which are reasonably necessary "in the interest of the general public" as contemplated by Article 19(6) of the Constitution.

The right to freedom under Article 19 has been long recognized as a natural and inalienable right that belongs to all citizens. Indeed, what would Independence mean without it? Chief Justice Sikri cites the following passage in Kesavananda[228] at para 300: "That article (Article 19) enumerates certain freedoms under the caption "right to freedom" and deals with those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country."

In a landmark judgment explaining the concept of freedom of expression as envisaged in our Constitution the Supreme Court in *Maneka Gandhi v. Union of India*,[229] held that Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not, mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow unimpeded and impartial justice (social, economic and political), freedom (not only of thought, expression, belief, faith and worship, but also of association, movement vocation or occupation as well as of acquisition and possession of reasonable property), or equality (of status and of opportunity, which imply

[228] *Kesavananda Bharati v. State of Kerela*, (1973) 4 SCC 225.
[229] (1978) 1 SCC 248.

absence of unreasonable or unfair discrimination between individuals, groups and classes), and of fraternity (assuring dignity-of the individual and the unity of the nation) which our Constitution visualizes. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat very objects of such protection. Article 19(1)(a) guarantees to Indian Citizens the right to freedom of speech and expression. It does not delimit the grant of that right in any manner and there is no reason arising either out of interpretational dogmas or pragmatic considerations why courts should strain the language of the Article to cut down amplitude of that right. The plain meaning of the clause guaranteeing free speech and expression is that Indian citizens are entitled to exercise that right wherever they choose regardless of geographical considerations here are no geographical limitations to freedom of speech and expression guaranteed under Art. 19(1) (a) and this freedom is exercisable not only in India but also outside and if State action sets up barriers to its citizens' freedom of expression in any country in the world, it would violate Article 19(1) (a) as much as if it inhibited such expression within the country. This conclusion would on a parity of reasoning apply equally in relation to fundamental right to practise any profession or to carry on any occupation, trade or business, guaranteed under Article 19(1)(g). Freedom to go abroad incorporates the important function of an ultimum refunium liberatis when other basic freedoms are refused. Freedom to go abroad has much social value and represents a basic human right of great significance. It is in fact incorporated as in alienable human right in Article 13 of the Universal Declaration of Human Rights. But it is not specifically named as a fundamental right in Art. 19(1) of the Constitution.

Even if a right is not specifically named in Art. 19(1) it may still be a fundamental right covered by some clause of that Article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence, is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right, nor can it be regarded as such merely because it may not be possible otherwise to

effectively exercise that fundamental right. What is necessary to be seem is and that is the test which must be applied, whether the right claimed by the petitioner is an, integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental, right is in reality and substance nothing but an instance of the exercise of, the named fundamental right. If this be the correct test, the right to go abroad cannot in all circumstances be regarded as included in freedom of speech and expression.[230]

In *Additional District Magistrate, Jabalpur v. Shivkant Shukla*,[231] the Supreme Court through Kania, Chief Justice while distinguishing the objects and natures of Articles 21 and 19, gave a wide enough scope to Article 21.

Kania CJ said "Deprivation (total loss) of personal liberty,which inter alia includes the right to eat or sleep when one likes or to work or not to work as and when one-pleases and several such rights sought to be protected by the expression 'personal liberty' in Article 21, is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by Article 19(1)(d). Deprivation of personal liberty has not the same meaning as restriction of free movement in the territory of India. This is made clear when the provisions of the Criminal Procedure Code in Chapter VIII relating to security of peace or maintenance of public order are read. Therefore Article 19 (5) cannot apply to a substantive law depriving a citizen of personal liberty. I am unable to accept the contention that the word 'deprivation' includes within its scope 'restriction' when interpreting Article 21.

Article 22 envisages the law of preventive detention. So does Article 246 read with Schedule Seven, List I, Entry 9, and l List III, Entry 3. Therefore, when the subject of preventive detention is specifically dealt with in the Chapter on Fundamental Rights I do not think it is proper to consider a legislation permitting preventive detention as in conflict with the rights mentioned in Article 19(1). Article 19(1) does not purport to cover all aspects of liberty or of personal liberty. In that article only certain phases of liberty are dealt with. 'Personal liberty' would primarily mean liberty of the physical body. The rights given

[230] supra
[231] (1976) 2 SCC 521.

under article 19(1) do not directly come under that description. They are rights which accompany the freedom or liberty of the person. By their very nature they are freedoms of a person assumed to be in full possession of his personal liberty. If Article 19 is considered to be the only article safeguarding personal liberty several well-recognised_ rights, as for instance, the right to eat or drink, the right to work, play, swim and numerous other rights and activities and even the right to life will not be deemed protected under the Constitution. I do not think that is the intention. It seems to me improper to read Article 19 as dealing with the same subject as Article 21.

The expression 'freedom of press' has not been used in Article 19 of the Constitution but, as declared by this Court, it is included in Article 19 (1) (a) which guarantees freedom of speech and expression. Freedom of press means freedom from interference from authority which would have the effect of interference with the content and circulation of newspapers. [232]

There could not be any kind of restriction on the freedom of speech and expression other than those mentioned in Article 19 (2) and it is clear that there could not be any interference with that freedom in the name of public interest, Even when clause (2) of Article 19 was subsequently substituted under the Constitution (First Amendment) Act, 1951 by a new clause which permitted the imposition of reasonable restrictions on the freedom of speech and expression in the interests of sovereignty and integrity of India, these unity of the State, friendly relations with foreign States, public order, decency or morality in relation to contempt of court, defamation or incitement to an offence. Parliament did not choose to include a clause enabling the imposition of reasonable restrictions in the public interest. Freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Newspapers being purveyors of news and views

[232]*Indian Express Newspapers (Bombay) Private Ltd v. Union of India*, (1985) 1 SCC 641.

having a bearing on public administration very often carry material which would not be palatable to governments and other authorities. With a view to checking malpractices which interfere with free flow of information, democratic constitutions all over the world have made provisions guaranteeing the freedom of speech and expression laying down the limits of interference with it. It is the primary duty of all the national courts to uphold the said freedom and invalidate all laws or administrative actions which interfere with it, contrary to the constitutional mandate.[233]

A new dimension was given to the right of sovereign i.e. the people to make choice of their representatives after knowing the assets and antecedents of the persons seeking election to the legislatures. The judgment also gave an expansive meaning to the term `expression' used in Article 19(1)(a) by declaring that in the democratic set up of our country the elector's right to have complete information about the candidates and then express his choice for a particular person, are necessary concomitant of the freedom of expression guaranteed under Article 19(1)(a).[234]

Article 19(1)(g) employs four expressions, viz., profession, occupation, trade and business. Their fields may overlap, but each of them does have a content of its own. Education is per se regarded as an activity that is charitable in nature has so far not been regarded as a trade or business where profit is the motive. Even if there is any doubt about whether education is a profession or not, it does appear that education will fall within the meaning of the expression "occupation". Article 19(1) (g) uses the four expressions so as to cover all activities of a citizen in respect of which income or profit is generated, and which can consequently be regulated under Article 19(6).[235]

The source of right to information does not emanate from the Right to Information Act. It is a right that emerges from the constitutional guarantees under Article 19(1)(a) as held by the Supreme Court in a catena of decisions. The Right to Information Act is not repository of the right to information. Its repository is the

[233] supra
[234] People's Union For Civil Liberties v. Union Of India, (2009) 3 SCC 200
[235] *T.M.A.Pai Foundation & Ors vs State Of Karnataka*, (2002) 8 SCC 481

constitutional rights guaranteed under Article 19((1)(a). The Act is merely an instrument that lays down statutory procedure in the exercise of this right. Its overreaching purpose is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and to help the governors accountable to the governed.[236]

Answering to the question as to whether the 93rd Amendment violate the Basic Structure of the Constitution by imposing reservation on unaided institutions? Answering in the affirmative the Supreme Court has opined: Yes, it does. Imposing reservation on unaided institutions violates the Basic Structure by stripping citizens of their fundamental right under Article 19(1)(g) to carry on an occupation.[237]

Article 19 gives the rights specified therein only to the citizens of India while Article 21 is applicable to all persons. The word citizen is expressly defined in the Constitution to indicate only a certain section of the inhabitants of India. Moreover, the protection given by Article 21 is very general. It is of 'law' whatever that expression is interpreted to mean. The legislative restrictions on the law-making powers of the legislature are not here prescribed in detail as in the case of the rights specified in Article 19. In my opinion therefore Article 19 should be read as a separate complete article".

4.6. REASONABLE RESTRICTION IN THE INTEREST OF THE GENERAL PUBLIC.

Article 19(5) permits the imposition of reasonable restrictions on each of the constituent elements of property namely, to acquire, hold and dispose of, in the interest of the general public or for the protection of the interest of any schedule tribe.

Ordinarily the individual proprietary rights are respected, unless a clear case is made out for imposing restriction thereon, in the interest of the general

[236] *Supreme Cour of India. v. Subhash Chandra Agarwal,* (2011) 1 SCC 496
[237] *Ashoka Kumar Thakur vs Union Of India,* (2008) 6 SCC 1

public, and even then the restriction sought to be imposed must not be arbitrary, but have reasonable relation to the object sought to be achieved. There must be a harmonious balancing between the fundamental right declared by Article 19(1)(f) and the 'social control' permitted by Article 19(5).

Whether a restriction is in the interest of the general public or not is justiciable issue. 'In the interest of the general public' means the same thing as 'in the public interest', and will include public order, public health, morality etc.

In a number of cases restrictions on the freedom of property have been upheld on the ground of their being in the interest of the general public. A law limiting the size of holdings in the hands of a single individual to a specific limit or a law promoting consolidation of holdings has been upheld as being in the interest of the general public. Ban on possession, sale, consumption or use of liquor has been upheld as a reasonable restriction in the public interest. Limitation imposed on owners of land by Municipal bye-laws to construct buildings have been held valid.

In *Bhau Ram v. B. Baijnath Singh*[238] , law of pre-emption giving the right of pre-emption to a co-sharer imposes a reasonable restriction on the right to acquire, hold, and dispose of property, as in the interest of the general public. The Court held that in view of the Indian way of life to live in compact communities this was a reasonable restriction. It would also avoid disputes that may arise if a stranger were allowed to come in. The reasons for upholding pre-emption on the ground of being co-sharers were equally applicable to pre-emption on the ground of vicinage.

In *Prem Dulari v. Raj Kumari*[239] the Supreme Court has held that in the case of properties having a common entrance, the owners of the buildings would stand more or less in the position of co-sharers and the right of pre-emption is sustainable as a reasonable restriction.

[238] AIR 1962 SC 1476.
[239] AIR 1967 SC 1578.

In *Manchegowda v. State of Karnataka*[240] the Supreme Court upheld the provision of an Act which prohibits transfer of land by the SC and ST members. The Court held that persons belonging to scheduled castes and scheduled tribes to whom the lands were granted were, because of their poverty, lack of education and general backwardness, exploited by various persons who could and would take advantage of bonafide the said plight of these poor persons for depriving them of their lands. The imposition of the condition of prohibition on transfer for a particular period could not, therefore, be considered to constitute any unreasonable restriction on the right of the grantees to dispose of the granted lands. The imposition of such a condition on prohibition in the very nature of the grant was perfectly valid and legal.

The Supreme Court in Municipal Corporation of *Ahmedabad v. Jan Mohammed Usmanbhai*[241] held that Clause (6) of Article 19 protects a law which imposes in the interest of general public, reasonable restrictions on the exercise of the right conferred by sub-c1ause (g) of c1ause (1) of Art. 19. It is left to the Court in case of a dispute to determine the reasonableness of the restriction imposed by the law. But the Court cannot proceed on a general notion of what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or persons on whom the restrictions are imposed. The right conferred by sub-c1ause (g) is expressed in general language and if there had been no qualifying provision like c1ause (6) the right so conferred would have been an absolute one. What the Court has to do is to consider whether the restrictions imposed are reasonable in the interest of general public. The expression "in the interest of general public" is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution. Nobody can dispute a law providing for basic amenities; for the dignity of human labour as a social welfare measure in the interest of general public.

The Supreme Court in *Fatehchand Himmatlal v. State of Maharashtra*[242], a question was raised whether rural money lending is a trade in the context of

[240] (1984) 3 SCC 301.
[241] (1986) 3 SCC 20.
[242] (1977) 2 SCC 670.

determining the validity of the Maharashtra Debt Relief Act 1976. The Court held that the freedom while it is wide is not absolute. Every systematic, profit oriented activity, however sinster, suppressive or socially diabole, cannot ipso facto exalt itself into a trade. Dealings of Banks and similar institutions having some nexus with trade, actual or potential, may itself be trade or intercourse. All modern commercial credit and financial dealings amount to trade. However, village based age old, feudal pattern of money lending to those below the subsistence level to the village artisan, the bonded labourer, the marginal tiller and the broken farmer,who borrows and repays in perpetual labour, hereditary service, periodical delivery of grain and unvouchered usurious interest is a countryside incubus. Such debts ever swell never shrink, such captive debtor never become quits.Such countryside creditors never get off the backs of the victims.

In a landmark judgment the Supreme Court in *Unni Krishan v. State of U.P.*[243] held that Article 19(1)(g) of the Constitution declares that all citizens of country shall have the right to any profession, or to carry on any occupation, trade or business. No opinion is expressed on the question whether the right to established an education institution can be said to be on any 'occupation' within the meaning of Article 19(1)(g). Assuming that it is occupation such activity can in no event be a trade or business nor can it be a profession within the meaning of Article 19 (1) (g). Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sensibilities of this nation. The argument to the contrary has an unholy ring to it. Imparting of education has never been treated as a trade or business in this country since times immemorial. It has been treated as a religious duty, and a charitable activity, but never as trade or business. Education in its true aspect is more a mission and a vocation rather than a profession, trade or business, however wide may be the denotation of the two latter words. The Parliament too has manifested its intention repeatedly (by enacting the U.G.C. Act, I.M.C. Act and A.I.C.T.E. Act) that commercialisation of education is not permissible and that no person shall be allowed to steal a march over a more meritorious candidate because of his economic power.

[243] (1993) 1 SCC 645.

The Supreme Court has held that the State has powers to fix minimum wages with regard to workers under the Minimum Wages Act, 1948. The learned Judge in *U. Unichoyi v. The State of Kerela*[244] held that the restrictions were imposed in the interest of the general public and with a view to carry out one of the directive principles of State policy as embodied in Art. 43 and so the impugned sections were protected by the terms of clause (6) of Article 19. In repelling the argument of the employers' inability to meet the burden of the minimum wage rates it was observed that "the employers cannot be heard to complain if they are compelled to pay minimum wages to their labourers even though the labourers on account of their poverty and helplessness are willing to work on lesser wages, and that if individual employers might find it difficult to carry on business on the basis of minimum wages fixed under the Act that cannot be the reason for striking down the law itself as unreasonable. The inability of the employers may in many cases be due entirely to the economic conditions of those employers."

Similarly the provision in Payment of Gratuity Act, 1972, requiring the employer to pay gratuity to the employee after five years continuous service is not an unreasonable restriction.[245] The provision in the Industrial Dispute Act, 1947, requiring prior permission of concerned authorities by the employer before effecting lay off of employees is a reasonable restriction.[246]

In *Naramada Bachao Andolan v. Union of India*[247], Dr. A.S. Anand, C.J., speaking for himself and B.N. Kirpal, J. (as he then was) observed as under: " We wish to emphasise that under the cover of freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the court and bring it into disrepute or ridicule. Courts are not unduly sensitive to fair comment or even outspoken comments being made regarding their judgments and orders made objectively, fairly and without any malice, but no one can be permitted to distort orders of the court and deliberately

[244] AIR 1962 SC 12.
[245] *Bakshish Singh v. M/s Darshan Engineering Works*, AIR 1994 SC 251.
[246] *Papnasam Labour Union v. Madura Coats Lltd*, AIR 1995 SC 2200.
[247] (1999) 8 SCC 308

give a slant to its proceedings, which have the tendency to scandalise the court or bring it to ridicule, in the larger interest of protecting administration of justice.

Ordinarily, the Court would not use the power to punish for contempt for curbing the right of freedom of speech and expression, which is guaranteed under Article 19(1)(a) of the Constitution. Only when the criticism of judicial institutions transgresses all limits of decency and fairness or there is total lack of objectivity or there is deliberate attempt to denigrate the institution then the Court would use this power.[248]

In the case of *S. Rangarajan v. Jagjivan Ram*[249], this Court noticed as under: The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a spark in a power keg.

Rights guaranteed under Article 19(1)(g) can also be restricted or curtailed in the interest of general public imposing reasonable restrictions on the exercise of rights conferred under Article 19(1)(g). Laws can be enacted so as to impose regulations in the interest of public health, to prevent black marketing of essential commodities, fixing minimum wages and various social security legislations etc., which all intended to achieve socio-economic justice. Interest of general public, it may be noted, is a comprehensive expression comprising several issues which affect public welfare, public convenience, public order, health, morality, safety etc. all intended to achieve socio-economic justice for the people. The law is

[248] *Indirect Tax Practitioners Assn. v. R.K.Jain,* (2010) 8 SCC 281.
[249] (1989) 2 SCC 574

however well settled that the State cannot travel beyond the contours of Clauses (2) to (6) of Article 19 of the Constitution in curbing the fundamental rights guaranteed by Clause (1), since the Article guarantees an absolute and unconditional right, subject only to reasonable restrictions. The grounds specified in clauses (2) to (6) are exhaustive and are to be strictly construed. The Court, it may be noted, is not concerned with the necessity of the impugned legislation or the wisdom of the policy underlying it, but only whether the restriction is in excess of the requirement, and whether the law has over-stepped the Constitutional limitations. Right guaranteed under Article 19(1)(g), it may be noted, can be burdened by constitutional limitations like sub-clauses (i) to (ii) to Clause (6). Article 19(6)(i) enables the State to make law relating to professional or technical qualifications necessary for practicing any profession or to carry on any occupation, trade or business. Such laws can prevent unlicensed, uncertified medical practitioners from jeopardizing life and health of people. Sub clause (ii) to Article 19(6) imposes no limits upon the power of the State to create a monopoly in its favour. State can also by law nationalize industries in the interest of general public. Clause (6)(ii) of Article 19 serves as an exception to clause (1)(g) of Article 19 which enable the State to enact several legislations in nationalizing trades and industries.[250]

Reference may be made to Chapter-4 of the Motor Vehicles Act, 1938, The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, General Insurance Business (Nationalization) Act, 1972 and so on. Sub-clause 6(ii) of Article 19 exempts the State, on the conditions of reasonableness, by laying down that carrying out any trade, business, industry or services by the State Government would not be questionable on the ground that it is an infringement on the right guaranteed under Article 19(1)(g).[251]

The Supreme Court in the case of *Re-Ramlila Maidan Incident*[252] directed that the State has a duty to ensure fulfillment of the freedom enshrined in our Constitution and so it has a duty to protect itself against certain unlawful actions. It

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[250] *Society for Un-aided Private Schools of Rajasthan v. Union of India,* (2012) 6 SCC 1.

[251] Supra.
[252] (2012) 5 SCC 1.

may, therefore, enact laws which would ensure such protection. The rights and the liberties are not absolute in nature and uncontrolled in operation. While placing the two, the rule of justice and fair play requires that State action should neither be unjust nor unfair, lest it attracts the vice of unreasonableness or arbitrariness, resultantly vitiating the law, the procedure and the action taken thereunder.

It is neither correct nor judicially permissible to say that taking of police permission for holding of dharnas, processions and rallies of the present kind is irrelevant or not required in law. Thus, in my considered opinion, the requirement of associating police, which is an important organ of the State for ensuring implementation of the rule of law, while holding such large scale meetings, dharnas and protests, would not infringe the fundamental rights enshrined under Articles 19(1)(a) and 19(1)(b) of the Constitution. This would squarely fall within the regulatory mechanism of reasonable restrictions, contemplated under Articles 19(2) and 19(3). Furthermore, it would help in ensuring due social order and would also not impinge upon the rights of others, as contemplated under Article 21 of the Constitution of India. The police authorities, who are required to maintain the social order and public tranquility, should have a say in the organizational matters relating to holding of dharnas, processions, agitations and rallies of the present kind. However, such consent should be considered in a very objective manner by the police authorities to ensure the exercise of the right to freedom of speech and expression as understood in its wider connotation, rather than use the power to frustrate or throttle the constitutional right.

Part III of the Constitution is the soul of the Constitution. It is not only a charter of the rights that are available to Indian citizens, but is even completely in consonance with the basic norms of human rights, recognized and accepted all over the world. The fundamental rights are basic rights, but they are neither uncontrolled nor without restrictions. In fact, the framers of the Indian Constitution themselves spelt out the nature of restriction on such rights. Exceptions apart, normally the restriction or power to regulate the manner of exercise of a right would not frustrate the right. Take, for example, the most valuable right even from amongst the fundamental rights, i.e., the right to freedom of speech and expression. This right is conferred by Article 19(1)(a) but in turn, the Constitution itself

requires its regulation in the interest of the `public order' under Article 19(2). The State could impose reasonable restrictions on the exercise of the rights conferred, in the interest of the sovereignty and integrity of India, the security of the State, free relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement of an offence. Such restrictions are within the scope of -constitutionally permissible restriction. Exercise of legislative power in this respect by the State can be subjected to judicial review, of course, within a limited ambit. Firstly, the challenger must show that the restriction imposed, at least prima facie, is violative of the fundamental right. It is then that the burden lies upon the State to show that the restriction applied is by due process of law and is reasonable. If the restriction is not able to satisfy these tests or either of them, it will vitiate the law so enacted and the action taken in furtherance thereto is unconstitutional. It is difficult to anticipate the right to any freedom or liberty without any reasonable restriction. Besides this, the State has to function openly and in public interest. The width of the expression `public interest' cannot be restricted to a particular concept. It may relate to variety of matters including administration of justice.[253]

The constitution- makers had decided to incorporate Fundamental Rights in the Constitution because of several reasons, such as, consciousness of the massive minority problem in India, memories of the protracted struggle against the despotic British Rule, acknowledgement of the Gandhian ideals, the climate of international opinion and the American experience.

But it can be seen from the past history that inclusion of Fundamental Rights under the Indian Constitution was also a reasonable step towards the natural apprehension of any such autocratic rule and arbitrariness in future and to prevent it. In other words, to limit the government acts.

The courts are also playing a crucial role in guaranteeing these rights to the people besides broadening them with changing circumstances and conditions and making them even more efficient for protection against any arbitrary act on the part of the govt. or any individual.

[253] *N.K.Bajpai v. Union Of India*, (2012) 4 SCC 653.

The Supreme Court as the sentinel on the qui vive, is constitutionally obligated to enforce the fundamental rights of all the citizens of the country and to protect them from exploitation and to provide guidance and direction for facilities and opportunities to them for securing socio-economic justice, empowerment and to free the handicapped persons from the disabilities with which they suffer from and to make them realise and enjoy the fundamental rights ensured to them under the Constitution.

Part III of the Constitution dealing with the Fundamental Right Chapter has played a pivotal role in ensuring the principle that the right to fundamental right is a necessary concomitant to social justice or else such rights would be rendered illusory.

This is what the principle of constitutionalism also calls for. Thus, it can very well be said that Fundamental Rights are really an expression of constitutionalism in India.

CHAPTER 5.

SOCIAL JUSTICE AND DIRECTIVE PRINCIPLE.

Part IV of the Constitution is designed to bring about the social and economic revolution that remained to be fulfilled after independence. The aim of the Constitution is not to guarantee certain liberties to only a few of the citizens but for all. The Constitution visualizes our society as a whole and contemplates that every member of the society should participate in the freedoms guaranteed. To ignore Part IV is to ignore the substance provided for in the Constitution, the hopes held out to the Nation and the very ideals on which our Constitution is built. Without faithfully implementing the Directive Principles, it is not possible to achieve the Welfare State contemplated by the Constitution. A society like ours stepped in poverty and ignorance satisfying the minimum economic needs of every citizen of this country. Any Government which fails to fulfill the pledge taken under the Constitution cannot be said to have been faithful to the Constitution and to its commitments.

The reality of inequality, and its possible solution, is manifest in the Preamble, followed by the Fundamental Rights and Directive Principles. The Preamble makes explicit, the resolve to create a "socialist and democratic republic" in order to secure political justice, equality, liberty and dignity. The principle assertion being that in order to obliterate social injustice, upholding the dignity of the human personality is paramount. The Indian Constitution, as a social document, seeks to foster this by striving to create the requisite social, cultural, political and economic conditions that are required to attain this noble goal. Its ideals are based on the grim experience of colonialism, and India's bitter struggle against that imperial regime, which consistently violated the rights of the people of India, and worked relentlessly to create inequalities within the social strata. There was intense and extensive social and economic discrimination due to irrational prejudices, which resulted in certain sections of society to suffer severe handicaps in practically all walks of life. However, it is also true that the British brought with them certain reforms that were largely influenced by Western thought. Notable among these, were the abolition of slavery in 1843, abolition of the practice of Sati

in 1829 and prevention of female infanticide. However, despite these measures, the problems of social inequality were deep rooted in India, and at that time, possibilities of judicial intervention were limited.

The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice--social, economic and political. We therefore, put part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved.

After the adoption of our Constitution, large scale social and economic changes have taken place. It is true that in many areas, we could not achieve the desired results, but even then the powers of law and legislation have tremendous impact in society. Law is essentially marginal to the process by which society changes law is an effect rather than a cause. It is only within the limits given there that change can be accomplished. Legislation is always based on the quintessence of the public opinion. India after attaining independence by a series of social welfare legislations based on the mandate of our Constitution proved that law could be active and dynamic. No longer was the State seen as standing to one side of the society and performing the role of a night watchman, but as a manager of social and economic interests. The State has become the centre of political and economic power and source and distributor of basic legal rights and material standards. The operation of law with numerous regulations brings about change in the society.

Since the directive principles are not enforceable by any court, it has been advocated that they are not laws, much less constitutional laws and therefore their non-observance by the State does not entail legal consequences. For the same reason a law giving effect to the directive principle has to observe all the constitutional limitations such as fundamental rights and in case it violates these limitations, it must be held unconstitutional.[1] The idea seems to have changed during the course of time, and over last few years one can on evaluating the judgment of the Supreme Court find that the Directive Principles have been given

[1] H.M Seervai: *Constitutional Law of India*, Vol. 2, Chap. XVII, (4th Edn., 1993)

much more importance. This chapter evaluates the decisions of the Supreme Court and tends to find out how the Directive Principles of State Policy have been instrumental in providing social justice to the citizens at large.

The Study is based on different decision of the Hon'ble Supreme Court of India, on the subject as to how the Apex Court have dealt with the Directive Principles in rendering social justice.

5.1. SOCIAL ORDER.

Article 38 provided that the State to secure a social order for the promotion of welfare of the people;

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life, and,

(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

A law which fulfils the directive of Article 38 is incapable of abrogating fundamental freedoms or of damaging the basic structure of the Constitution inasmuch as that structure itself is founded on the principle of justice --social, economic and political. Article 38, which contains a directive principle, provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. A law which complies with Article 38 cannot conceivably abrogate the fundamental freedoms except certain economic rights and that too, for the purpose of minimising inequalities. A law which will abrogate fundamental freedoms will either bring about social injustice or economic injustice or political injustice.

In a case of supreme importance the Learned Advocate-General appearing for the State before the Supreme Court in the case of *State of Madras v.*

Champakam Dorairajan[2] contended that Article 46 charges the State with promoting with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and with protecting them from social injustice and all forms of exploitation. It was pointed out that although this article finds a place in Part IV of the Constitution which lays down certain directive principles of State policy and though the provisions contained in that Part are not enforceable by any Court, the principles therein laid down are nevertheless fundamental for the governance of the country and Article 37 makes it obligatory on the part of the State to apply those principles in making laws. The Court rejecting the above noted contentions completely held that the directive principles of the State policy, which by Article 37 are expressly made unenforceable by a Court, cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or directions under Article 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 article in Part III. The directive principles of State policy have to conform to and run as subsidiary to the Chapter of 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. Right, 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.

Again in *Kerela Education Bill, Re,1957*[3] the Court has held that the directive principle of State policy could not override a fundamental right and must subserve it, but no Court should in determining the ambit of a fundamental right, entirely ignore a directive principle but should try to give as much effect to both as possible by adopting the principle of harmonious construction.

[2] AIR 1951 SC 226.

[3] AIR 1958 SC 956.

The Supreme Court on answering to the question as to whether the power of Government to fix minimum wages was restrictive of trade and business, held that freedom of trade does not mean freedom to exploit. The provisions of the Constitution are not erected as barriers' to progress. It is a fallacy to think that in our Constitution there are only rights and no duties There is no conflict between Part III and Part IV of the Constitution which are complementary and supplemental to each other. The hopes and aspirations aroused by the Constitution will be the minimum needs of the lowest of our citizens.[4]

Article 38 provides that the state shall secure a social order for the promotion of the welfare of its people. The Constitution (Forty fourth) Amendment Act, 1978, by inserting new clause (1) in Article 38 have provided that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may be as social order in which justice, social, economic and political, shall inform to the institution of national life.

The Preamble and Article 38 of the Constitution envision social justice as the arch to ensure life to be meaningful and livable with human dignity. Jurisprudence is the eye of law giving an insight into the environment of which it is the expression. It relates the law to the spirit of the time and kames it richer. Law is the ultimate aim of every civilised society, as a key system in a given era, to meet the needs and demands of its time. Justice, according to law, comprehends social urge and commitment. The Constitution commands justice, liberty, equality and fraternity as supreme values to usher the egalitarian social, economic and political democracy. Social justice, equality and dignity of persons are cornerstones of social democracy. The concept of "social justice" which the Constitution of India engrafted, consists of diverse principles essential for the orderly growth and development of personality of every citizen. "Social justice" is thus an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person.

[4] *C. B Boarding and Lodging v. State of Mysore*, AIR 1970 SC 2042.

Social justice is not a simple or single idea of a society but is an essential part of complex social change to relive the poor etc. From handicaps, penury to ward off distress and to make their life livable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation and constitutional goal. Social security, just and humane conditions of work and leisure to workman are part of this meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity. The State should provide facility and opportunities to enable them to reach at least minimum standard of health, economic security and civilised living while sharing according to their capacity, social and cultural heritage. In a developing society like ours, steeped with unbridgeable and ever-widening gaps of inequality in status and of opportunity, law is a catalyst, rubicon to the poor etc, to reach the ladder of social justice. What is due cannot be ascertained by an absolute standard which keeps changing, depending upon the time, place and circumstance. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor, the workmen etc, are languishing and to secure dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to flavour and enliven the practical content of life. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results.[5]

M.H. Beg, J. in his judgment in the landmark case of *Kesavananda Bharati v. State of Kerela*[6] opined "I think that it is clear from the Preamble as well as the provisions of Parts III and IV of our Constitution that it seeks to express the principle : "Solus Populi Seprema Lex". In other words, the good of the mass of citizens of our country is the supreme law embodied in our Constitution prefaced

[5] *Consumer Education & Research Centre v. Union Of India,* (1995) 3 SCC 42

[6] (1973) 4 SCC 225.

as it is by the preamble or the 'key' which puts "justice, social, economic and political" as the first of the four objectives of the Constitution by means of which "the people" of India constituted "a sovereign democratic Republic".

A modern democratic Constitution is to my mind, an expression of the sovereign will of the people, although, as we all know, our Constitution was drawn up by a Constituent Assembly which was not chosen by adult franchise. Upon this Constituent Assembly was conferred the legal power and authority, by Section 8 of the Indian Independence Act, passed by the British Parliament, to frame our Constitution. Whether we like it or not, Section 6 and 8 of an Act of the British Parliament transferred, in the eye of law, the legal sovereignty, which was previously vested in the British Parliament, to the Indian Parliament which was given the powers of a Constituent Assembly for framing our Constitution. The result may be described as the transfer of political as well at legal sovereignty from one nation to another, by means of their legally authorised channels. This transfer became irrevocable both as a matter of law and even more so of fact. Whatever theory some of the die-hard exponents of the legal omnipotence of the British Parliament may have expounded, the modern view, even in Britain, is that what was so transferred from one nation to another could not be legally revoked. The vesting of the power of making the Constitution was however, legally in the Constituent Assembly thus constituted and recognised and not in "the people of India", in whose name the Constituent Assembly no doubt spoke in the Preamble to the Constitution. The Constituent Assembly thus spoke for the whole of the people of India without any specific or direct legal authority conferred by the people themselves to perform this function.[7]

The voice of the people speaking through the Constituent Assembly constituted a new "Republic" which was both "Sovereign and Democratic". It no doubt sought to secure the noble objectives laid down in the Preamble primarily through both the Fundamental rights found in Part III and the Directive Principles of State Policy found in Part IV of the Constitution. It would, however, not be correct, in my opinion, to characterise, the Fundamental rights contained in Part

[7] ibid

III, as merely the means whereas the Directive Principles, contained in Part IV as the ends of the endeavours of the people to attain the objectives of their Constitution. On the other hand, it appears to me that it would be more correct to describe the Directive Principles as laying down the path which was to be pursued by our Parliament and State Legislatures in moving towards the objectives contained in the Preamble. Indeed, from the point of view of the Preamble, both the fundamental rights and the Directive Principles are means of attaining the objectives which were meant to be served both by the fundamental rights and Directive Principles. If any distinction between the fundamental rights and the Directive Principles on the basis of a difference between ends or means were really to be attempted, it would be more proper, in my opinion to view fundamental rights as the ends of the endeavours of the Indian people for which the Directive principles provided the guidelines. It would be still better to view both fundamental rights and the "fundamental" Directive Principles as guide lines.[8]

Perhaps, the best way of describing the relationship between the fundamental rights of individual citizens, which imposed corresponding obligations upon the States and the Directive Principles, would be to look upon the Directive principles as laying down the path of the country's progress towards the allied objectives and aims stated in the Preamble, with fundamental rights as the limits of that path, like the banks of a flowing river, which could, be mended or amended by displacements replacements or curtailments or enlargements of any part according to the needs of those who had to use the path. In other words, the requirements of the path itself were more important. A careful reading of the debates in the Constituent Assembly also lead me to this premise or assumption. If the path needed widening or narrowing or changing, the limits could be changed. It seems to be impossible to say that the path laid down by the Directive Principles is less important than the limits of that path. Even though the Directive Principles are "non-justiciable," in the sense that they could not be enforced through a Court, they were declared, in Article 37, as "the principles...fundamental in the governance of the country". The mandate of Article 37 was : "it shall be the duty of the State to apply these principles in making laws". Primarily the mandate was addressed to the

[8] ibid

Parliament and the State Legislatures, but, in so far as Courts of justice can indulge in some judicial law making, within the interstices of the Constitution or any Statute before them for construction, the Courts too are bound by this mandate. Another distinction, which seems to me to be valid and very significant it that, whereas, the fundamental rights were "conferred" upon citizens, with corresponding obligations of the State, the Directive Principles lay down specific duties of the State organs. In conferring fundamental rights, freedom of individual citizens, viewed as individuals, were sought to be protected, but, in giving specific directives to State organs, the needs of social welfare, to which individual freedoms may have to yield, were put in the forefront. A reconciliation between the two was, no doubt, to be always attempted whenever this was reasonably possible. But, there could be no doubt, in cases of possible conflict, which of the two had to be subordinated when found embodied in laws properly made.[9]

Article 38 shows that the first of the specific mandates to State organs says: The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

In other words, promotion of a social order in which "justice, social, economic, and political" was the first duty of all the organs of the State.

In *Air India Statutory Corporation v. United Labour Union*[10] the Supreme Court held: “It would be necessary to recapitulate the Preamble, Fundamental Rights in Part III and Directive Principle in Part IV trinity setting out the conscience of the Constitution deriving from the source "We, the people", a charter to establish an egalitarian social order in which social and economic justice with dignity of person and equality of status and opportunity, are assured to every citizen in a socialist democratic Bharat Republic”. The Constitution, the Supreme law heralds to achieve the above goals under the rule of law. Life of law is not logic but is one of experience, Constitution provides an

[9] supra

[10] AIR 1997 SC 645.

enduring instrument, designed to meet the changing needs of each succeeding generation altering and adjusting the unequal conditions to pave way for social and economic democracy within the spirit drawn from the Constitution. Preamble of the Constitution, as its integral part, is people including workmen, harmoniously blending the details enumerated in the Fundamental Rights and the Directive Principles. The Act is a social welfare measure to further the general interest of the community of workmen as opposed to the particular interest of the individual enterpreneur. The individual interest can, therefore, no longer stem the forward flowing tide and must, of necessity, give way to the broader public purpose of establishing social and economic democracy in which every workmen realises socioeconomic justice assured in the preamble, Articles 14,15 and 21 and the Directive Principles of the Constitution. The founding fathers of the Constitution, cognizant of the reality of life wisely engrafted the Fundamental Rights and Directive Principles in Chapters III and IV for a democratic way of life to every one in Bharat Republic, the State under Article 38 is enjoined strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life and to minimize the inequalities in income and endeavour to eliminate the inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

The Supreme Court in *Gaurav Jain v. Union of India*[11] stressing the importance of bringing light in the lives of the victims of prostitution has opined that "The Preamble, an integral part of the Constitution, pledges to secure `socio-economic justice' to all its citizens with stated liberties, `equality of status and of opportunity', assuring `fraternity' and `dignity' of the individual in a united and integrated Bharat. The fallen women too are part of citizenry. Prostitution in society has not been an unknown phenomenon; it is of ancient origin and has its manifestation in various forms with varied degrees unfounded on so-called social sanctions etc. The victims of the trap are the poor, illiterate and ignorant sections of the society and are the target group in the flesh trade; rich communities exploit

[11] (1998) 4 SCC 270.

them and harvest at their misery and ignominy in an organised gangsterism, in particular, with police nexus. It is of grave social concern, increasingly realised by enlightened public spirited sections of the society to prevent gender exploitation of girl children. The prostitute has always been an object and was never seen as complete human being with dignity of person; as if she has had no needs and aspirations of her own, individually or collectively. Their problems are compounded by coercion laid around them and torturous treatment meted out to them. When they make attempts either to resist the prostitution or to relieve themselves from the trap, they succumb to the violent treatment and resultantly many a one settle for prostitution. Prostitute is equally a human being. Despite that trap, she is confronted with the problems to bear and rear the children. The limitations of trade confront them in bringing up their children, be it male or female. Their children are equally subjected to inhuman treatment by managers of brothels and are subjected to discrimination, social isolation; they are deprived of their right to live normal life for no fault of their own. In recent times, however, there has been a growing body of opinion, by certain enlightened sections of the society advocating the need to no longer treat the fallen women as a criminals or as an object of shocking sexual abuse; they are victims of circumstances and hence should be treated as human beings like others, so as to bring them into the mainstream of the social order without any attached stigma. Equally, they realise the need to keep their children away from the red light area, particularly girl children and have them inducted into respectable and meaningful avocations and/or self-employment schemes. In no circumstances, they should continue to be in the trap of flesh trade for commercial exploitation. They need to be treated with humanity and compassion so as to integrate them into the social mainstream. If given equal opportunity, they would be able to play their own part for peaceful rehabilitation, live a life with happiness purposefully, with meaningful right to life, culturally, socially and economically with equality of status and dignity of person. These constitutional and human rights to the victims of fallen track of flesh trade, need care and consideration of the society. This case calls upon to resolve than human problem with caress and purposeful guidelines, lend help to ameliorate their socio-economic conditions, eradicate social stigma and to make available to them equal opportunities for the social order".

Mahatma Gandhi, the Father of the Nation said, "The caste system as we know is an anachronism. It must go if both Hinduism and India are to live and grow from day to day". In its onward march towards realising the constitutional goal, every attempt has to be made to destroy caste stratification. Article 38(2) enjoins the State to strive to minimise the inequality in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.[12]

The Supreme Court in *Harjinder Singh Vs. Punjab State Warehousing Corporation* [13] held that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to sub-serve the common good and also ensure that the workers get their dues.

When the Constitution of India was adopted, the people of this country resolved to constitute India into a Sovereign Democratic Republic. They also resolved to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the nation. For achieving the goals set out in the preamble, the framers of the Constitution identified and recognized certain basic rights of the citizens and individuals and pooled them in Part III, which has the title `Fundamental Rights' and simultaneously incorporated Directive Principles of State Policy which, though not enforceable by any Court are fundamental in

[12] *Ashoka Kumar Thakur vs Union Of India,* (2008) 6 SCC 1.

[13] (2010) 3 SCC 192.

governance of the country and the State is under obligation to comply with the principles embodied in Part-IV in making laws. Article 38, which was renumbered as Clause (1) thereof by the Constitution (Forty-fourth Amendment) Act, 1978 declares that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Clause (2) of this Article, which was inserted by the same Amending Act declares that State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals, but also amongst groups of people residing in different areas or engaged in different vocations.[14]

Directives Principles of State policy which, though not justiciable, may be taken info account in considering the Constitution as a whole. These directives lay down the principles which it will be the duty of the State to apply in the making of laws and their execution. Article 38 states that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life".

5.2. SOCIAL WELFARE AND LIVELIHOOD.

Article 39, contains the principles of what is known as the socialistic "welfare State". It attempts to promote social justice by means of nationalisation and State action for a better distribution of material resources of the country among its citizens and to prevent the exploitation of the weak and the helpless. It runs as follows:

39. The State shall, in particular, direct its policy towards securing:

[14] *Delhi Jal Board v. National Campaign for Dignity and Rights of Sewage and all Allied Workers,* (2011)8 SCC 568.

(a) that the citizens, men and women equally, have the light to an adequate means of livelihood.

(b) that the ownership and control of the material resources or 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 deteriment;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 39 lays down the principles which must inspire State policy.

Article 39(a) provides that the State shall direct its policies towards securing the citizens, men and women equally, the right to an adequate means of livelihood; clause (d) provides for equal pay for equal work for both men and women; clause (e) provides to secure the health and strength of workers. Article 39(a) furnishes beacon light that justice be done on the basis of equal opportunity and no one be denied justice by reason of economic or other disabilities. Courts are sentinal in the quivive of the rights of the people, in particular the poor. The judicial function of a Court, therefore, in interpreting the Constitution and the provisions of the Act, requires to build up continuity of socio-economic empowerment to the poor to sustain equality of opportunity and status and the law should constantly meet the needs and aspiration of the society in establishing the egalitarian of the society social order.

M.H. Beg, J. in his judgment in the landmark case of *Kesavananda Bharati v. State of Kerela*[15] held that a socialistic state, must have the power and make the attempt to build a new social and economic order free from exploitation, misery and poverty, in the manner those in charge of framing policies and making appropriate laws think best for serving the public good. We do not today conceive

[15] Ibid.

of public good or progress in terms of a "movement from status to contract", but in terms of a movement for control of economic and other kinds of powers of exploitation by individuals so as to ensure that public good not merely appears to be served but is actually served by all individuals wherever or however placed.

He concluded, by a special reasons for holding Section 3 of the Constitution (25th Amendment) Act 1971, adding Article 31C to the Constitution also as valid.

M.H. Beg, J. opined: Article 31C has two parts. The first part is directed at removing laws passed for giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 of the Constitution from the vice of invalidity on the ground that any such law "is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31 of the Constitution". If we, stop here, the question whether the law is really for the purpose of giving effect to the principles specified in Clauses (b) or (c) of Article 39 would still be justiciable whenever laws passed under this provision come up before Courts. In other words, the question of relevancy of the law passed to the specified principles could still be examined by courts although the effect of invalidity for alleged violations of Articles 14 or 19 or 31 would vanish so long as the law was really meant to give effect to the principles of Article 39(b) and (c). A colourable piece of legislation with a different object altogether but merely dressed up as a law intended for giving effect to the specified principles would fail to pass the test laid down by the first part. The second part of Article 31C goes on to provide that, if such a law contains a declaration that it is for giving effect to such policy, it will become immune from judicial review altogether. In cases of laws passed by State legislatures there is a further safeguard that such laws must have been reserved for consideration by the President and assented to by him. The purpose of the declaration is, therefore, to take the place of a judicial verdict on relevancy of the grounds to the principles found in Clauses (b) and (c) of Article 39 as well as on effectiveness of these laws for the intended purposes. [16]

[16] supra

The Court expressly ruled that Article 31C as it stood at that time was constitutionally valid. No doubt, the protection of Article 31C was at that time confined to laws giving effect to the policy of the clauses (b) and (c) of Article 39. By the Constitution Forty-Second Amendment Act, the protection was extended to all laws giving effect to all or any of the principles laid down in Part IV. The dialectics, the logic and the rationale involved in upholding the validity of Article 31C when it confined its protection to laws enacted to further Article 39(b) or Article 39(c) should, uncompromisingly lead to the same resolute conclusion that Article 31C with its extended protection is also constitutionally valid. No one suggests that the nature of the Directive Principles enunciated in the other Articles of Part IV of the Constitution is so drastic or different from the Directive Principles in clauses (b) and (c), of Art 39, that the extension of constitutional immunity to laws made to further those principles would offend the basic structure of the Constitution.[17]

In *State of Karnataka v. Shri Ranganatha Reddy*[18] a Bench of nine Judges of the Supreme Court, considering the nationalisation of the contract carriages, had held that the aim of socialism is the distribution of the material resources of the community in such a way as to subserve the common hood. The principle embodied in Article 39(b) of the Constitution is one of the essential directives to bring about the distribution of the material resources. It would give full play to the distributive justice. It fulfills the basic purpose of restructuring the economic order. Article 39(b), therefore, has a social mission. It embraces the entire material resources of the community. Its task is to distribute such resources. Its goal is to undertake distribution as best to subserve the common good.

The Court observed: (1) The State symbolises, represents and acts for the good of society. Its concerns are the ways of meeting the wants of the community, directly or otherwise, and the public sector in our constitutional system, is a strategic tool in' the national plan for transformation from stark poverty to social justice, transcending administrative and judicial allergies (2) Serious constitutional

[17] Supra.

[18] (1978) 1 SCR 641.

problems cannot be studied in a socioeconomic vacuum, since socio-cultural changes are the source of new values. Our emphasis is on abandoning formal legalistic or sterile logomachy in assessing the vires of statutes regulating vital economic areas, and adopting instead, a dynamic, goal-based approach to problems of constitutionality. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. The Constitution ensouls such a value system in Parts III and IV and elsewhere, and the dialectics of social justice should not be missed if their synthesis is to influence State action and Court pronouncement. Illusory compensation, nexus doctrine and 'distributed to subserve the common good, should not reduce lofty constitutional considerations into hollow concepts.[19]

Article 39(b) fulfils the basic purpose of restructuring the economic order and undertakes to distribute the entire material resources of the community, as best to subserve the common good. To exclude ownership of private resources from its coils, is to cipherise its very purpose of redistribution the socialist way. Article 39(b) is ample enough to rope in buses, as motor vehicles, are part of the material resources of the operators. Socially conscious economists will find little difficulty in treating nationalisation of transport as a distributive progress for the good of the community. Part IV of the Constitution, especially Article 39(b) and (c) is futuristic mandate to the State with the message of transformation of the economic and social order. Such change calls for collaborative effort from a the legal institutions of the system, the legislature, the judiciary and the administrative machinery. The manifesto being the constitution designed to uphold the humanist values of life, liberty and the equal pursuit of happiness, material and spiritual.[20]

The Principles contained in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be

[19] Supra.

[20] Ibid.

sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right, to life conferred by Article 21."[21]

In *Sanjeev Coke Manufacturing Co. v. Bharat Cooking Coal Ltd.*[22] another Constitution Bench interpreted the word "socialism" and Article 39(b) of the Constitution and had held that the broad egalitarian principle of economic justice was implicit in every Directive Principle. The law was designed to promote broader egalitarian social goals to do economic justice for all. The object of nationalisation of mining was to distribute nation's resources.

The expression "Material resources of the community" as used in Article 39(b) of the Constitution is not confined to natural resources owned by the public, it means and includes all resources, natural and man-made, public and private-owned. The expression "material resources of the community" means all things which are capable of producing wealth for the community. There is no warrant for interpreting the expression in so narrow a fashion as to confine it to public-owned material resources and exclude private owned material resources. The expression involves no dichotomy. The words must be understood in the context of the constitutional goal of establishing a sovereign, socialist, secular' democratic republic. When Article 39(b) refers to material resources of the community it does not refer only to resources owned by the community as a whole, but it refers also to resources owned by individual members of the community. Resources of the community do not mean public resources only but include private resources as well. The distribution envisaged by Article 39(b) necessarily takes within its stride the transformation of wealth from private-ownership into public-ownership and is not confined to that which is already public-owned. [23]

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[21] *Madhu Kishwar v. State Of Bihar,* AIR 1996 SC 1864.

[22] (1983) 1 SCR 1000.

[23] supra

To contend that a law founded on discrimination is not entitled to the protection of Article 31 C, as such a law can never be said to further the directive principles affirmed in Article 39(b) would be to put the cart before the horse. If the law made to further directive principle is necessarily non-discriminatory or is based on a reasonable classification, then such law does not need any protection such as that afforded by Article 31 C. Such law would be valid on its own strength, with no aid from Article 31 C. To make it a condition precedent that a law seeking the haven of Article 31 C must not be discriminatory or based on reasonable classification is to make Article 31C meaningless. If Article 14 is not offended, no one need give any immunity from an attack based on Article 14. The broad egalitarian principle of social and economic justice for all was implicit in every Directive Principle, and, therefore, a law designed to promote a directive principle, even if it came into conflict with the formalistic and doctrinaire view of equality before the law, would most certainly advance the broader egalitarian principle and the desirable constitutional goal of social and economic justice to all. If the law was aimed at the broader egalitarianism of the Directive Principles, Article 31 C protected the law from needless, unending and rancorous debate on the question whether the law contravened Article 14 concept of equality before the law. The law seeking the immunity afforded by Article 31 C must be a law directing the policy of the State towards securing a Directive Principle. The object of the law must be to give effect to the Directive Principle and the connection with the Directive Principle must not be "same remote or tenuous connection". When Article 31 C comes in, Article 14 goes out. There is no scope for bringing in Article 14 by a side wind as it were, that is, by equating the rule of equality before the law of Article 14 with the broad egalitarianism of Article 39(b) or by treating the principle of Article 14, as included in the principle of Article 39(b). To insist on nexus between the law for which protection is claimed and the principle of Article 39(b) is not to insist on fulfilment of the requirement of Article 14. They are different concepts and in certain circumstances, may even run counter to each other. That is why the need for the immunity afforded by Articles 31 C.[24]

[24] ibid

When our Constitution states that it is being enacted to give to all the citizens of India "Justice, Social, economic and political", when clause (I) of Article 38 of the Constitution directs the State to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which social, economic and political justice shall inform all the institutions of the national life, when clause (2) of Article 38 directs the State in particular, to minimise the inequalities in income, not only amongst individuals but also amongst group of people residing in different areas or engaged in different vocations and when Article 39 directs the State that it shall, in particular, direct its policy towards securing that the citizens men and women equally, have the right to an adequate means of livelihood and that the operation of the economic system does not result in the concentration of wealth and reasons of production to the common detriment and that there should equal pay for equal work for both men and women, it is the doctrine of distributive justice which is speaking through the words of the Constitution.[25]

In *State of Tamil Nadu v. L. Abu Kavur Bai*[26] the same interpretation was given by another Constitution Bench upholding nationalisation of State Carriages and Contract Carriages (Acquisition) Act. Therefore, all State actions should be such to make socio-economic democracy with liberty, equality and fraternity, a reality to all the people through democratic socialism under the rule of law.

A Constitution Bench of the Supreme Court in *D.S. Nakara v.Union of India,*[27] held that pension ensures freedom from undeserved want. The basic framework of the Constitution is to provide a decent standard of living to the working people and especially provides security from cradle to grave. Every State action whenever taken must be directed and be so interpreted as to take society one step towards the goal of establishing a socialist welfare society. While examining the constitutional validity of legislative/administrative action, the touchstone

[25] *Central Inland Water v. Brojo Nath Ganguly,* AIR 1986 SC 1571.

[26] (1984) 1 SCR 725.

[27] (1983) 2 SCR 165.

of the Directive Principles of the State policy in the light of the Preamble provides yardstick to hold one way or the other.

Having set out clearly the society which we propose to set up, the direction in which the State action must move, the welfare State which we propose to build up, the constitutional goal of setting up a socialist State and the assurance in the Directive Principles of State Policy especially of security in old age at least to those who have rendered useful service during their active years, it is indisputable, nor was it questioned, that pension as a retirement benefit is in consonance with and furtherance of the goals of the Constitution. The goals for which pension is paid themselves give a fillip and push to the policy of setting up a welfare State because by pension the socialist goal of security of cradle to grave is assured at least when it is mostly needed and least available, namely, in the fall of life.[28]

Earlier in *Deoki Nandan Prasad v. State of Bihar*[29] the Supreme Court has held that the discernible purpose underlying the pension scheme must inform the interpretative process and it should receive a liberal construction. Pension is a right; not a bounty or gratuitous payment. The payment of pension does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. The pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation for service rendered. Pension also has a broader significance in that it is a social-welfare measure rendering socio-economic justice by providing economic security in old age to those who toiled ceaselessly in the hey-day of their life. Pension as a retirement benefit is in consonance with and in furtherance of the goals of the Constitution.

The goals for which pension is paid themselves give a fillip and push to the policy of setting up a welfare state. The preamble to the Constitution envisages the establishment of a socialist republic. The basic framework of socialism is to

[28] supra

[29] (1971) suppl. SCR 634.

provide a decent standard of life to the working people and especially provide security from cradle to grave. Article 41 enjoins the State to secure public assistance in old age, sickness and disablement. Every state action whenever taken must be directed and must be so interpreted as to take society one step towards the goal of establishing a socialist welfare society. While examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble provides a reliable yardstick to hold one way or the other.[30]

In a judgment of supreme importance the Supreme Court in *Bandhua Mukti Morcha v. Union of India*[31] the Court opined that it is the fundamental right of every one in this country, assured under the interpretation given to Article 21 by this Court in *Francis Mullen's*[32] case, to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials. Since the Directive Principles of State Policy contained in clauses (e) and (f) of Article 39, Article 41 and 42 are not enforceable in a court of law, it may not be possible to compel the State through the judicial process to make provision by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity but where legislation is already enacted by the State providing these basic requirements to the

[30] Supra.

[31] AIR 1984 SC 802.

[32] (1981) 1 SCC 608.

workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21.

In *J.P. Unnikrishnan v. State of Andhra Pradesh*[33], a Constitution Bench has held education upto the of 14 years to be a fundamental right; right to health has been held to be a fundamental right; right to potable water has been held to be a fundamental right; meaningful right to life has been held to be a fundamental right. The child is equally entitled to all these fundamental rights. It would, therefore, be incumbent upon the State to provide facilities and opportunity as enjoined under Article 39(e) and (f) of the Constitution and to prevent exploitation of their childhood due to indigence and vagary.

In *R.D. Upadhyay v. State of A.P.*[34] dealing with an issue of great importance relating to welfare of children who are in jail with their mothers, directed all the States to implement schemes and laws relating to welfare and development of such children in letter and spirit. State Legislatures may consider passing of necessary legislations, wherever necessary. It also reminded that there are wide range of existing laws on the issues concerning children, such as, the Guardians and Wards Act, 1890, Child Marriage Restraint Act, 1929, the Factories Act, 1948, Hindu Adoptions and Maintenance Act, 1956, Probation of Offenders Act, 1958, Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960, the Child Labour (Prohibition and Regulation) Act, 1986, Juvenile Justice (Care and Protection of Children) Act, 2000, the Infant Milk Substitutes, Feeding Bottles and Infant Foods, (Regulation of Production, Supply and Distribution) Act, 1992, Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Immoral Traffic (Prevention) Act, 1986. The Juvenile Justice Act, 2000 replaced the Juvenile

[33] (1993) 1 SCC642.

[34] (2007) 15 SC 337

Justice Act, 1986 to comply with the provisions of the Convention on the rights of the child which has been acceded to by India in 1992.

In *Olga Tellis v. Bombay Municipal Corporation,*[35] another Constitution Bench of the Supreme Court held that the right to life inculdes right to livelihood because no person can live without the means of living i.e. means of livelihood. If the right to livelihood is not treated as part of constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live.

The Supreme Court in *Narendra Kumar Chandla v. State of Haryana*[36] expanded the scope of Article 21 and held that `right to livelihood' is integral part of the `right to life'.

Taking cognizance of the stark reality that majority of the Indian population (about 76%) is residing in rural areas and unemployment was the greatest challenge before any State or the Central Government, the Parliament decided to enact a law to provide rural employment to restricted persons as stated in such law. This resulted in enactment of the National Rural Employment Guarantee Act, 2005 (for short, `the Act'). As per the preamble of the Act, it was an enactment to provide for enhancement of livelihood security of households in the rural areas of the country by providing at least hundred days of guaranteed wage employment in every financial year to every household whose adult members volunteer to do unskilled manual work and for matters connected therewith and incidental thereto. Even the object and reasons of this enactment demonstrate that objective of the legislation is to enhance the livelihood security of the poor households in rural areas and the Government including the State Government was required to prepare a scheme to give effect to the guarantee proposed under the legislation. Another paramount feature of the Act was that if an eligible applicant is not provided work

[35] 1985 suppl. (2) SCR 51.

[36] (1994) 4 SCC 460.

as per the provisions of this legislation within the prescribed time limit, it will be obligatory on the part of the State Government to pay unemployment allowance at the prescribed rate. This Act was to extend to whole of India and was to come into force on such date as the Central Government by notification in the official Gazette may appoint. This Act was later amended by Amending Act 46 of 2009 (w.e.f. October 2, 2009) and titled as `Mahatma Gandhi National Rural Employment Guarantee Act, 2005'.

The legislative scheme of the Act clearly places the `right to livelihood' at a higher pedestal than a mere legal right. Conjunct reading of the afore referred provisions of the Act demonstrates that the legislature desired to provide minimum one hundred days of employment to one person in the family to ensure that the members of the family do not starve and are able to make their ends meet with reference to the bare minimum requirements for existence. The Act provides constitution of fora and functionaries right from the higher levels in the Central and State Governments to the grass-root levels at Block and Panchayat.

A Constitution Bench of this court in the case of *Secretary, State of Karnataka v. Uma Devi*[37], while dealing with the question that the persons appointed under the provisions of the Act would be entitled to regular appointment, rejected the claim of the Respondents for regularisation and made certain significant observations which read as under : "The argument that the right to life protected by Article 21 of the Constitution would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the backdoor. The obligation cast on the

[37] (2006) 4 SCC 1.

State under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognise that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualising justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens.

However in a case[38] before it, the Supreme Court was shocked to find that there is participatory loot, plunder and pillage in Orissa's rural job scheme. There is open loot of taxpayers' money, there is plunder of poors' right to guaranteed wage employment for 100 days and there is pillage of every single norm of democratic governance and administrative accountability. It is shocking to note that we could not find a single case where entries in the job cards are correct and match with the actual number of workdays physically verified with the villagers. Out of the 100 sample villages covered for this survey, 18 villages have not received any job card, 37 villages have not received any job under NREGS even after 16 months of launch of the scheme, 11 villages have received neither job cards nor any job, Job cards of 23 villages were lying with VLWs (Village Level Worker) and JEs (Junior Engineer) for more than 6-8 months against the will of card holders. In 25 villages, only half, one third or partial wage payments were made. In 20 villages, we found scandalous difference in the number of workdays recorded in the job cards and the number of actual workdays given to the workers. There are 3 villages where no wage payments have been made even after 4-8 months of the works done.

[38] *Centre For Environment & Food Security v. Union Of India*, (2011) 5 SCC 676.

In *Randhir Singh v. Union of India*[39], the Supreme Court has came to view that the principle of 'equal pay for equal work' was not an abstract doctrine but one of substance. Thereafter, this Court observed as follows: "The Preamble to the Constitution of the International Labour Organisation recognises the principle of 'equal remuneration for work of equal value' as constituting one of the means of achieving the improvement of conditions "involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled". Construing Articles 14 and 16 in the light of the Preamble and Article 39(d), we are of the view that the principle 'equal pay for equal work' is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer."

It follows from the above decisions that although the doctrine of 'equal pay for equal work' does not come within Article 14 of the Constitution as an abstract doctrine, but if any classification is made relating to the pay-scales and such classification is unreasonable and/or if unequal pay is based on no classification, then Article 14 at once be attracted and such classification should be set at naught and equal pay may be directed to be given for equal work. In other words, where unequal pay has brought about a discrimination within the meaning of Article 14 of the Constitution, it will be a case of 'equal pay for equal work', as envisaged by Article 14 of the Constitution. If the classification is proper and reasonable and has a nexus to the object sought to be achieved, the doctrine of 'equal pay for equal work' will not have any application even though the persons doing the same work are not getting the same pay. In short, so long as it is not a case of discrimination under Article 14 of the Constitution, the abstract doctrine of 'equal pay for equal work', as envisaged by Article 39(d) of the Constitution, has no manner of application, nor is it enforceable in view of Article 37 of the Constitution.[40]

[39] (1982) 1 SCC 618.

[40] Supra.

In *R. Chandevarappa v. State of Karnataka*[41] the Supreme Court was to consider whether the alienation of Government lands allotted to the Scheduled Castes was in violation of the Constitutional objectives under Article 39(b) and 46. It was held that economic empowerment to the Dalits, Tribes and the poor as a part of distributive justice is a Fundamental Right; assignment of the land to them under Article 39(b) was to provide socio-economic justice to the Scheduled Castes. The alienation of the land, therefore, was held to be in violation of the Constitutional objectives. It was held thus: "In fact, the cumulative effect of social and economic legislation is to specify the basic structure. Moreover, the social system shapes the wants and aspirations and its citizens come to have. It determines in part the sort of persons they want to be as well as the sort of persons they are. Thus an economic system is not only an institutional device for satisfying existing wants and needs but a way of creating and fashioning wants in the future. The economic empowerment, therefore, to the poor, dalits and tribes as an integral constitutional scheme of socio-economic democracy is a way of life of political democracy. Economic empowerment is, therefore, a basic human right and a fundamental right as part of right to live, equality and of status and dignity to the poor, weaker sections, dalits and tribes. The prohibition from alienation is to effectuate the constitutional policy of economic empowerment under Article 14, 21, 38, 39 and 46 read with the Preamble of the Constitution. Accordingly refusal to permit alienation is to effectuate the constitutional policy the alienation was declared to be void under sections 23 of the Contract Act being violative of the constitutional scheme of economic empowerment of accord equality of status, dignity of persons and economic empowerment." It was further held that providing adequate means of livelihood for all the citizens and the distribution of the material resources of the community for common welfare, enable the poor, the dalits and the tribes, to fulfill the basic needs to bring about the fundamental change in the structure of the Indian society. Equality of opportunity and status would thereby become the bedrocks for social integration. Economic empowerment is, therefore, a basic human right and fundamental right as apart of right to life to make political democracy stable. Socio-economic democracy must

[41] (1995) 6 SCC 309.

take strong route and become a way of life. The state, therefore, is enjoined to provide adequate means of livelihood to the poor, weaker sections of the society, the dalits and the tribes and distribute material resources of the community to them for common welfare. Justice is an attribute of human conduct and rule of law is indispensable foundation to establish socio-economic justice. The doctrine of political economy must include interpretation for the public good which is based on justice that would guide the people when questions of economic and social policy are under consideration.

The workers, have a special place in a socialist pattern of society. They are not mere vendors of toil, they are not a marketable commodity to be purchased by the owners of capital. They are producers of wealth as much as capital nay very much more. They supply labour without which capital would be impotent and they, at the least, equal partners with capital in the enterprise. Our constitution has shown profound concern for the workers and given them a pride of place in the new socioeconomic order envisaged in the Preamble and the Directive Principles of State Policy. The Preamble contains the profound declaration pregnant with meaning and hope for millions of peasants and workers that India shall be a socialist democratic republic where social and economic justice will inform all the institutions of national life and there will be equality of status and opportunity for all and every endeavour shall be made to promote fraternity ensuring the dignity of the individual.[42]

The right to health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery. Lack of health denudes his livelihood. Compelling economic necessity to work in an industry exposed to health hazards due to indigence to bread-winning to himself and his dependents, should not be at the cost of the health and vigour of the workman. Facilities and opportunities, as enjoined in Article 38, should be provided to protect the health of the workman. Provision for medical test and treatment invigorates the health of the worker for higher production or efficient service. Continued

[42] Supra.

treatment, while in service or after retirement is a moral, legal and constitutional concomitant duty of the employer and the State. Therefore, it must be held that the right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution and make the life of the workman meaningful and purposeful with dignity of person.[43]

In *Consumer Education & Research Centre v. Union of India*[44], a Bench of three Judges had to consider whether right to health of workers in the Asbestos industries is a fundamental right and whether the management was bound to provide the same? In that context, considering right to life under Article 21, its meaning, scope and content, this Court had held that the jurisprudence of personhood or philosophy of the right to life envisaged under Article 21 enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood, to sustain the dignity of person and to live a life with dignity and equality. The expression "life" assured in Article 21, does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure. Right to health and medical care to protect health and vigour, while in service or after retirement, was held a fundamental right of a worker under Article 21, read with Articles 39(e), 41,43,48 A and all related constitutional provisions and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person. The right to health of a worker is an integral facet of meaningful right to life, to have not only a meaningful existence but also robust health and vigour without which the worker would lead a life of misery. Lack of health denudes him of his livelihood. Compelling economic necessity to work in an industry exposed to health hazards, due to indigence for bread-winning for himself and his dependents, should not be at the cost of the health and vigour of the workman.

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[43] *Paschim Banga Khet Mazdoor Samity v. State Of West Bengal*, JT 1996 (6) 43.

[44] (1995) 3 SCC 42.

In *Vishaka v. State of Rajasthan*[45], the writ petition was filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India with the aim of finding suitable methods for realization of the true concept of "gender equality"; and preventing sexual harassment of working women in all work places through judicial process to fill the vacuum in existing legislation. This Court while framing the guidelines and norms to be observed by the employers in work places to ensure the prevention of sexual harassment of women, inter alia, relied on the provisions in the Convention on the Elimination of All Forms of Discrimination against Women as also the general recommendations of CEDAW for construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.

Constitutional validity of Section 30 of the Punjab Excise Act, 1914 (for short "the Act") prohibiting employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or intoxicating drug is consumed by the public is the question involved in the case of *Anuj Garg v. Hotel Association of India*[46]. The Supreme Court opined that women would be as vulnerable without state protection as by the loss of freedom because of impugned Act. The present law ends up victimizing its subject in the name of protection. In that regard the interference prescribed by state for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society.

Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the state as well as law modeling done in this behalf.

The Supreme Court in *Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde*[47] the question arose; whether the alienation of the lands assigned to

[45] (1997) 6 SCC 241.

[46] (2007) 13 SCALE 762.

[47] (1995) supp. 2 SCC 549.

Scheduled Tribes was valid in law ? In that context considering the Preamble, the Directive Principles and the Fundamental Rights including the right to life, this court had held that economic empowerment and social justice are Fundamental Rights to the tribes. The basic aim to the Welfare State is the attainment of substantial degree of social, economic and political equalities and to achieve self-expression in his work as a citizen, leisure and social justice. The distinguishing characteristic of the welfare State is the assumption by community acting through the State and as its responsibilities to provide the means, whereby all its members can reach minimum standard of economic security, civilised living, capacity to secure social status and culture to keep good health. The welfare State, therefore, should take positive measure to assist the community at large to act in collective responsibility towards its member and should take positive measure to assist them to achieve the above.

It was accordingly held that right to economic empowerment is a fundamental right. The alienation of assigned land without permission of competent authority was held void.

In *Dalmia Cement (Bharat) Ltd. v. Union of India*[48] a Bench of three judges was to consider the constitutionality of Jute Packing Material Act, 1987. The law was made to protect the agriculturists cultivating jute and jute products. In that context it was held thus:

"The agriculturists have fundamental rights to social justice and economic empowerment. The Preamble of the Constitution is the epitome of the basic structure built in the Constitution guaranteeing justice, social, economic and political - equality of status and of opportunity with dignity of person and fraternity. To establish an egalitarian social order, the trinity, the Preamble, the Fundamental Rights in Part III and Directive Principles of State Policy in Chapter IV of the Constitution delineated the socio-economic justice. The word justice envision in the Preamble is used in broad spectrum to harmonise individual right with the general welfare of the society. The Constitution is the supreme law. The purpose of law is realization of justice whose content and scope vary

[48] JT 1996 (4) SC 555.

depending upon the prevailing social environment. Every social and economic change causes change in the law. In a democracy governed by rule of law, it is not possible to change the legal basis of socio economic life of the community without bringing about corresponding change in the law. The Constitution, the fundamental supreme lex distributes the sovereign power between the Executive, the Legislature and the Judiciary. The Court, therefore, must strive to give harmonious interpretation to propel forward march and progress towards establishing an egalitarian social order."[49]

In *U.P. State Sugar Corporation Ltd. v. Sant Raj Singh*[50], this Court opined: The doctrine of equal pay for equal work, as adumbrated under Article 39(d) of the Constitution of India read with Article 14 thereof, cannot be applied in a vaccum. The constitutional scheme postulates equal pay for equal work for those who are equally placed in all respects. Possession of a higher qualification has all along been treated by this Court to be a valid basis for classification of two categories of employees.

The Supreme Court in *State of Haryana v. Charanjit Singh*[51] another three Judge Bench had occasion to consider the matter with regard to Article 39(d) of the Constitution of India i.e. 'equal pay for equal work'. Their Lordships said that there must be everything identical and equal. The concept of 'equal pay for equal work' has undergone a sea of change in series of subsequent decisions. Their Lordships after reviewing all the case laws on the subject observed as follows : " Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a court of law. But equal pay must be for equal work of equal value.

The finding in *Devinder Singh case*[52], that for similar work the principle of equal pay applies, cannot be accepted. Equal pay can only be given for equal work

[49] supra

[50] (2006) 9 SCC 82

[51] (2006) 9 SCC 321.

[52] (1998) 9 SCC 595.

of equal value. The principle of "equal pay for equal" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purpose of pay in order to promote efficiency in administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation. The view that there cannot be discrimination in pay on the ground of differences in modes of selection taken in *Bhagwan Dass*[53] case, cannot be accepted. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a different. If the educational qualifications are different, then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by the competent authority cannot be challenged. A classification based on different in educational qualifications justifies a different in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a different. Thus normally the applicability of this principle must be lest to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interefere." Therefore, their Lordships

[53] (1987) 4 SCC 634.

after reviewing all the judgments have considered all the facets of the principle of Article 39(d) of the Constitution of India.

In *Dayanand's*[54] *case*, the Supreme Court observed that the ratio of *Randhir Singh's*[55] *case* has not been followed in later judgments and held that similarity in the designation or quantum of work are not determinative of equality in the matter of pay scales and that before entertaining and accepting the claim based on the principle of equal pay for equal work, the Court must consider the factors like the source and mode of recruitment/appointment, the qualifications, the nature of work, the value judgment, responsibilities, reliability, experience, confidentiality, functional need etc.

The principle of equal pay for equal work has been considered, explained and applied in a catena of decisions of this Court. The doctrine of equal pay for equal work was originally propounded as part of the Directive Principles of the State Policy in Article 39(d) of the Constitution. In *Randhir Singh v. Union of India*[56] , a bench of three learned Judges of this Court had observed that principle of equal pay for equal work is not a mere demagogic slogan but a constitutional goal, capable of being attained through constitutional remedies and held that this principle had to be read under Article 14 and 16 of the Constitution. This decision was affirmed by a Constitution Bench of this Court in *D.S. Nakara v. Union of India*[57]. Thus, having regard to the constitutional mandate of equality and inhibition against discrimination in Article 14 and 16, in service jurisprudence, the doctrine of equal pay for equal work has assumed status of a fundamental right.[58]

The Supreme Court, on tracing the history of the socialist concept of equal pay and equal work in the case of *U.P. Land Development v. Mohd. Khursheed*

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[54] *Official Liquidator v. Dayanand,* (2008) 10 SCC 1.

[55] *Randhir Singh v.Union of India,* (1982) 1 SCC 618.

[56] (1982) 1 SCC 618

[57] (1983) 1 SCC 305.

[58] *Union of India v. Dineshan K.K,* (2008) 1 SCC 586 1

Anwar[59] opined that the concept of equal pay and equal work is not an abstract doctrine. It articulated that thought it is true that the principle of equal pay for equal work is not expressly declared by our Constitution to be a fundamental right. But it certainly is a constitutional goal. Article 39(d) of the Constitution proclaims equal pay for equal work for both men and women as a directive principle of State Policy. Equal pay for equal work for both men and women means equal pay for equal work for everyone and as between the sexes. Directive principles, as has been pointed out in some of the judgments of this Court have to be read into the fundamental rights as a matter of interpretation. Article 14 of the Constitution enjoins the State not to deny any person equality before the law or the equal protection of the laws and Article 16 declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. These equality clauses of the Constitution must mean something to everyone. To the vast majority of the people the equality clauses of the Constitution would mean nothing if they are unconcerned with the work they do and the pay they get. To them the equality clauses will have some substance if equal work means equal pay. The Preamble to the Constitution declares the solemn resolution of the people of India to constitute India into a Sovereign Socialist Democratic Republic. Again the word socialist must mean something. Even if it does not mean `to each according to his need', it must at least mean equal pay for equal work. The principle of equal pay for equal work is expressly recognized by all socialist systems of law, e.g., Section 59 of the Hungarian Labour Code, para 2 of Section 111 of the Czechoslovak Code, Section 67 of the Bulgarian Code, Section 40 of the Code of the German Democratic Republic, para 2 of Section 33 of the Rumanian Code. Indeed this principle has been incorporated in several western Labour Codes too. Under provisions in Section 31 (g. No. 2d) of Book I of the French Code du Travail, and according to Argentinian law, this principle must be applied to female workers in all collective bargaining agreements. In accordance with Section 3 of the Grundgesetz of the German Federal Republic, and Clause 7, Section 123 of the Mexican Constitution, the principle is given universal significance (vide International Labour Law by Istvan Szaszy, p. 265).

[59] JT 2010 (6) SC 431

The Preamble to the Constitution of the International Labour Organisation recognises the principle of `equal remuneration for work of equal value' as constituting one of the means of achieving the improvement of conditions involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled. Construing Articles 14 and 16 in the light of the Preamble and Article 39 (d), we are of the view that the principle equal pay for equal work is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.

In a landmark judgment in *C.E.S.C. Ltd. v. Subhash Chandra Bose,*[60] the Supreme Court held that Article 39(2) of the Constitution enjoins the State to direct its policies to secure the health and strength of workers. The right to social justice is a fundamental right. Right to livelihood springs from the right to life guaranteed under Article 21. The health and strength of a worker is an integral facet of right to life. The aim of fundamental rights is to create an egalitarian society to free all citizens from coercion or restrictions by society and to make liberty available for all. Right to human dignity, development of personality, social protection, right to rest and leisure as fundamental human rights to common man mean nothing more than the status without means. To the tillers of the soil, wage earners, labourers, wood cutters, rickshaw pullers, scavengers and hut dwellers, the civil and political rights are 'mere cosmetic" rights. Socio-economic and cultural rights are their means and relevant to them to realise the basic aspirations of meaningful right to life. The Universal Declaration of Human Rights, International Conventions of Economic, Social and Cultural Rights rccognise their needs which include right to food, clothing, housing, education, right to work, leizure, fair wages, decent working conditions, social security, right to physical or mental health, protection of their families as integral part of the right to life. Our Constitution in the Preamble and Part IV reinforce them compendiously as social economic justice, a bed-rock to an egalitarian social order. The right to social and economic justice is thus fundamental right. The term 'health' implies more than an

[60] (1992) 1 SCC 441.

absence of sickness. Medical care and health facilities not only project against sickness but also ensures stable man power for economic development. Facilities of health and medical care generate devotion and dedication to give the workers' best, physically as well as mentally in productivity. It enables the worker to enjoy the fruit of his labour, to keep him physically fit and mentally alert for leading a successful, economic, social and cultural life. The medical facilities, arc therefore, part of social security and like gilt edged security, it would yield immediate return in the increased production or at any rate reduce absenteeism on grounds of sickness, etc. health is thus a state of complete physical, menial and social well being and nut merely the absence of disease or infirmity. Right to health is a fundamental human right to workmen. The Employees' State Insurance Act aims at relieving the employees from health and occupational hazards. The judge acts as a vehicle of communication between the authors and the recipients. The end result is to promote rule of law and to enliven social order and humane relations.

In *Regional Director, ESI Corporation v. Francis De Costa*[61], the Supreme Court has held that security against sickness and disablement is fundamental right under Article 25 of the Universal Declaration of Human Rights and Article 7(b) of international Convention of Economic, Social and Cultural Rights and under Articles 39(e), 38 and 21 of the Constitution of India. Employees State Insurance Act seeks to provide seccour to maintain health of an injured workman and the interpretation should be so given as to give effect to right to medical benefit which is a fundamental right to the workman.

The proposition that the legislative declaration of the nexus between the law and the principles in Article 39 is inconclusive and justiciable is well settled. The sequentor is that whenever any immunity is claimed for a law under Article 31-C, the Court has the power to examine whether the provisions of the law are basically and essentially necessary for the effectuation of the principles envisaged in Article 39(b) and (c). It can, hardly be gain-said that the electrical energy generated and distributed by the undertakings of the petitioners constitutes "material resources of the community". The idea of distribution of the material

[61] (1993) suppl. (4) SCC 100.

resources of the community in Article 39(b) is not necessarily limited to the idea of what is taken over for distribution amongst the intended beneficiaries. That is one of the modes of "distribution". Nationalisation is another mode. The economic cost of social and economic reform is, perhaps, amongst the most vexed problems of social and economic change and constitute the core element in Nationalisation. The need for constitutional immunities for such legislative efforts at social and economic change recognise the otherwise unaffordable economic burden of reforms. It is not possible to divorce the economic considerations or components from the scheme of nationalisation with which the former are inextricably integrated. The financial cost of a scheme of nationalisation lies at its very heart and cannot be isolated. [62]

The State, it is trite, while fixing the price for the purpose of equitable distribution or otherwise cannot be actuated purely by a profit motive. It should not discharge its functions in such a way as to aspire to earn huge profit specially at the cost of those who are fully dependent upon them for supply of a monopoly item like coal. It cannot be the law that the public sector undertakings while selling essential commodities must suffer loss. It is also not the law that public sector undertakings must distribute subsidy, but what is required in terms of the constitutional scheme adumbrated under Article 39(b) and Article 14 of the Constitution of India is to make the said essential commodity available at a fair price. [63]

In *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India*[64], the court had held that stability of the political democracy hinges upon socio-economic democracy. Right to development is one of the important facets of basic human rights. Right to selfinterest is inherent in right to life. Mahatma Gandhiji, the Father of Nation said that "every human being has a right to live and, therefore, to find the wherewithal to feed himself and where necessary to clothe and house himself".

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[62] *Tinsukhia Electric Supply Co. Ltd v. State Of Assam,* AIR 1990 SC 123.

[63] *Ashoka Smokeless Coal Ind. Pvt. Ltd. v. Union of India,* 2006 (13) SCALE 102.

[64] (1992) 2 SCC 343.

In *D.K. Yadav v. J.M.A. Industries Ltd.*[65], the question was whether the workman for absence in service for 7 days can be removed without an enquiry. In that context a bench of three judges had held thus: "Article 21 clubs life with liberty, dignityof person with means of livelihood without which the glorious contents of dignity of person would be reduced to animal existence. When right to life is interpreted in the light of the colour and content of procedure established by law must be in conformity with the minimum fairness and procedural justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defence. Article 14 has pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness".

Similarly, the Supreme Court in *L.I.C. of India v. Consumer Education & Research Centre*[66] the Court opined that exercise of The Preamble, the arch of the Constitution, assures socio-economic justice to all the Indian citizens in matters of equality of status and of opportunity with assurance to dignity of the individual. Article 14 provides equality before law and its equal protection. Article 19 assures freedoms with right to residence and settlement in any part of the country and Article 21 by receiving expansive interpretation of right to life extends to right to livelihood.

The Supreme Court in *Mackinnon Mackenzie & Co. Ltd. v. Audrey D'costa*[67] on deciding whether while performing same or similar nature of work lower remuneration to women workers discriminatory on ground of sex and violative of section 4(1), the Court held that to implement Article 39(d) of the Constitution of India and Equal Remuneration Convention, 1951(adopted by International Labour Organisation), the Equal Remuneration Act, 1976 came to be enacted providing for the payment of equal remuneration to men and women workers and for the prevention of discrimination on the ground of sex against

[65] (1993) 3 SCC 259.

[66] (1995) 5 SCC 482.

[67] (1987) 2 SCC 469.

women in the matter of employment and for matters connected therewith or incidental thereto.

It is true that the principle of 'equal pay for equal work' is not expressly declared by our Constitution to be a fundamental right. But it certainly is a Constitutional goal. Art. 39(d) of the Constitution proclaims 'equal pay for equal work for both men and women" as a Directive Principle of State Policy. 'Equal pay for equal work for both men and women' means equal pay for equal work for everyone and as between the sexes. Directive principles, as has been pointed out in some of the judgments of this Court have to be read into the fundamental rights as a matter of interpretation. Equal pay for equal work' is not a mere demagogic slogan. It is a constitutional goal capable of attainment through constitutional remedies by the enforcement of constitutional rights.[68]

The Constitutional Bench of the Supreme Court in *D.S. Nakara v. Union of India*[69] explaining socialism in golden words have expressed that since the advent of the Constitution, the state action must be directed towards attaining the goals set out in Part IV of the Constitution which, when achieved, would permit us to claim that we have set up a welfare State. Article 38 (1) enjoins the State to strive to promote welfare of the people by securing and protecting as effective as it may a social order in which justice social, economic and political shall inform all institutions of the national life. In particular the State shall strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities. Art. 39 (d) enjoins a duty to see that there is equal pay for equal work for both men and women and this directive should be understood and interpreted in the light of the judgment of this Court in *Randhir Singh's*[70] *case* revealing the scope and content of this facet of equality, Chinnappa Reddy, J. speaking for the Court observed as under :

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[68] *Randhir Singh v. Union Of India,* AIR 1982 SC 879.

[69] AIR 1993 SC 130.

[70] supra

"Now, thanks to the rising social and political consciousness and the expectations aroused as a consequence and the forward looking posture of this Court, the under privileged also are clamouring for the rights and are seeking the intervention of the Court with touching faith and confidence in the Court. The Judges of the Court have a duty to redeem their Constitutional oath and do justice no less to the pavement dweller than to the guest of the Five Star Hotel."

Recall at this stage the Preamble, the flood light illuminating the path to be pursued by the State to set up a Sovereign Socialist Secular Democratic Republic. Expression 'socialist' was intentionally introduced in the Preamble by the Constitution (Forty-Second Amendment) Act, 1976. In the objects and reasons for amendment amongst other things, ushering in of socio-economic revolution was promised. The clarion call may be extracted : "The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity, has been engaging the active attention of Government and the public for some time. It is, therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism, to make the directive principles more comprehensive" What does a Socialist Republic imply? Socialism is a much misunderstood word. Values determine contemporary socialism pure and simple. But it is not necessary at this stage to go into all its ramifications. The principal aim of a socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxism and Gandhism leaning heavily towards Gandhian socialism. During the formative years, socialism aims at providing all opportunities for pursuing the educational activity. For want of wherewithal or financial equipment the opportunity to be fully educated shall not be denied. Ordinarily, therefore, a socialist State provides for free education from primary to Ph. D. but the pursuit must be by those who have the necessary intelligence quotient and not as in our society where a brainy young man coming from a poor family will not be able to prosecute the education for

want of wherewithal while the ill-equipped son or daughter of a well-to-do father will enter the portals of higher education and contribute to national wastage. After the education is completed, socialism aims at equality in pursuit of excellence in the chosen avocation without let or hindrance of caste, colour, sex or religion and with full opportunity to reach the top not thwarted by any considerations of status, social or otherwise. But even here the less equipped person shall be assured a decent minimum standard of life and exploitation in any form shall be eschewed. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder. Then comes the old age in the life of everyone, be he a monarch or a Mahatma, a worker or a pariah. The old age overtakes each one, death being the fulfilment of life providing freedom from bondage. But there socialism aims at providing an economic security to those who have rendered unto society what they were capable of doing when they were fully equipped with their mental and physical prowess. In the fall of life the State shall ensure to the citizens a reasonably decent standard of life, medical aid, freedom from want, freedom from fear and the enjoyable leisure, relieving the boredom and the humility of dependence in old age. This is what Article 41 aims when it enjoins the State to secure public assistance in old age, sickness and disablement. It was such a socialist State which the Preamble directs the centres of power Legislative Executive and Judiciary to strive to set up. From a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society is a long march but during this journey to the fulfilment of goal every State action whenever taken must be directed, and must be so interpreted, as to take the society one step towards the goal.[71]

To some extent this approach will find support in the judgment in *Minerva Mills Ltd. v. Union of India*[72] Speaking for the majority, Chandrachud, C.J. observed as under :

"This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into

[71] supra

[72] (1986) 4 SCC 222

a Socialist State which carried with it the obligation to secure to our people justice-social, economic and political. We, therefore, put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved."

At a later stage it was observed that the fundamental rights are not an end in themselves but are the means to an end, the end is specified in part IV. Bhagwati, J. in his minority judgment after extracting a portion of the speech of the then Prime Minister Jawahar Lal Nehru, while participating in a discussion on the Constitution (First Amendment) Bill, observed that the Directive Principles are intended to bring about a socio-economic revolution and to create a new socio-economic order where there will be social and economic justice for all and everyone, not only a fortunate few but the teeming millions of India, would be able to participate in the fruits of freedom and development and exercise the fundamental rights. It, therefore, appears to be well established that while interpreting or examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other.[73]

5.3. SOCIAL JUSTICE AND EQUALITY.

Article 39 A provides for equal justice and free legal aid.

This Article has often been relied in support of right to legal aid as well as legal aid programmes. In pursuance of this Article the Parliament have passed the Legal Service Authorities Act, 1987.

[73] supra

In *Sheela Barse v. State of Maharashtra*[74] the Supreme Court has held that free legal assistance to a poor or indigent accused, arrested and put in jeopardy of his life or personal liberty, is a constitutional imperative mandated not only by Article 39 A but also by Articles 14 and 21 of the Constitution.

In *M. H. Hoskot v. State of Maharashtra*[75] the Supreme Court has held that Judicial Justice with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our Judicature and Judicial Process, engineered by kindred legal technology, compel the colloboration of lawyer power for steering the wheels of equal justice under the law. If a prisoner who is sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appear for want of legal assistance, there is implicit in the Court under Article 142 read with Articles 21 and 39A of the Constitution power to assign counsel for such imprisoned individual "for doing complete justice". This is a necessary incident of the right of appeal conferred by the Code and allowed by Article 136 of the Constitution. The inference is inevitable that this is a State's duty and not government's charity. Equally affirmative is the implication that while legal services must be free to the beneficiary, the lawyer himself has to be reasonably remunerated for his services. Surely, the profession has a public commitment to the people but mere philanthropy of its members yields short mileage in the long run. Their services, especially when they are on behalf of the State, must be paid for. Naturally, the State concerned must pay a reasonable sum that the court may fix when assigning counsel to the prisoner. Of course, the court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the court. The accused has a right to counsel

[74] AIR 1983 SC 378.

[75] AIR 1978 SC 1548.

not in the permissive sense of Article 22(1) and its wider amplitude but in the peremptory sense of Article 21 confined to prison situations.

Stressing the importance of legal aid programmes the Supreme Court in *Center For Legal Research v. State of Kerala*[76] held that there can be no doubt that if the legal aid programme is to succeed it must involve public participation. The State Government undoubtedly has an obligation under Article 39A of the Constitution which embodies a directive principle of State policy to set up a comprehensive and effective legal aid programme in order to ensure that the operation of the legal system promotes justice on the basis of equality. But we have no doubt that despite the sense of social commitment which animates many of our officers in the Administration, no legal aid programme can succeed in reaching the people if its operation remains confined in the hands of the Administration. It is absolutely essential that people should be involved in the legal aid programme because the legal aid programme prevailing in the country, adopt a more dynamic posture and take within its sweep what we may call strategic legal aid programme consisting of promotion of legal literacy, organisation of legal aid camps, encouragement of public interest litigation and holding to lok adaltas or niti melas for bringing about settlements of disputes whether pending in courts or outside.

Article 39-A came to be inserted in the Constitution by Constitution (42nd Amendment) Act, 1976 with effect from 3.1.1977. It enjoins upon the State to secure that the operation of the legal system promotes justice on the basis of equal opportunity and in particular to provide free legal aid by suitable legislation or schemes or in any other way and to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Equal justice to all and free legal aid are hallmark of Article 39-A. Pursuant to these objectives, the 1987 Act was enacted by the Parliament to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal

[76] AIR 1986 SC 1322.

opportunity. The statement of objects and reasons that led to enactment of 1987 Act reads as follows : “Article 39-A of the Constitution provides that the State shall secure that the operation of the legal system promotes justice on the 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 not denied to any citizen by reason of economic or other disabilities.[77]

Legal Services Authorities Act, 1987 (the Act) was enacted to constitute Legal Services Authorities to provide for free and competent legal service to the weaker sections of the society, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity. The Act was enacted with a view to give effect to the provisions of Article 39A of the Constitution of India which mandates that 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 not denied to any citizen by reason of economic or other disability. The Statement of Objects and Reasons for enacting the Amendment Act is as under :- "The Legal Services Authorities Act, 1987 was enacted to constitute legal services authorities for providing free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice were not denied to any citizen by reason of economic or other disabilities and to organize Lok Adalats to ensure that the operation of the legal system promoted justice on a basis of equal opportunity. The system of Lok Adalat, which is an innovative mechanism for alternate dispute resolution, has proved effective for resolving disputes in a spirit of conciliation outside the courts."[78]

Gandhiji said, ‘I realized that the true function of a lawyer was to unite the parties. The lesson was so indelible burnt into that the large part of my time during the twenty years of my practice a lawyer was occupied in bringing about private

[77] *Bar Council of India v. Union of India*, (2012) 8 SCC 243.

[78] *United India Insurance Co. Ltd v. Ajay Sinha*, (2008)7 SCC 454.

compromise of hundred of cases. I lost nothing thereby. Not even money, certainly not my soul.[79]

The Indian Parliament had enacted the Consumer Protection Act, 1986. The declared objective of the statute was to provide for better protection of the interests of consumers. It seeks to provide a speedy and inexpensive remedy to the consumer. The Consumer Protection Act, 1986 is one of the benevolent social legislations intended to protect the large body of consumers from exploitation. The Act has come as a panacea for consumers all over the country and is considered as one of the most important legislations enacted for the benefit of the consumers. The Consumer Protection Act, 1986 provides inexpensive and prompt remedy. The Consumer Protection Act, 1986 is dedicated, as its preamble shows, to provide for effective protection of the rights of the consumers. According to the Statement of Objects and Reasons, it seeks to provide speedy and simple redressal to consumer disputes. The object of the Act is to render simple, inexpensive and speedy remedy to the consumers with complaints against defective goods and deficient services and for that a quasi-judicial machinery has been sought to be set up at the District, State and Central levels. The Consumer Protection Act has come to meet the long-felt necessity of protecting common man from wrongs for which the remedy under the ordinary law for various reasons has become illusory.[80]

On deciding a question whether the State is duty bound to grant in aid to private law colleges the Supreme Court in *State of Maharashtra v. Manubhai Pragaji Vashi*[81] examined in the light of the combined effect of Article 21 and Article 39A of the Constitution of India. The Court opined that right to free legal aid and speedy trial are guaranteed fundamental rights under Article 21 of the Constitution. The preamble to the Constitution of India assures `justice, social, economic and political'.

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[79] Nyaya Deep, Vol-VIII, Issue 3, July 2007.

80 *C. Venkatachalam v. Ajitkumar C. Shah*, (2011) 9 SCC 707.

[81] AIR 1996 SC 1.

Judges of the last Court in the largest democracy of the world have a duty and the basic duty is to articulate the Constitutional goal which has found such an eloquent utterance in the Preamble. Judges and specially the judges of the highest Court have a vital role to ensure that the promise is fulfilled. If the judges fail to discharge their duty in making an effort to make the Preambular promise a reality, they fail to uphold and abide by the Constitution which is their oath of office. This has to be put as high as that and should be equated with the conscience of this Court.[82]

The Supreme Court, in the case of *Zahira Habibullah Sheikh (5) v. State of Gujarat*[83] has explained the concept of fair trial to an accused and it was central to the administration of justice and the cardinality of protection of human rights. It is stated : "This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice--often referred to as the duty to vindicate and uphold the majesty of the law. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The

[82] *Harjinder Singh Vs. Punjab State Warehousing Corporation* , (2010) 3 SCC 192.

[83] (2006) 3 SCC 374.

courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators. The principles of rule of law and due process are closely linked with human rights protection. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

The Supreme Court in *Mohd. Sukur Ali v. State of Assam,*[84] held that we are of the opinion that it is not fair or just that a criminal case should be decided against an accused in the absence of a counsel. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, in our opinion, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of a counsel, there will be violation of Article 21 of the Constitution.

The right to appear through counsel has existed in England for over three centuries. In ancient Rome there were great lawyers e.g. Cicero, Scaevola, Crassus, etc. who defended the accused. In fact the higher the human race has progressed in civilisation, the clearer and stronger has that right appeared, and the more firmly has it been held and asserted. Even in the Nuremberg trials the Nazi war criminals, responsible for killing millions of persons, were yet provided counsel. Therefore when we say that the accused should be provided counsel we are not bringing into existence a new principle but simply recognising what already existed and which civilised people have long enjoyed.[85]

[84] (2011) 4 SCC 729.

[85] Supra.

Right to fair trial, presumption of innocence until pronouncement of guilt and the standards of proof i.e. the prosecution must prove its case beyond reasonable doubt are the basic and crucial tenets of our criminal jurisprudence. The courts are required to examine both the contents of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to state such principle with exactitude as it will always depend on the facts and circumstances of a given case. Therefore, the court has to ensure that the ends of justice are met as that alone is the goal of criminal adjudication.[86]

In *Md.Ajmal Amir Kasab v. State Of Maharashtra*[87], the Supreme Court giving effect to the mandate of Article 39 A provided free legal assistance to the accused who were not represented of a standard and quality that is not available to a majority of Indian nationals approaching this Court against their conviction and sentence.

Article 21 of the Constitution of India takes in its sweep the right to expeditious and fair trial. Even Article 39A of the Constitution recognizes the right of citizens to equal justice and free legal aid. To put it simply, it is the constitutional duty of the Government to provide the citizens of the country with such judicial infrastructure and means of access to Justice so that every person is able to receive an expeditious, inexpensive and fair trial. The plea of financial limitations or constraints can hardly be justified as a valid excuse to avoid performance of the constitutional duty of the Government, more particularly, when such rights are accepted as basic and fundamental to the human rights of citizens.[88]

In a democratic polity, governed by rule of law, it should be the main concern of the State, to have a proper legal system. Article 39 A mandates that the State shall provide free legal aid by suitable legislation or schemes or in any other way to ensure that opportunities for securing justice are not denied to any citizen

[86] *Mohd. Hussain @ Julfikar Ali v. The State (Govt. of NCT) Delhi,* AIR 2012 SC 750.

[87] (2012) 9 SCC 1.

[88] *Brij Mohan Lal v. Union of India,* (2012) 6 SCC 502.

by reason of economic or other disabilities. The principles contained in Article 39A are fundamental and cast a duty on the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunities and further mandates to provide free legal aid in any way - by legislation or otherwise, so that justice is not denied to any citizen by reason of economic or other disabilities. Legal aid is required in many forms and at various stages, for obtaining guidance, for resolving disputes in courts, tribunals or other authorities. It has manifold facets. The explosion in population, the vast changes brought about by scientific, technological and other developments, and the all round enlarged field of human activity reflected in modern society, and the consequent increase in litigation in courts and other forums demand that the service of competent persons with expertise in law is required in many stages and at different forums or levels and should be made available.

Article 40 provides for organisation of village panchyat. The States 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.

The Constitution (Seventy-Third Amendment) Act, 1992 came into force on 24th April, 1993 introducing the panchyats in Part IX vide Article 243 to 243 O, to give effect to one of the Directive Principles of the State Policy, embodied in Article 40 of the Constitution of India which directs the State to organise village panchayats as units of self-government. On coming into force of the said Constitutional Amendment, the States were required by the Centre to take steps to organise village panchayats on the lines of the provisions of the said Constitutional Amendment by making law or amending the existing law suitably. There is, however, no doubt that when the Article speaks of village panchayats as units of self- government, it has in view the organisation of the lowest level units of self-governance in the hierarchy of self-governing democratic, policy making and administrative units. In other words, the village panchayats are envisaged by the Article as the base democratic institutions of a pyramid of the democratically organised and functioning self-governing units. This being so, while organising the village panchayats, what is necessary to be kept in mind is (a) that they are to be

the self governing units at the lowest end of the democratic polity, (b) that being self-governing units, those who are governed by the said units and for whose benefit they are going to operate, will have either a direct or an elective indirect representation in them; (c) that they will have an effective say in the conduct of their affairs including its plans, policies and programmes and their execution and (d) that thus they will have not only a sense and satisfaction of participation but also an experience in the governance of their own affairs. So long as the village panchayats are organised to achieve the said objectives, the requirements of the said Article will have been complied with both in their spirit and in letter.

In 1992, the Constitution (Seventy-third Amendment) Act was introduced in Parliament and the existing Part IX was substituted. The background in which this amendment was introduced is evinced from the first two paragraphs of the Statement of Objects and Reasons, which are extracted below:

"Though the Panchayati Raj institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged supersessions, insufficient representation of weaker sections like Scheduled Castes, Scheduled Tribes and women, inadequate devolution of powers and lack of financial resources.

Article 40 of the Constitution which enshrines one of the directive principles of State Policy lays down that 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. In the light of the experience in the last forty years and in view of the shortcomings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of Panchayati Raj institutions to impart certainty, continuity and strength to them."

The Supreme Court in *N. M Kheni v. Manikrao Patil*[89] held that elections to local bodies and vesting of powers in units of self government are part of the Directive Principles of State Policy which is embodied in Article 40 of the Constitution and, in a sense, homage to the Father of the Nation, standing as he did for participative democracy through decentralisation of power. The Court further opined that the power to the people, which is the soul of a republic, stands subverted if decentralisation and devolution desiderated in Article 40 of the Constitution is ignored by executive inaction even after holding election to the floor-level administrative bodies.

In the case of immense importance the Supreme Court has held that it is common knowledge that the needs of the people change with the development in the economic, scientific and technologic fields as also with the developments in transport and communication. With them, the concept of self sufficiency and the means, mode and range of self-governance also change. What is more, the units of self-governance at the lower level being interrelated and integrated with those at the higher levels as parts of the whole scheme of administration and development in the State, have to respond to and fall in line with the growth in the size and operation of the units at the higher level to form a coordinated democratic polity and administrative machinery. The concept of grassroot or lowest level administration must, therefore, necessarily change with the advance and progress at other levels. The governing units at all levels have to fit in a pattern, and a scheme for administration both for law and order and economic growth. They have to act as vehicles of overall stability and progress. For that purpose, their constitution and functioning have to be in conformity with the larger social, political and economic goals. Hence there cannot be any immutable social, political, economic or organisational concept of village as a self governing unit. In a developing country like ours, where the population is growing fast, where the society is in ferment on all fronts, where divisive forces of all kinds abound, where the vast majority of population is illiterate and is the victim of ignorance, superstition, blind-faith, biases and prejudices, and is shackled by tradition, and irrational customs and practices, there is an urgent need to evolve means to

[89] (1977) 4 SCC 16.

unite and integrate the society, to expose the populace to larger and higher goals, to imbibe in them the wider perspectives and to forge a socially cohesive front for breaking the barriers of race, caste, class, religion and region rather than to pander to the age-old, self-centered physical and mental barriers.[90]

Article 243 (g) of the Constitution defines village to mean "a village specified by the Governor to be village and includes a group of villages so specified". In other words, according to this definition, any existing village or a group of the existing villages may be specified by the Governor as a village for the purposes of organising a village panchayat. The definition begs the question as to what is a village which the Governor can specify as a village for the purposes of constituting the "village panchayat".[91]

The 73rd Amendment was brought into force on 24.4.93 to give effect to one of the Directive Principles of State Policy, namely, Article 40 of the Constitution. Therefore, it cannot be said that the 73rd Amendment of the Constitution is the basic feature of the Constitution. Article 40 cannot be said to qualify as the basic feature of the Constitution. The 73rd Amendment came to the Constitution by way of amendment under Article 368 and, therefore, it cannot be said to be a basic feature of the Constitution. It is an enabling provision and the State is empowered either to eliminate, modify or cancel by exercising power under the enabling provision.[92]

Examining on the question of representation of the backward class the Supreme Court in *Bihari Lal Rada v. Anil Jain*[93] explained why it may be necessary to provide reservations in favour of Scheduled Tribes and opined that ever since the adoption of the Constitution, there have been efforts at democratic

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[90] *State of U.P. v. Pradhan Sangh Kshettra Samiti*, 1995 SCC Supl. (2) 305.

[91] Supra.

[92] *U.P. Gram Panchayat Adhikari Sabha v. Daya Ram Saroj,* (2007) 2 SCC 138.

[93] (2009) 4 SCC 1.

decentralization of power. A reference may be made to Article 40 of the Constitution which obligates the State to take steps to re-organise village Panchayats and endow them with such powers and functions as may be necessary to enable them to function as units of self- government. How far the local self-government institutions at the gross roots have attained the objectives of democratic decentralization always remained a matter of serious and sustained debate. It was felt that the monopoly of leadership by certain groups was deeply disturbing. The poorer and weaker sections of the Society were prevented from providing effective leadership. Roles in implementing the community development plans, electoral politics at the gross root level led to patronage. It was perceived that dominant sections in both Panchayati Raj Institutions and as well as Nagarpalikas/Municipalities etc. captured power and used the same for their own ends. All this has contributed to a loss of faith in the gross root democratic institutions.

While introducing the 73rd Amendment Act, the Statement of Objects and Reasons clearly contemplated democratic decentralization to pursue the legitimate governmental objective of ensuring that the traditionally marginalized groups should progressively gain a foothold in local self government. It is in this background that `reasonable classification' is to be viewed. Reservation in favour of the STs in Panchayats at all the three tiers is clearly an example of `compensatory discrimination' especially in view of the fact that the scheduled areas under consideration were completely under a separate administrative scheme as per the Fifth Schedule to the Constitution.[94]

Under 73rd Amendment of the Constitution, Panchayat became an `institution of self governance' which was previously a mere unit, under Article 40. 73rd Amendment heralded a new era but it took nearly more than four decades for our Parliament to pass this epoch making 73rd Constitution Amendment - a turning point in the history of local self-governance with sweeping consequences in view of decentralization, grass root democracy, people's participation, gender equality and social justice. Decentralization is perceived as a pre- condition for preservation

[94] *Union Of India v. Rakesh Kumar*, 2010(1) SCALE 281.

of the basic values of a free society. Republicanism which is the `sine qua non' of this amendment is compatible both with democratic socialism and radical liberalism. Republicanism presupposes that laws should be made by active citizens working in concert. Price of freedom is not merely eternal vigilance but perpetual and creative citizen's activity. This 73rd Amendment is a very powerful `tool of social engineering' and has unleashed tremendous potential of social transformation to bring about a sea-change in the age-old, oppressive, anti human and status quoist traditions of Indian society. It may be true that this amendment will not see a quantum jump but it will certainly initiate a thaw and pioneer a major change, may be in a painfully slow process.[95]

On a careful reading of this amendment, it appears that under Article 243B of the Constitution, it has been mandated that there shall be Panchayat at the village, intermediate and district levels in accordance with the provisions of Part IX of the Constitution. Article 243C provides for composition of Panchayat which contemplated the post of Chairperson. Article 243D provides for reservation of seats and 243E provides for duration of Panchayat. Article 243F enumerates the grounds of disqualification of membership of the Panchayat and 243G prescribes the powers, authority and responsibilities of Panchayat. There are several other provisions relating to powers of the Panchayat to impose taxes and for constitution of Finance Commission in order to review financial position of the Panchayat. The accounts of the Panchayat are also to be audited as per Constitutional mandate under Article 243J. There are detailed provisions for elections of Panchayat under Article 243K. Article 243O imposes the bar to interference by Courts in electoral matters of the Panchayat. In this connection particular reference may be made to the provision of Article 243G of the Constitution which is set out below: "243G. Powers, authority and responsibilities of Panchayat. - Subject to the provisions of this Constitution the Legislature of a State may, by law, endow the Panchayats with such powers and authority and may be necessary to enable them to function as institutions of self- government and such law may contain provisions for the

[95] *Bhanumati v. State of U.P.,* (2010) 12 SCC 1.

devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to- (a) the preparation of plans for economic development and social justice; (b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule." The said article is to be read in conjunction with 11th Schedule of the Constitution which came with the said 73rd Amendment. To alter the planning process of the country a statutory planning body like District Planning Committee has been created. To ensure regular election to these bodies Election Commission has been created. In order to ensure people's participation Gram Sabha, a body at the grass root level, has been constitutionally planned. A perusal of the Constitution provision in the 73rd Amendment would show that the success of the system does not depend merely on the power which has been conferred but on the responsibility which has been bestowed on the people. Under the Constitutional scheme introduced by the 73rd Amendment Government State is no longer a service provider but is a felicitator for the people to initiate development on the basis of equity and social justice and for the success of the system people has to be sensitized about their role and responsibility in the system. Thus the composition of the Panchayat, its function, its election and various other aspects of its administration are now provided in great detail under the Constitution with provisions enabling the State Legislature to enact laws to implement the Constitutional mandate. Thus formation of Panchayat and its functioning is now a vital part of the Constitutional scheme under Part IX of the Constitution.[96]

The provisions contained in Part IX provide firm basis for self-governance by the people at the grass root through the institution of Panchayats at different levels. For achieving the objectives enshrined in Part IX of the Constitution, the State Legislatures have enacted laws and made provision for devolution of powers upon and assigned various functions listed in the Eleventh Schedule to the Panchayats. The primary focus of the subjects enumerated in the Eleventh Schedule is on social and economic development of the rural parts of the country by conferring upon the Panchayat the status of a constitutional body. Parliament

[96] supra

has ensured that the Panchayats would no longer perform the role of simply executing the programs and policies evolved by the political executive of the State. By virtue of the provisions contained in Part IX, the Panchayats have been empowered to formulate and implement their own programs of economic development and social justice in tune with their status as the third tier of government which is mandated to represent the interests of the people living within its jurisdiction. The system of Panchayats envisaged in this Part aims at establishing strong and accountable systems of governance that will in turn ensure more equitable distribution of resources in a manner beneficial to all.[97]

5.4. RIGHT TO WORK WITH DIGNITY.

Article 41 provides the directives for right to work, to education and to public assistance in certain cases.

Articles 41 provides that within the limits of its economic capacity and development, the state shall make effective provision to secure the right to work as fundamental with just and human conditions of work by suitable legislation or economic organization or in any other way in which the worker shall be assured of living wages, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workmen. The poor, the workman and common man can secure and realise economic and social freedom only through the right to work and right to adequate means of livelihood, to just and human conditions of work, to a living wage, a decent standard of life, education and leisure. To them, these are fundamental facets of life. Article 43A, brought by 42nd Constitution (Amendment) Act, 1976 enjoins upon the State to secure by suitable legislation or in any other way, the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry. Article 46 gives a positive mandate to promote economic and educational interest of the weaker sections of the people. Correspondingly, Article

[97] *Village Panchayat Calangute vs Additional Director Of Panchayat,* (2012) 7 SCC 550.

51A imposes fundamental duties on every citizen to develop the scientific temper, humanism and 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. To make these rights meaningful to workmen and meaningful right to life a reality to workmen, shift of judicial orientation from private law principles to public law interpretation harmoniously fusing the interest of the community. The judicial function of a Court, therefore, in interpreting the Constitution and the provisions of the Act, requires to build up continuity of socio-economic empowerment to the poor to sustain equality of opportunity and status and the law should constantly meet the needs and aspiration of the society in establishing the egalitarian of the society in establishing the egalitarian social order. Therefore, the concepts engrafted in the statute require interpretation from that perspectives, without doing violence to the language. Such an interpretation would elongate the spirit and purpose of the Constitution and make the aforesaid rights to the workmen a reality lest establishment of an egalitarian social order would be frustrated and Constitutional goal defeated.

In *Bandhua Mukti Morcha v. Union of India*,[98] this court held that Article 21 read with articles 39, 41 and 42 provides for protection and preservation of health and strength also of tender age children against abuse of opportunities and further provides for providing the educational facilities.

The Supreme Court in *Mohini Jain v. State of Karnataka*[99] has held that Article 41 in Chapter IV of the Constitution recognises an individual's right "to education". It says that "the State shall, within the limits of its economic capacity and development, make effective provision for the securing the right to education." Although a citizen cannot enforce the directive principles contained in Chapter IV of the Constitution but these were not intended to be mere pious declarations. Without making "right to education" under Article 41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate. The "right to education", therefore, is

[98] AIR 1984 SC 802

[99] (1992) 3 SCC 666.

concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society. Every citizen has a `right to education' under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through state owned or state-recognised educational institutions. When the State Government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the Constitution. The students are given admission to the educational institutions whether state-owned or state-recognised in recognition of their `right' to education' under the Constitution. Charging capitation fee in consideration of admission to educational institutions is a patent denial of a citizen's right to education under the Constitution.

The citizens of this country have a fundamental right to education. The said right flows from Article 21.This right is, however, not an absolute right. Its contentand parameters have to be determined in the light of Articles 45 and 41. In other words, every child/citizen of this country has a right to free education until he completes the age of 14 years. Thereafter his right to education is subject to the limits of economic capacity and development of the State. The obligations created by Articles 41, 45 and 46 of the Constitution can be discharged by the State either by establishing institutions of, its own or by aiding, recognising and/or granting affiliation to private educational institutions.[100]

The Supreme Court in *Unni Krishan v. State of A.P*[101] has held that a true democracy is one where education is universal, where people understand what is good for them and the nation and know how to govern themselves. Articles 45, 46 and 41 are designed to achieve the said goal among others. It is in the lot of these articles that the content and parameters of the right to education have to be determined. Thus, right to education, understood in the context of Articles 45 and

[100] supra

[101] (1993) 1 SCC 645.

41, means: (a) every child/citizen of this country has a right to free education until he completes the age of 14 years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development. Article 45 assures right to free education for all children until they complete the age of 14 years. Among the several articles in Part IV, only Article 45 speaks of a time-limit no other article does. This is very significant. The State should honour the command of Article 45. It must be made a reality. A childhood has a fundamental right to free education up to the age of 14 years.

The Court further held that the right to education further means that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development. This does not mean transferring Article 41 from Part IV to Part III. No State would say that it need not provide education to its people even within the limits of its economic capacity, and development. It goes without saying that the limits-of economic capacity are, ordinarily speaking matters within the subjective satisfaction of the State. Therefore, it is not correct to say that reading the right to education into Article 21, this Court would be enabling each and every citizen of this, country to approach the courts to compel the State to provide him such education as he chooses. The right to free education is available only to children until they complete the age of 14 years. Thereafter, the obligation of the State to provide education is subject to the limits of its economic capacity and development.[102]

Article 21 A was introduced in the Constitution in lines of Article 41 and Article 45 providing to free and compulsory education to children until they complete the age of 14 years.

In the case of *Deoki Nandan Prasad v.State of Bihar*[103] the Supreme Court has held that pension is a right; not a bounty or gratuitous payment. The payment of pension does not depend upon the discretion of the Government but is

[102] supra

[103] (1971) Suppl. SCR 634.

governed by the rules and a government servant coming within those rules is entitled to claim pension. The pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation for service rendered. Pension also has a broader significance in that it is a social welfare measure rendering socio-economic justice by providing economic security in old age to those who toiled ceaselessly in the hey-day of their life. Pension as a retirement benefit is in consonance with and in furtherance of the goals of the Constitution. The goals for which pension is paid themselves give a fillip and push to the policy of setting up a welfare state. The preamble to the Constitution envisages the establishment of a socialist republic. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. Article 41 enjoins the State to secure public assistance in old age, sickness and disablement. Every state action whenever taken must be directed and must be so interpreted as to take society one step towards the goal of establishing a socialist welfare society. While examining the constitutional validity of legislative/ administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble provides a reliable yardstick to hold one way or the other.

Referring to the introduction of Socialism the Supreme Court has viewed that the Preamble, the flood light illuminating the path to be pursued by the State to set up a Sovereign Socialist Secular Democratic Republic. Expression 'socialist' was intentionally introduced in the Preamble by the Constitution (Forty-Second Amendment) Act, 1976. In the objects and reasons for amendment amongst other things, ushering in of socio-economic revolution was promised. The clarion call may be extracted : "The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity, has been engaging the active attention of Government and the public for some time. It is, therefore, proposed to amend the Constitution to spell out

expressly the high ideals of socialism to make the directive principles more comprehensive."[104]

There is no doubt that broadly interpreted and as a necessary logical corollary, right to life would include the right to livelihood and, therefore, right to work. It is for this reason that this Court in *Olga Tellis v. Bombay Municipal Corporation*[105], while considering the consequences of eviction of the pavement dwellers had pointed out that in that case the eviction not merely resulted in deprivation of shelter but also deprivation of livelihood inasmuch as the pavement dwellers were employed in the vicinity of their dwellings. The Court had, therefore, emphasised that the problem of eviction of the pavement dwellers had to be viewed also in that context. This was, however, in the context of Article 21 which seeks to protect persons against the deprivation of their life except according to procedure established by law. This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it, and not because it considers it any the less fundamental to life. Advisedly, therefore, it has been placed in the Chapter on Directive Principles Article 41 of which enjoins upon the State to make effective provision for securing the same "within the limits of its economic capacity and development". Thus even while giving the direction to the State to ensure the right to work, the Constitution-makers thought it prudent not to do so without qualifying it.[106]

In *Consumer Education & Research Centre v. Union of India*[107], a Bench of three Judges had to consider whether right to health of workers in the Asbestos industries is a fundamental right and whether the management was bound to provide the same? In that context, considering right to life under Article 21, its meaning, scope and content, this Court had held that the jurisprudence of

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[104] supra

[105] AIR 1986 SC 180.

[106] *Delhi Development Horticulture Employees' Union v. Delhi Administration,* (1992) 4 SCC 99.

[107] (1995) 3 SCC 42.

personhood or philosophy of the right to life envisaged under Article 21 enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood, to sustain the dignity of person and to live a life with dignity and equality. The expression "life" assured in Article 21, does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure. Right to health and medical care to protect health and vigour, while in service or after retirement, was held a fundamental right of a worker under Article 21, read with Articles 39(e), 41,43,48 - A and all related constitutional provisions and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person. The right to health of a worker is an integral facet of meaningful right to life, to have not only a meaningful existence but also robust health and vigour without which the worker would lead a life of misery. Lack of health denudes him of his livelihood. Compelling economic necessity to work in an industry exposed to health hazards, due to indigence for bread-winning for himself and his dependents, should not be at the cost of the health and vigour of the workman.

The National Rural Employment Guarantee Act, 2005, (NREGA) was enacted to reinforce the commitment towards livelihood security in rural areas. The Act was notified on 7th September, 2005. The law was initially called the National Rural Employment Guarantee Act (NREGA) but was renamed to Mahatma Gandhi National Rural Employment Guarantee Act, on 2 October 2009. The significance of NREGA lies in the fact that it creates a right based framework for wage employment programmes and makes the Government legally accountable for providing employment to those who ask for it. In this way, the legislation goes beyond providing a social safety net towards guaranteeing the right to employment. The National Rural Employment Guarantee Act (NREGA) aims at enhancing the livelihood security of the people in rural areas by guaranteeing hundred days of wage employment in a financial year, to a rural household whose members volunteer to do unskilled manual work. The objective of the Act is to create durable assets and strengthen the livelihood resource base of the rural poor.

The choice of works suggested in the Act address causes of chronic poverty like drought, deforestation, soil erosion, so that the process of employment generation is on a sustainable basis works suggested in the Act addresses causes of chronic poverty like drought, deforestation and soil erosion, so that the process of employment generation is maintained on a sustainable basis.

Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated equals. Thus, any public employment has to be in terms of the constitutional scheme. A sovereign government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary appointments or engaging workers on daily wages. Going by a law newly enacted, The National Rural Employment Guarantee Act, 2005, the object is to give employment to at least one member of a family for hundred days in an year, on paying wages as fixed under that Act. But, a regular process of recruitment or appointment has to be resorted to, when regular vacancies in posts, at a particular point of time, are to be filled up and the filling up of those vacancies cannot be done in a haphazard manner or based on patronage or other considerations. Regular appointment must be the rule.[108]

The Act was introduced to implement the constitutional obligation of Right to work under Article 41 of the Directive Principles.

Aajeevika- National Rural Livihood Mission (NRLM) was launched by the Ministry of Rural Development (MoRD), Government of India, in June 2011. The mission aims at creating efficient and effective institutional platforms for rural poor enabling them to increase household income through sustainable livelihood enhancements and improved access to financial services.

[108] *State Of Karnataka v. Umadevi,* (2006) 4 SCC 1.

Schemes as such are introduced in keeping in mind of Article 41 of the Directive Principles.

The Supreme Court in *State of Tamil Nadu v. K. Shyam Sunder*[109], held as under:

"In the post constitutional era, attempts have been made to create an egalitarian society by removing disparity among individuals and in order to do so, education is the most important and effective means. There has been an earnest effort to bring education out of commercialism/merchantilism. The right of a child should not be restricted only to free and compulsory education but should be extended to have quality education without any discrimination on economic, social and cultural grounds".

Imparting elementary and basic education is a constitutional obligation on the State as well as societies running educational institutions. When we talk of education, it means not only learning how to write and read alphabets or get mere information but it means to acquire knowledge and wisdom so that he may lead a better life and become a better citizen to serve the nation in a better way. The policy framework behind education in India is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds. Every generation looks up to the next generation with the hope that they shall build up a nation better than the present. Therefore, education which empowers the future generation should always be the main concern for any nation.[110]

[109] (2011) 8 SCC 737.

[110] *Bhartiya Seva Samaj Trust v. Yogeshbhai Ambalal Patel*, (2012) 9 SCC 310.

The Supreme Court in *Narmada Bachao Andolan v. State of M.P*[111]., has dealt elaborately with most of the issues agitated in this appeal, particularly, the issues of delay and laches, availability of alternative remedy, entitlement of major sons and daughters of oustees/as well as the landless labourers for allotment of agricultural land. The issues of land acquisition, rehabilitation and resettlement of oustees considering their fundamental and constitutional rights under Articles 21 and 300-A of the Constitution of India have been dealt with elaborately therein. This Court held:- These cases are to be decided giving strict adherence to the R & R Policy, as amended on 3.7.2002, further considering that special care is to be taken where persons are oppressed and uprooted so that they are better off.

Our Constitution requires removal of economic inequalities and provides for provision of facilities and opportunities for a decent standard of living and protection of economic interests of the weaker segments of the society and in particular Scheduled Castes and Scheduled Tribes. Every human being has a right to improve his standard of living. Ensuring people are better off is the principle of socio-economic justice which every State is under obligation to fulfil, in view of the provisions contained in Articles37, 38, 39(a), (b), (e), (f), 41, 43, 46 and 47 of the Constitution of India.[112]

Some Social Welfare schemes undertaken by the Government of India in the lines of Article 41 are enumerated below:

Labour and Employment Scheme-
Employment Assurance Scheme (EAS)
Food for Work Programme
Jawahar Rozgar Yojana
Labour Welfare Fund
Maternity Benefits Scheme
Million Wells Scheme
Mahatma Gandhi National Rural Employment Guarantee Act, 2005

[111] AIR 2011 SC 1989.

[112] Supra.

(MNREGA)

Prime Minister's Rozgar Yojana (PMRY)

Rural Employment Generation Programme(REGP)

Sampoorna Grameen Rozgar Yojana (SGRY)

Scheme for Working Women Hostels

Scheme for Rehabilitation of Bonded Labourers

Support to Training and Employment Programme for Women (STEP)

Swarnjayanti Gram Swarozgar Yojana(SGSY)

Training of Rural Youth for Self- Employment (TRYSEM)

Article 42 provides provisions for just and human conditions of work and maternity relief.

Laws such as Industrial Disputes Act, 1947, The Minimum Wages Act, The Maternity Relief Act, The Workman Compensation Act, Maternity Benefit Act, 1961, The Employees Insurance Act, are also introduced to implement the provision of Article 42 of the Directive Principles.

The Supreme Court in *Municipal Corporation of Delhi v. Female Workers*[113] examining in the background of the provisions contained in Article 39, specially in Articles 42 and 43, that the claim of the respondents for maternity benefit and the action of the petitioner in denying that benefit to its women employees has to be scrutinised so as to determine whether the denial of maternity benefit by the petititoner is justified in law or not, held that a just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realize the physical difficulties which a working woman would face in performing

[113] (2000) 3 SCC 224.

her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period.

Since Article 42 specifically speaks of "just and humane conditions of work" and "maternity relief, the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.

In *Bandhua Mukti Morcha v. Union of India*[114] Bhagwati J. while affirming the proposition that Article 21 must be construed in the light of the Directive Principles of the State Policy observed thus: "This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities of children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity.

The Supreme Court in *B. Shah Vs. Presiding Officer, Labour Court*[115], while interpretation of social security legislation for women, opined that it has also to be borne in mind in this connection that in interpreting provisions of beneficial pieces of legislation like the one in hand which is intended to achieve the object of doing social justice to women workers employed in the plantations and which squarely fall within the purview of Article 42 of the Constitution, the beneficent

[114](1984) 2 SCR 67.

[115] (1997) 4 SCC 384.

rule of construction which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output has to be adopted by the Court.

In *Vincent v. Union of India*[116], it was held by a Division Bench of this Court that: "In a welfare State, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health In a series of pronouncements, during the recent years, this court has culled out from the provisions of Part IV of the Constitution, the several obligations of the State and called upon it to effectuate them in order that the resultant pictured by the Constitution fathers may become a reality.'

In *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*[117], the short question which was to be decided by the Supreme Court was whether having regard to the provisions contained in Maternity Benefit Act, 1961, women engaged on casual basis or on muster roll basis on daily wages and not only those in regular employment were eligible for maternity leave. The Court while upholding the right of the female workers to get maternity leave relied upon the doctrine of social justice as embodied in Universal Declaration of Human Rights Act, 1948 and Article 11 of the Convention on the elimination of all forms of discrimination against women held that the provisions of the same must be read into the service contracts of Municipal Corporation.

Article 43 provides provision for living wages, etc, for workers.

The idea is that every workman shall have a wage which will maintain him in the highest state of industrial efficiency, which will enable him to provide his family with all the material things which are needed for their health and physical well being, enough to enable him to qualify to discharge his duties as a citizen. The amount of living wage in money terms will vary as between trade and trade. It is in these broad and idealist sense that Article 43 of the Constitution refers to living

[116] (1987) 2 SCR 468.

[117] (2000) 3 SCC 224.

wage when it enunciates the directive principle that the State shall endeavor, inter alia, to secure by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work a living wage condition of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural oppurtunities.

The concept of living wage has been discussed by the Supreme Court in *Standard Vacuum Refining Co. of India v. Workmen*[118] . The Court has held that in construing wage structure the considerations of right and wrong, propriety and impropriety, fairness and unfairness are also taken into account to some extent. As the social conscience of the general community becomes more alive and active, as the welfare policy of the State takes a more dynamic form, as the national economy progresses from stage to stage, and as under the growing strength of the trade union movement collective bargaining enters the field, wage structure ceases to be a purely arithmetical problem. Wages are usually divided into three broad categories the basic minimum wage, the fair wage and the living wage. The concept of these three wages cannot be described in definite words, is their contents are elastic and vary from time to time and from place to place. The concept of a living wage is not a static concept; it is expanding and the number of its constituents and their respective contents are bound to expand and widen with the development and growth of national economy. In an underdeveloped country no wage structure could be described as reaching the ideal of a living wage.

The Supreme Court in referring to the Minimum Wages Act, 1948, in[119], opined that the Act which was enacted, in 1948 has its roots in the recommendation adopted by the International Labour Conference in 1928. The object of the Act as stated in the preamble is to provide for fixing minimum rates of wages in certain employments and this seems to us to be, clearly directed against exploitation of the ignorant, less organised and less privileged members of the society by the capitalist class. This anxiety on the part of the society for improving the general economic condition of some of its less favoured members

[118] AIR 1961 SC 895.

[119] *Y. A. Mamarde v. Authority under the Minimum Wages Act*, (1972) 2 SCC 108.

appears to be in supersession of the old principle of absolute freedom of 'contract and the doctrine of laissez faire and in recognition of the new principles of social welfare and common good. Prior to our Constitution this principle was advocated by the movement for liberal employment in civilised countries and the Act which is a pre-Constitution measure was the offspring of that movement. Under our present Constitution the State is now expressly directed to endeavour to secure to all workers (whether agricultural, industrial or otherwise) not only bare physical subsistence but a living wage and conditions of work ensuring a decent standard of life and full enjoyment of leisure. This Directive Principle of State Policy being conducive to the general interest of the public and, therefore, to the healthy progress of the nation as a whole, merely lays down the foundation for appropriate, social structure in which the labour will find its place of dignity, legitimately due to it in lieu of its contribution to the progress of national economic prosperity. The Act has since its enactment been amended on several occasions apparently to make it more and more effective in achieving its object which has since secured more firm support from the Constitution. The present rules under s. 30, it may be pointed out, were made in October, 1950 when the State was under a duty to apply the Directive Principles in making laws.

Article 43 enjoins the State to endeavour to secure to all workers, be they agricultural, industrial or otherwise, a living wage and proper conditions of work so as to assure to them a decent standard of life and full enjoyment of leisure and social and cultural opportunities. The idea, therefore, is that the workers would not be compelled to work on all days. While other employees may enjoy national and festival holidays, the workers in an industry or an agricultural farm must work throughout and should not avail of any holiday is not the philosophy of Article 43. As human beings, they are entitled to a period of rest which would enable them to fully enjoy their leisure and participate in social and cultural activities.[120]

The Act is a social legislation to give effect to the Directive Principles of State Policy contained in Article 43 of the Constitution. The law so made cannot be said to be arbitrary nor can it be struck down for being violative of Article 14 of

[120] *M.R.F. Ltd v. Inspector Kerala Govt,* (1998) 8 SCC 227.

the Constitution." In examining the reasonableness of a statutory provision, whether it is violative of the Fundamental Right guaranteed under Article 19, one cannot lose sight of the Directive Principles of State Policy contained in Chapter IV of the Constitution.[121]

Article 43 casts a duty on the State to make efforts to secure by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities, and, in particular, social opportunities. The State is also required to make special endeavour to promote cottage industries on an individual or cooperative basis in rural areas.

The Supreme Court opined that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to sub-serve the common good and also ensure that the workers get their dues.[122]

Speaking for the benevolent legislation Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and its importance for promoting social justice the Supreme Court in *Regional P.F. Commissioner v. Hooghly Mills Co. Ltd.*[123] opined that it is no doubt true that the said Act effectuates the economic message of the Constitution as articulated in the Directive Principles of State Policy. Under the Directive Principles the State has the obligation for securing just and humane

[121] Supra.

[122] *Harjinder Singh v. Punjab State Warehousing Corp.* (2010) 3 SCC 192.

[123] (2012) 2. SCC 489.

conditions of work which includes a living wage and decent standard of life. The said Act obviously seeks to promote those goals. Therefore, interpretation of the said Act must not only be liberal but it must be informed by the values of Directive Principles. Therefore, an awareness of the social perspective of the Act must guide the interpretative process of the legislative device.

The prosperity of the country in its condition of labour. By this process it is of labour can be proiressiviily raised from the stage of minimim wage, passing through need found wage, fair wage, to living wage.

The Constitution (Forty second) Ammendment Act, 1976 have introduced Article 43-A in the Constitution which provides for participation of workers in management of industries.

In *National Textile Workers' Union v. P.R. Ramkrishnan*[124] the Supreme Court has expressed that our Constitution has shown profound concern for the workers and given them a pride of place in the new socio-economic order envisaged in the Preamble and the Directive Principles of State Policy. Article 43A states that the State shall take steps by suitable legislation or in any other way to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry. The constitutional mandate is therefore clear and undoubted that the management of the enterprise should not be left entirely in the hands of the suppliers of capital but the workers should also be entitled to participate in it. In a socialist pattern of society the enterprise which is a centre of economic power should be controlled not only by capital but also by labour. It cannot therefore be contended that the workers should have no voice in the determination of the question whether the enterprise should continue to run or be shut down under an order of the court. The workers who have contributed to the building of the enterprise have every right to be heard when it is sought to demolish that centre of economic power. It is not only the shareholders who have supplied capital who are interested in the enterprise which is being run by a company but the workers who supply labour are also equally, interested because what is produced by the enterprise is the result of labour as well as

[124] (1983) 1 SCC 228.

capital. The owners of capital bear only limited financial risk and otherwise contribute nothing to production while labour contributes a major share of the product. While the former invest only a part of their moneys the latter invest their sweat and toil; in fact, their life itself.

Article 43A of the Constitution requires the State to take steps to secure the participation of workmen in the management of the undertaking, establishments or other organisations engaged in any industry. Thus, from being a factor of production the labour has become a partner in industry. It is a common venture in the pursuit of desired goal.[125]

In *Krishan Singh v. Executive Engineer, Haryana State Agricultural Marketing Board, Rohtak (Haryana)*[126], the Supreme Court reiterating to its earlier stand held that while exercising its jurisdiction under Article 226 of the Constitution of India, this Court is bound to keep in mind the Act and other similar legislative instruments, which are social welfare legislations, and they should be construed and interpreted keeping in view of the goals set out in the preamble of the Constitution and the provisions contained in part IV of the Constitution including Articles 38, 39(a) to (e), 43 and 43A.

The workers therefore have a special place in a socialistic pattern of society. They are no more vendors of toil they are not a marketable commodity to be purchased by the owners of capital. They are producers of wealth as much as capital they supply labour without which capital would be impotent.

Article 44 provides for the Uniform civil Code for the citizens. It provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. However it seems that there has never been any direction issued for the codification of a common civil code.

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[125] *Hindustan Tin Works Pvt. Ltd v. Employees Of Hindustan Tin Works*, AIR 1979 SC 75.

[126] (2010) 3 SCC 637.

Chandrachud, CJ in the case decided by the Constitution Bench in *Mohd. Ahmed Khan vs. Shah Bano Begum*[127], opined one wonders how long will it take for the Government of the day to implement the mandate of the framers of the Constitution under Article 44 of the Constitution of India. The traditional Hindu law - personal law of the Hindus - governing inheritance, succession and marriage was given go- bye as back as 1955-56 by codifying the same. There is no justification whatsoever in delaying indefinitely the introduction of a uniform personal law in the country. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus alongwith Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a "common civil Code" for the whole of India. It has been judicially acclaimed in the United States of America that the practice of Polygamy is injurious to "public morals", even though some religion may make it obligatory or desirable for its followers.

"It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing

[127] AIR 1985 SC 945.

a uniform civil code for the citizens of the country and, unquestionably; it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made is the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge that gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case."[128]

"The State shall endeavour to secure for the citizens a uniform civil code through-out the territory of India" is an unequivocal mandate under Article 44 of the Constitution of India which seeks to introduce a uniform personal law - a decisive step towards national consolidation. Pandit Jawahar Lal Nehru, while defending the introduction of the Hindu Code Bill instead of a uniform civil code, in the Parliament in 1954, said "I do not think that at the present moment the time is ripe in India for me to try to push it through". It appears that even 41 years thereafter, the Rulers of the day are not in a mood to retrieve Article 44 from the cold storage where it is lying since 1949. The Governments - which have come and gone - have so far failed to make any effort towards "unified personal law for all Indians". The reasons are too obvious to be stated. The utmost that has been done is to codify the Hindu law in the form of the Hindu Marriage Act, 1955. The Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956 which have replaced the traditional Hindu law based on different schools of thought and scriptural laws into one unified code. When more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in

[128] supra

abeyance, any more, the introduction of "uniform civil code" for all citizens in the territory of India.[129]

Till the time we achieve the goal - uniform civil code for all the citizens of India - there is an open inducement to a Hindu husband, who wants to enter into second marriage while the first marriage is subsisting, to become a Muslim. Since monogamy is the law for Hindus and the Muslim law permits as many as four wives in India, errand Hindu husband embraces Islam to circumvent the provisions of the Hindu law and to escape from penal consequences.[130]

5.5. PROTECTION TO MINORITIES AND WEAKER SECTION OF SCOIETY.

Article 45 provides for provision for free and compulsory education for children.

The dignity of man is inviolable. It is the duty of the State to respect and protect the same. It is primarily the education which brings-forth the dignity of a man. The framers of the Constitutions were aware that more than seventy per cent of the people, whom they were giving the Constitution of India, were illitrate. They were also hopeful that within a period of ten years illiteracy would be wiped out from the country. It was with that hope that Articles 41 and 45 were brought in Chapter IV of the Constitution. An individual cannot be assured of human dignity unless his personality is developed and the only way to do that is to educate him. The "right to education", therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society.

[129] *Smt. Sarla Mudgal v. Union Of India,* (1995) 3 SCC 635

[130] supra

In *Unni Krishan v. State of A.P*[131] the Supreme Court has held that a true democracy is one where education is universal, where people understand what is good for them and the nation and know how to govern themselves. Articles 45, 46 and 41 are designed to achieve the said goal among others. It is in the lot of these articles that the content and parameters of the right to education have to be determined. Thus, right to education, understood in the context of Articles 45 and 41, means: (a) every child/citizen of this country has a right to. free education until he completes the age of 14 years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development. Article 45 assures right to free education for all children until they complete the age of 14 age. Among the several articles in Part IV, only Article 45 speaks of a time-limit no other article does. This is very significant. The State should honour the command of Article 45. It must be made a reality. A childhood has a fundamental right to free education up to the age of 14 years. Therefore, right to free education up to the age of 14 years is a fundamental right. Since fundamental rights and directive principles are complementary to each other, there is no reason why this fundamental right cannot be interpreted in this manner.

Questioning the delay the Supreme Court enquired, has it no significance? Is it a mere pious wish, even after 44 years of the Constitution? Can the State flout the said direction even after 44 years on the ground that the article merely calls upon it to "endeavour to provide" the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44 years more than four times the period stipulated in Article 45 convert the obligation created by the article into an enforceable right? Indeed, the 'National Education Policy 1986' says that the promise of, Article 45 will be redeemed before the end of this century. Be that as it may, we hold that a child (citizen, has a fundamental right to free education up to the age of 14 years.

[131] (1993) 1 SCC 645.

The demand for a fundamental right to education span between 1950 to the judgment in *Unnikrishnan's*[132] Case in 1993 saw several policy developments. The Indian Education Commission (Kothari Commission) 1964–1968, reviewed the status of education in India and made several recommendations. Most important amongst these is its recommendation of a common school system with a view to eliminating inequality in educational opportunities. Immediately thereafter, the National Policy on Education (NPE), 1968 was formed. This Policy was the first official document evidencing the Indian Government's commitment towards school education. It dealt with issues of equalisation of educational opportunity and sought to adopt a common school system in order to promote social cohesion. Interestingly, it even required special schools to provide a proportion of free studentships to prevent social segregation in schools. Nevertheless, it retained the status of FCE as a 'directive principle'. Subsequently, the National Policy on Education, 1986, re-affirmed the goal of universalisation of school education and promised to take measures to achieve a common school system. This policy document once again did not discuss or aim to alter the legal status of FCE in India, i.e., FCE continued to remain a non-justiciable Directive Principle of State Policy. On the contrary, the 1986 Policy has been criticised for having introduced non-formal education into India, and therefore having reduced the constitutional obligation of full-time schooling. The first official recommendation for the inclusion of a fundamental right to education was made in 1990 by the Acharya Ramamurti Committee. Thereafter, several political as well as policy level changes influenced the course of FCE. The country witnessed an increased international focus on its initiatives regarding FCE after its participation in the World Conference on Education for All in 1990. India also ratified the UNCRC in 1992. The World Bank funded District Primary Education Programme (DPEP) was introduced in 1994 under the auspices of the IMF-World Bank Structural Adjustment Programme. DPEP introduced a five-year 'primary education' programme and a system of appointment of para-teachers. From the point of view of a 'right' to education, this five-year programme and the appointment of para-teachers have been criticised as having diluted the constitutional norm of quality

[132] Ibid.

compulsory schooling for children till the age of fourteen. The use of the phrase 'primary education' and its corresponding five-year programme under DPEP may be contrasted with Dr B R Ambedkar's observations at the time of drafting the Constitution. He opposed the introduction of the phrase 'primary education' in draft Article 36 (corresponding to former Article 45) on the ground that the State was obliged to keep children below the age of fourteen years in an educational institution to prevent them from being employed as child labour.

A great legal breakthrough was achieved in 1992 when the Supreme Court of India held in *Mohini Jain v State of Karnataka*[133] , that "the 'right to education' is concomitant to fundamental rights enshrined under Part III of the Constitution" and that "every citizen has a right to education under the Constitution". The Supreme Court subsequently reconsidered the abovementioned judgment in the case of *Unnikrishnan, J P v State of Andhra Pradesh.*[134] The Court (majority judgment) held that "though right to education is not stated expressly as a fundamental right, it is implicit in and flows from the right to life guaranteed under Article 21 (and) must be construed in the light of the Directive Principles of the Constitution. Thus, 'right to education' understood in the context of Article 45 and 41 means: (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes fourteen years, his right to education is circumscribed by the limits of the economic capacity of the State and its development." The *Unnikrishnan*[135] Judgement empowered people with a legal claim to FCE. This is evidenced by a spate of litigations that relied upon the principle of law laid down in the *Unnikrishnan's*[136]judgement.

In *Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Ganghi,*[137] the Supreme Court, while holding that right to

[133] Ibid.

[134] Ibid.

[135] Ibid.

[136] Ibid.

[137] (1991) 2 SCC 7161.

education is a fundamental right, had held the native endowments of men are by no means equial. Education means a process which provides for intellectual, moral and physical development of a child for good character formation; mobility to social status; an opportunity to scale equality and a powerful instrument to bring about social change including necessary awakening among the people. Education promotes intellecutal, moral and social democracy. Education lays foundation of good citizenship and is a principal instrument to awaken the child to intellectual and cultural pursuits and values in preparing the child for later professional training and helps him to adjust to the new environment. Education, therefore, should be co-related to the social, political or economic needs of our developing nation fostering secular values, breaking the barriers of casteism, linguism, religious bigotry and should act as an instrument of social change. Education kindles its flames for pursuit of excellence, enables and enobles the young mind to sharpen his or her intellect more with reasoning than blind faith to reach intellectual heights and inculcate in him or her to strive for social equality and dignity of person.

A combination of forces from different quarters, viz, support from the judiciary, greater international attention and increased civil society and grass-roots level campaigns exerted tremendous pressure on the Government to introduce a fundamental right to education. A Constitutional Amendment bill for the inclusion of a fundamental right to education was moved in the Parliament amidst much criticism and debate regarding the contents of the Bill. The said amendment proposed that Article 21–A (fundamental right to free and compulsory education for children in the age group of six to fourteen years) be introduced, former article 45 (the then existing directive principle on FCE) be deleted and Article 51–A(k) (fundamental duty on parents) be introduced. In November 2001 the Bill was re-numbered as the 93rd Bill and the 83rd Bill was withdrawn. The 93rd Bill proposed that former Article 45 be amended to provide for early childhood care and education instead of being deleted altogether. Despite continued criticism against the altered version, the Bill was passed in 2002 as the 86th Constitutional Amendment Act. Currently, under Article 21–A of the Constitution, every child between the ages of six and fourteen has a fundamental right to ‘free and

compulsory' education, which the State shall provide 'in such manner as the State may, by law, determine.' Early childhood care and education (for children up to six years of age) is provided for as a Directive Principle of State Policy under Article 45 of the Constitution. Furthermore, Article 51–A(k) imposes a 'fundamental duty' on parents to provide educational opportunities to their children in the age group of six to fourteen years.

Article 45 makes provision for free of exploitation. Article 45 makes provision for free and compulsory education for children, which is now well settled as a fundamental right to the children upto the age of 14 years; it also mandates that facilities and opportunities for higher educational avenues be provided to them. The social justice and economic empowerment are firmly held as fundamental rights of every citizen.[138]

In the next two decades the highest priority must be given to programmes aimed at raising the educational level of the average citizen. Such programmes are essential on grounds of social justice, for making democracy viable and for improving the productivity of the average worker in agriculture and industry. The most crucial of these programmes is to provide, as directed by Article 45 of the Constitution, free and compulsory education of good quality to all children up to the age of 14 years. In view of the immense human and physical resources needed, however, the implementation of this programme will have to be phased over a period of time."[139]

Article 46 provides for promotion of education and economic interests of Schedule Castes, Schedule Tribes and other weaker sections.

Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the Constitution.

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[138] *Gaurav Jain v. Union Of India*, (1997) 8 SCC 114

[139] *Ashoka Kumar Thakur vs Union Of India*, (2008) 6 SCC 1

Article 15 (4) authorises the State to make special provision for the advancement of socially and educationally backward classes of citizens as distinguished from the Scheduled Castes and Scheduled Tribes. Some backward classes may, by presidential order, be included in Scheduled Castes and Tribes, and in that sense the backward classes for whose improvement provision is made in Article 15 (4) are comparable to Scheduled Castes and Scheduled Tribes. The backwardness under Article 15 (4) must be social and educational. It is not either social or educational, but it is both social and educational. Though caste in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or dominant test. There are certain sections of Indian society such as Christians, Jains, Muslims, etc., who do not believe in caste system, and the test of caste does not apply to them. Moreover, social backwardness is in the Ultimate analysis the result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically socially backward. Moreover, the occupation of citizens and the place of their habitation also result in social backwardness. The problem of determining who are socially backward classes, is undoubtedly very complex, but the classification of socially backward citizens on the basis of their castes alone is not permissible under Article 15(4). The object of making a special provision for the advancement of castes or communities is to carry out the Directive Principle enshrined in Article 46. Unless the educational and economic interests of the weaker sections of the people are promoted quickly and liberally, the ideal of establishing social and economic equality cannot be attained. Article 15 (4) authorises the State to take adequate steps to achieve the object. While making adequate reservation under Article 16 (4), care should be taken not to provide for unreasonable, excessive or extravagant reservation because that would by eliminating general competition in a large field and by creating widespread dissatisfaction among the employees, materially affect their efficiency. Like the special provision improperly made under Article 15 (4), reservation made under Article 16 (4) beyond the permissible and legitimate limits is a fraud on the Constitution.[140]

[140] Supra.

The Supreme Court in *State of Kerala v. N.M. Thomas*[141] expressed that the Preamble to the Constitution silhouettes a 'justice-oriented' community. The Directive Principles of State Policy, enjoin on the State the promotion with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes and protect them from social injustice. To neglect this obligation is to play truant with Article 46. Economic interests of a group as also social justice to it are tied up with its place in the services under the State. To give equality of opportunity for employment to the members of Scheduled Castes and Scheduled Tribes, it is necessary to take note of their social, educational and economic environment. Not only is the Directive Principle embodied in Article 46 binding on the law-maker as ordinarily understood but it should equally inform and illuminate the approach of the Court when it makes a decision as the Court also is `State' within the meaning of Art. 12 and makes law even though interstitially.

Article 16(4) is designed to reconcile the conflicting pulls of Article 16 (1) representing the dynamics of justice conceived of as equality in conditions under which candidates actually compete for posts in Government service and of Articles 46 and 355 embodying the duties of the State to promote the interests of the economically educationally and socially backward so as to release them from the clutches of social injustice. These encroachments on the field of Article 16(1) can only be permitted to the extent they are warranted by Article 16(4). To read broader concepts of social justice and equality into Article 16(1) may stultify this provision and make Article 16(4) otiose. It would be dangerous to extend the limits of protection against the operation of the principle of equality of opportunity in this field beyond its express constitutional authorisation by Article 16(4).[142]

Properly analysed, Article 46 contains a mandate to the State to take special care for the educational and economic interests of the weaker sections of the people and as illustrations of the persons who constitute the weaker sections the provision expressly mentions the Scheduled Castes and the Scheduled Tribes. A

[141] (1976) 2 SCC 310.

[142] supra

combined reading of Article 46 and clauses 24 and 25 of Article 366 clearly shows that the members of the Scheduled Castes and the Scheduled Tribes must be presumed to be backward classes of citizens particularly when the Constitution gives the example of the Scheduled Castes and the Scheduled Tribes as being the weaker sections of the society. The members of the Scheduled Castes and the Tribes have been given a special status in the Constitution and they constitute a class by themselves. That being the position it follows that they do not fall within the purview of Article 16(2) of the Constitution which prohibits discrimination between the members of the same caste. If the members of the Scheduled Castes and the Scheduled Tribes are not castes then it is open to the State to make reasonable classification in order to advance or lift these classes so that they may be able to be properly represented in the services under the State. (4)(a) Article 16 is merely an incident of Article 14 and both these articles form a part of the common system seeking to achieve the same end.[143]

The Supreme Court in *Samtha v. State of A.P.*[144] has expressed the need for establishing social justice, the Court opined it is the duty to formulate its policies, legislative or executive, accord equal attention to the promotion of, and to protect the right to social, economic, civil and cultural rights of the people, in particular, the poor, the Dalits and Tribes as enjoined in Article 46 read with Articles 38, 39 and all other related Articles read with right to life guaranteed by Article 21 of the Constitution of India. By that constant, endeavour and interaction, right to life would become meaningful so as to realise its full potentiality of "person" as inalienable human right and to raise the standard of living, improve excellence and to live with dignity of person and of equal status with social and economic justice, liberty, equality and fraternity, the trinity are pillars to establish the egalitarian social order in Socialist Secular Democratic Bharat Republic. Social and economic democracy is the foundation on which political democracy would be a way of life in the Indian polity. Law as a social engineering is to create just social order removing inequalities in social and economic life, socio-economic disabilities with

[143] supra

[144] (1997) 8 SCC 191.

which poor people are languishing by providing positive opportunities and facilities to individuals and groups of people. Agriculture is the only source of livelihood for Scheduled Tribes, apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality, permanent place of abode and work and living. It is a security and source for economic empowerment. Therefore, the tribes too have great emotional attachment to their lands. The land on which they live and till, assures them equality of status and dignity of person and means to economic and social justice and potent weapon of economic empowerment in social democracy.

In Murlidhar Dayandeo Kesekar v. Vishwanath Pandu[145] and *R. Chandevarappa v. State of Karnataka* [146], the Supreme Court had held that economic empowerment is a fundamental right to the poor and the State is enjoined under Articles 15(3), 46 and 39 to provide them opportunities. Thus, education, employment and economic empowerment are some of the programmes, the State has evolved and also provided reservation in admission into educational institutions, or in case of other economic benefits under Articles 15(4) and 46, or in appointment to an office or a post under the State under Article 16(4). Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also undergo have had same the handicaps, and must have been subject to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation. A candidate who had the advantageous start in life being born in forward caste and had march of advantageous life but is transplanted in backward caste by adoption or marriage or conversion, does not become eligible to the benefit of reservation either under Article 15(4) and 16(4), as the case may be. Acquisition of the Status of Scheduled Caste etc. by voluntary mobility into these categories would play fraud on the

[145] 1995 SCC, Supl. (2) 549.

[146] (1995) 6 SCC 309.

Constitution, and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution.

The economic empowerment, to the poor, dalits and tribes as an integral constitutional scheme of socio-economic democracy is a way of life of political democracy. Economic empowerment is, therefore, a basic human right and a fundamental right as part of right to live, equality and of status and dignity to the poor, weaker sections, dalits and tribes." The Prohibition from alienation is to effectuate the constitutional policy of economic empowerment under Articles 14, 21, 38, 39 and 46 read with the Preamble of the Constitution.[147]

An agreement entered into with a tribal for purchase of 5 acres of land without prior permission of the competent authority was held to be contrary to public policy laid down in Article 46 of the Constitution of India and as void under Section 23 of the Contract Act. [148]

The Supreme Court in *K.C. Vasanth Kumar* v. State of Karnataka[149] expressed its view that if on a fresh determination some castes or communities have to go out of the list of backward classes prepared for Article 15(4) and Article 16(4) the Government may still pursue the policy of amelioration of weaker sections of the population amongst them in accordance with the directive principle contained in Article 46 of the Constitution. There are in all castes and communities poor people who if they are given adequate opportunity and training may be able to compete successfully with persons belonging to richer classes. The Government may provide for them liberal grants of scholarships, free studentship, free boarding and lodging facilities, free uniforms, free mid day meals etc. to make the life of poor students comfortable. The Government may also provide extra tutorial facilities, stationery and books free of costs and library facilities. These and other steps should be taken in the lower classes so that by the time a student appears for

[147] *Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde*, JT (1995) 3 SC 563

[148] Supra.

[149] AIR 1985 SC 1495.

the qualifying examination he may be able to attain a high degree of proficiency in his studies."

Article 46 enjoins duty to promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Continued retention of the division of the society into various castes simultaneously introduces inequality of status. And this inequality in status is largely responsible for retaining inequality in facilities and opportunities, ultimately resulting in bringing into existence an economically depressed class for transcending caste structure and caste barrier. The society therefore was to be classless casteless society. In order to set up such a society, steps have to be taken to weaken and progressively eliminate caste structure. Unfortunately, the movement is in the reverse gear. Caste stratification has become more rigid to some extent, and where concessions and preferred treatment schemes are introduced for economically disadvantaged classes, identifiable by caste label, the caste structure unfortunately received a fresh lease of life. In fact there is a mad rush for being recognized as belonging to a caste which by its nomenclature would be included in the list of socially and educationally backward classes.[150]

'Caste is a reality'. Undoubtedly so are religion and race. Can they furnish basis for reservation of posts in services? Is the State entitled to practice it in any form for any purpose? Not under a Constitution wedded to secularism. State responsibility is to protect religion of different communities and not to practice it. Uplifting the backward class of citizens, promoting them socially and educationally taking care of weaker sections of society by special programmes, and policies is the primary concern of the State. It was visualised so by framers of the Constitution. But any claim of achieving these objectives through race, conscious measures or religiously packed programmes would be uncharitable to the noble and pious spirit of the founding fathers, legally impermissible and constitutionally ultra vires. Deriving inspiration from the American philosophy that, 'just as the race of students must be considered in determining whether a constitutional

[150] Supra.

violation has occurred so also must race be considered in formulating remedy' without any regard to the Preamble of our Constitution.[151]

Mahatma Gandhi, the Father of the Nation said, "The caste system as we know is an anachronism. It must go if both Hinduism and India are to live and grow from day to day". In its onward march towards realising the constitutional goal, every attempt has to be made to destroy caste stratification. [152]

Preamble to the Constitution of India secures, as one of its objects, fraternity assuring the dignity of the individual and the unity and integrity of the nation to We the people of India. Reservation unless protected by the constitution itself, as given to us by the founding fathers and as adopted by the people of India, is sub-version of fraternity, unity and integrity and dignity of the individual. While dealing with Directive Principles of State Policy, Article 46 is taken note of often by overlooking Articles 41 and 47. Article 41 obliges the State inter alia to make effective provision for securing the right to work and right to education. Any reservation in favour of one, to the extent of reservation, is an inroad on the right of others to work and to learn. Article 47 recognises the improvement of public health as one of the primary duties of the State. Public health can be improved by having the best of doctors, specialists and super specialists. Under-graduate level is a primary or basic level of education in medical sciences wherein reservation can be understood as the fulfilment of societal obligation of the State towards the weaker segments of the society. Beyond this, a reservation is a reversion or diversion from the performance of primary duty of the State. [153]

Though, no specific fundamental right for obtaining recognition is conferred in the Constitution, it cannot, however, be disputed that recognition of private educational institutions, including minority educational institutions, is an essential concomitant of the right under Articles 19(1)(g), 26(a) and 30(1) of the Constitution. Further, it is widely accepted that a lot of educational institutions

[151] Supreme Court referring to the Constituent Assemble Debates in *Indra Sawhney v. Union Of India*, AIR 1993 SC 477.

[152] "*Discovery of India*" by Pandit Nehru, Ch VI, p 234.

[153] *A.I.I.M.S. Students Union v. A.I.I.M.S.*, (2002) 1 SCC 428

(whether of non-minorities or of minorities) will not be able to impart instructions without financial aid of the State. For this purpose, each State in discharging its constitutional obligation under Articles 45 and 46, subject to its economic capacity, formulated policy for grant of aid to educational institutions and framed regulations.[154]

In the case of *M. Nagaraj v. Union of India*[155] it was contended in the Supreme Court that under Article 16(4A), reservation is limited. It is not to the extent of 50% but it is restricted only to SCs and STs, and, therefore, the "risk element" pointed out in Indra Sawhney5 stands reduced. To carve out SCs/STs and make a separate classification is not only constitutional, but it is a constitutional obligation to do so under Article 46.

In *Narmada Bachao Andolan v. Union of India*[156] while considering the validity of acquisition of lands by the State of Madhya Pradesh for a project known as Sardar Sarovar Project (SSP) by constructing a dam on river Narmada as a result whereof the residence of tribals in various States, viz., Madhya Pradesh, Gujarat, Maharashtra and Rajasthan were affected, the Supreme Court opined as under: "The displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities than those they enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of the society will lead to betterment and progress".

However, the Supreme Court in a recent case has opined that giving formal equality to all groups or communities in India would not result in genuine equality. The historically disadvantaged groups must be given special protection and help so that they can be uplifted from their poverty and low social status. It is for this reason that special provisions have been made in our Constitution in Articles 15(4),

[154] *T.M.A.Pai Foundation v. State Of Karnataka,* (2002) 8 SCC 481

[155] AIR 2007 SC 71

[156] (2000) 10 SCC 664.

15(5), 16(4), 16(4A), 46, etc. for the upliftment of these groups. Among these disadvantaged groups, the most disadvantaged and marginalized in India are the Adivasis (STs), who, as already mentioned, are the descendants of the original inhabitants of India, and are the most marginalized and living in terrible poverty with high rates of illiteracy, disease, early mortality etc.[157]

It must also be borne in mind that many other democracies face similar problems and grapple with issues of discrimination, in their own societal context. Though their social structure may be markedly different from ours, the problem of inequality in the larger context and the tools used to combat it may be common.

Article 46 enjoins duty to promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Continued retention of the division of the society into various castes simultaneously introduces inequality of status. And this inequality in status is largely responsible for retaining inequality in facilities and opportunities, ultimately resulting in bringing into existence an economically depressed class far transcending caste structure and caste barrier. The society therefore, was to be classless casteless society. In order to set up such a society, steps have to be taken to weaken and progressively eliminate caste structure. Unfortunately, the movement is in the reverse gear. Caste stratification has become more rigid to some extent, and where concessions and preferred treatment schemes are introduced for economically disadvantaged classes, identifiable by caste label, the caste structure unfortunately received a fresh lease of life. In fact there is a mad rush for being recognised as belonging to a caste which by its nomenclature would be included in the list of socially and educationally backward classes. [158]

Article 47 of the Directive Principles of the State Policy reads as follows: Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

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[157] *Kailas & Ors, v. State Of Maharashtra,* (2011) 1 SCC 793.

[158] *Ashoka Kumar Thakur v. Union Of India,* (2008) 6 SCC 1

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

This article enjoins upon and in turn enables the State to take measures to raise the level of nutrition and the standard of living of its people and to improve the public health. Towards this end, the State is required to bring about prohibition of the consumption of intoxicating drinks and drugs which are injurious to health. The prohibition may be complete or partial and it would also include regulation.

The importance of Article 47 of the Constitution of India may have to be noticed tracing the history back from the date of constitutional debate. With a view to find out the intent and purport for which the said provision was inserted, Shri H.M. Seervai in his treatise[159], *Constitutional Law of India*, noticed that all sections of the society including the Mohammadan community, whose social habits were reinforced by the Koranic injunction in relation to intoxicating liquor, supported the insertion of such a provision. The learned Author stated:

"The prohibition of intoxicating liquor had long been a part of the policy of the Indian National Congress and its inclusion in Article 47 received support from the Mohammedan community whose social habits were reinforced by the Koranic injunction against intoxicating liquor. In considering the directive in Article 47, it may be observed that alcohol (the intoxicating ingredient of liquor) is a "narcotic", a word replaced by the word "depressant" to describe the same effects contrary to the popular belief that it is a stimulant. It is not mere accident that intoxicating liquor and dangerous drugs have been clubbed together in entry 8, List II."

Article 47 has a unique feature in the sense that the first part refers to public health, whereas the second part specifically refers to prohibition of liquor. Similar provisions are found in the Constitution of U.S. and Lithuania as well. It is of some significance to note that Section 70 was inserted in the draft Constitution after the

[159] H.M. Seervai, *Constitutional Law of India,* Vol. II, 4th Ed. p.2012

first part was suggested by Shri B.N. Rau derived from the recommendations of the U.N. Conference on Food and Agriculture, 1943 as several members, including Seth Govind Das and Shri Bishwanath Das specifically wanted that prohibition should find specific mention at a suitable place in the Constitution. One of the members, Kazi Sayed Karimuddin expressed his desire that such a provision should be included in a separate Article having regard to the preachings of Mahatma Gandhi and also having regard to the fact that the same has been approved by all communities. In Article 47, however, only liquor was specifically mentioned at the instance of Shri Bishwanath Das who opined that if prohibition of liquor is to be included in a separate Article, other harmful articles like opium, tabacco and like products should also find mention in Article 47.[160]

In *State of Bombay v. FN. Balsara*[161], a Constitution Bench of five learned Judges, of the Supreme Court examined the validity of the Bombay Prohibition Act, 1949. In that case, the Court held that in view of the provisions of Article 47 of the Constitution, the total prohibition on potable liquor would be reasonable.

The Supreme Court in examining a Public Interest Litigation concerning about health Care for citizens has considered the question as to whether the Supreme Court could interfere with the matter touching the policy of the Government and the duty cast under Article 47 of the Constitution. The Court in *Vincent Panikurlangara v. Union of India*[162], has opined that with various facets. It involves and over changing challenge. There appears to be, as it were, a constant competition between Nature (which can be said to be responsible for new ailments) on the side and human ingenuity engaged in research and finding out curative processes. This being the situation, the problem has an ever-shifting base. It is common place that what is considered to be the best medicine today for treatment of a particular disease becomes out of date and soon goes out of the market with the discovery or invention of new drugs. Again what is considered to be incurable at any given point of time becomes subjected to treatment and cure with new finds.

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[160] *Constituent Assemble Debates*, Vol. VII, No.9, pp. 496 to 498.

[161] AIR 1951 SC 318.

[162] AIR 1987 SC 990.

There is yet another situation which must be taken note of as human knowledge expands and marches ahead. With the onward march of science and complexities of the living process and hitherto unknown diseases are noticed. To meet new challenges, new drugs have to be found. In this field, therefore, change appears to be the rule. Therefore, such drugs as are found necessary should be manufactured in abundance and availability to satisfy every demand should be ensured. Undue competition in the matter of production of drugs by allowing too many substitutes should be reduced as it introduces unhealthy practice and ultimately tends to affect quality. The State's obligation to enforce production of qualitative' drugs and elimination of the injuries ones from the market must take within its sweep an obligation to make useful drugs available at reasonable price so as to be within the common man's reach. That would involve regulating the price. It may be that there may be an improved quality of a particular medicine which on account of its cost of production will have to sell at a higher price but for every illness which can be cured by treatment, the patient must be in a position to get its medicine. This is an obligation under Article 47 of the Constitution.

In view of Article 47 of the Constitution, indisputably, public health in society plays a vital role. By the said expression, the makers of the Constitution refer both to the goal of health of the public and the attending promotion of healthy practices.

Prohibition of liquor was, thus, inserted as part of public health. Strict control was contemplated and it was made necessary. This in turn would require that while granting licence the statutory committees and other authorities must resort to strict scrutiny of the applications. For the purpose of grant of licence, the law as contained in the rules, do not contain any provision for relaxing any condition. The legislative policy, therefore, was not to grant any relaxation therein. Relaxation, it is trite, can be granted by the authorities provided there exists a specific provision therefor. Relaxation cannot be granted by exclusion, when there does not exist any provision. This aspect of the matter has recently been considered

by this Court wherein it was held that if an exemption notification is to be issued, the same must be done within the four-corners of the legislative policy.[163]

The Apex Court in *Synthetrics and Chemicals Limited v. State of U.P*[164] certain observations has been made in the concurring opinion of G.L. Oza, J. The learned judge referred to Article 47 of the Constitution and observed: "This article appears in the chapter of directive principles of State Policy. Inclusion of this article in this chapter clearly goes to show that it is the duty of the State to do what has been enacted in Article 47 and in fact this article starts with the phrase "Duty of the State" and the duty is to improve public health and it is further provided that this duty to improve public health will be dicharged by the State by endeavouring to bring about prohibition. It sounds contradictory for a State which is duty bound to protect human life, which is duty bound to improve public health and for that purpose is expected to move towards prohibition claims that it has the privilege of manufacture and sale of alcoholic beverages which are expected to be dangerous to human health, transferring this privilege of Selling this privilege on consideration to earn huge revenue without thinking that this trade in liquor ultimately results in degradation of human life even endangering human life and is nothing but moving contrary to the duty cast under Articles 21 and 47 and ideal of prohibition enshrined in Article 47. In view of Articles 21 and 47 with all respect to the learned Judges who so far accepted the privilege doctrine it is not possible to accept any privilege of the State having the right to trade in goods obnoxious and injurious to health."

The Constitutional test of reasonableness, built into Article IV and of arbitrariness implied in Article 14 has a relativist touch. The degree of constitutional restriction and the strategy of meaningful enforcement will naturally depend on the Third World setting, the ethos of our people, the economic compulsions of today and of human tomorrow. While scanning the rationale of an Indian temperance measure it would be useful to remember the universal evil in

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[163] *Tata Iron & Steel Co. Ltd. v. State of Jharkhand*, (2005) 4 SCC 272.

[164] (1990)1 SCC 109.

alcohol and the particularly pernicious consequences of the drink evil in India. Societal realities shape social justice."We, the people of India" have enacted Article 47 and "we the Justices of India" cannot 'lure it back to cancel half a life' or 'wash out a word of it especially when progressive implementation of the policy of prohibition is, by Articles 38 and 47, made fundamental to the country's governance. The Constitution is the property of the people and the court's know-how is to apply the Constitution not to assess it. In the process of interpretation Part IV of the Constitution must enter the soul of Part III and the laws.[165]

When a law is made, having regard to the phraseology used in Part IV of the Constitution of India, it is expected that law made or actions taken would be in furtherance thereof. In terms of the Directive Principles of State Policy, the State is bound to make endeavours to promote public health which is one of its primary duties of the State. One important component of the said directions was regulation and control over the trade in intoxicating drinks so as to enable the State to curb or minimize, as far as possible, the consumption thereof. The State may or may not prohibit manufacture, sale or consumption of liquor but it is vital that while parting with its exclusive privilege to deal with intoxicating liquor, the provisions of the Act and the Rules for which the same had been enacted must be strictly complied with.[166]

In *Vellore Citizens' Welfare Forum v. Union of India*[167] a three-Judge Bench of this Court, after referring to the principles evolved in various international conferences and to the concept of "sustainable development", inter alia, held that the precautionary principle and polluter-pays principle have now emerged and govern the law in our country, as is clear from Articles 47, 48-A and 51-A(g) of our Constitution and that, in fact, in the various environmental statutes including the Environment (Protection) Act, 1986, these concepts are already implied. These principles have been held to have become part of our law.

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[165] *P. N. Kaushal v. Union of India,* AIR 1978 SC 1457.

[166] *Ashok Lenka vs Rishi Dikshit,* (2006) 9 SCC 90.

[167] (1996) 5 SCC 647

Speaking on the obligation of the State of provide better health care the Supreme Court in *State of Punjab v. Ram Lubhaya Bagga*[168] opined that Article 21 casts obligation on the State. This obligation is further reinforced under Article 47, it is for the State to secure health to its citizen as its primary duty. No doubt government is rendering this obligation by opening Government hospitals and health centers, but in order to make it meaningful, it has to be within the reach of its people, as far as possible, to reduce the queue of waiting lists, and it has to provide all facilities for which an employee looks for at another hospital. Its up-keep maintenance and cleanliness has to be beyond aspersion. To employ best of talents and tone up its administration to give effective contribution. Also bring in awareness in welfare of hospital staff for their dedicated service, give them periodical, medico-ethical and service oriented training, not only at then try point but also during the whole tenure of their service. Since it is one of the most sacrosanct and a valuable rights of a citizen and equally sacrosanct sacred obligation of the State, every citizen of this welfare State looks towards the State for it to perform its this obligation with top priority including by way allocation of sufficient funds. This in turn will not only secure the right of its citizen to the best of their satisfaction but in turn will benefit the State in achieving its social, political and economical goal for every return there has to be investment. Investment needs resources and finances. So even to protect this sacrosanct right finances are an inherent requirement. Harnessing such resources needs top priority.

Article 47 of the Constitution of India clearly casts a duty on the State at least to reduce the consumption of liquor in the State gradually leading to prohibition itself. It appears to be right to point out that the time has come for the States and the Union Government to seriously think of taking steps to achieve the goal set by Article 47 of the Constitution of India. It is a notorious fact, of which we can take judicial notice, that more and more of the younger generation in this country is getting addicted to liquor. It has not only become a fashion to consume it but it has also become an obsession with very many. Surely, we do not need an indolent nation. Why the State in the face of Article 47 of the Constitution of India should encourage, that too practically unrestrictedly, the trade in liquor is

[168] (1998) 4 SCC 117.

something that it is difficult to appreciate. The only excuse for the State for not following the mandate of Article 47 of the Constitution is that huge revenue is generated by this trade and such revenue is being used for meeting the financial needs of the State. What is more relevant here is to notice that the monopoly in the trade is with the State and it is only a privilege that a licensee has in the matter of manufacturing and vending liquor.[169]

Whether the court while awarding a sentence would take recourse to the principle of deterrence or reform or invoke the doctrine of proportionality? This would no doubt depend upon the facts and circumstance of each case. While doing so, however, the nature of the offence said to have been committed by the accused plays an important role. The offences which affect public health must be dealt with severely. For the said purpose, the courts must notice the object for enacting Article 47 of the Constitution of India.[170]

The Supreme Court in *State of Kerala v. Kandath Distilleries* vide order dated February, 22, 2013, has opined that Article 47 is one of the Directive Principles of State Policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to the human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. State has, therefore, the exclusive right or privilege in respect of portable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are res extra commercium, cannot be carried on by any citizen and the State can prohibit completely trade or business in portable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different

[169] *State of Maharashtra v. Nagpur Distillers, Nagpur,* 2006(5)SCC112

[170] *State Of Punjab v. Prem Sagar,* (2008) 7 SCC 550.

from those imposed on trade or business in legitimate activities and goods and articles which are res commercium.

A writ petition was filed alleging that the decision of the Ministry of Environment and Forests permitting import of toxic wastes in India under the cover of recycling, which, according to the writ petitioner, made India a dumping ground for toxic wastes. After a detailed examination of the matter the Supreme Court in *Research Foundation for Science v. Union of India*[171] directed that the Central Government is directed to ban import of all hazardous/toxic wastes which had been identified and declared to be so under the BASEL Convention and its different protocols. The Central Government is also directed to bring the Hazardous Wastes (Management & Handling) Rules, 1989, in line with the BASEL Convention and Articles 21, 47 and 48A of the Constitution.

In fulfilling the Constitutional goal of raising the level of nutrition and the standard of living of its people and the improvement of public health, the government on 2nd October 1975, launched Integrated Child Development Services (ICDS) Scheme. Today, ICDS Scheme represents one of the world's largest and most unique programmes for early childhood development. ICDS is the foremost symbol of India's commitment to her children. India's response to the challenge of providing pre-school education on one hand and breaking the vicious cycle of malnutrition, morbidity, reduced learning capacity and mortality, on the other.

The Integrated Child Development Services (ICDS) Scheme was launched in 1975 with the following objectives:[172]

i. to improve the nutritional and health status of children in the age-group 0-6 years;
ii. to lay the foundation for proper psychological, physical and social development of the child;
iii. to reduce the incidence of mortality, morbidity, malnutrition and school dropout;

[171] (2012) 11 SCC 693.

[172] http://wcd.nic.in/icds.htm accessed on 12.02.2013.

iv. to achieve effective co-ordination of policy and implementation amongst the various departments to promote child development; and

v. to enhance the capability of the mother to look after the normal health and nutritional needs of the child through proper nutrition and health education.

Another important programme on nutrition is the Kishori Shakti Yojana (KSY), which seeks to empower adolescent girls, so as to enable them to take charge of their lives. It is viewed as a holistic initiative for the development of adolescent girls. The programme through its interventions aims at bringing about a difference in the lives of the adolescent girls. It seeks to provide them with an opportunity to realize their full potential. The broad objectives of the Scheme are to improve the nutritional, health and development status of adolescent girls, promote awareness of health, hygiene, nutrition and family care, link them to opportunities for learning life skills, going back to school, help them gain a better understanding of their social environment and take initiatives to become productive members of the society.

Another important programme is the Janani Suraksha Yojana (JSY) is a safe motherhood intervention under the National Rural Health Mission (NRHM) being implemented with the objective of reducing maternal and neo-natal mortality by promoting institutional delivery among the poor pregnant women. The Yojana, launched on 12th April 2005, by the Hon'ble Prime Minister, is being implemented in all states and UTs with special focus on low performing states.

On June 2011 the Government of India launched the Janani Shishu Suraksha Karyakram, (JSSK) a national initiative to make available better health facilities for women and children. It is but a step further in ensuring better facilities for women and child health services.

The new initiative of JSSK would provide completely free and cashless services to pregnant women including normal deliveries and caesarean operations and sick new born (up to 30 days after birth) in Government health institutions in both rural and urban areas. The new JSSK initiative is estimated to benefit more than one crore pregnant women & newborns who access public health institutions every year in both urban & rural areas.

Rajiv Gandhi Scheme for Empowerment of Adolescent Girls [RGSEAG] – SABLA was launched on April 1, 2011 under Ministry of Women and Child Development, Government of India. It is proposed by the Ministry, whereby the Nutrition Programme for Adolescent Girls (NPAG) and Kishori Shakti Yojana (KSY) would be merged with content enrichment. The scheme is proposed to be implemented using the platform of Integrated Child Development Services Scheme. The scheme aims at empowering adolescent girls (AGs) of 11-18 years with focus on out-of-school girls by improvement in their nutritional and health status and upgrading various skills like home skills, life skills and vocational skills. The scheme also aims at equipping the girls on family welfare, health hygiene etc. and information and guidance on existing public services along with aiming to mainstream out of school girls into formal or non-formal education.

Some Social Welfare schemes to raise the level of nutrition and the standard of living and to improve public health, undertaken by the Government of India in the lines of Article 47 are enumerated below:

Child Scheme-

Aganwadi Scheme
Balika Samriddhi Yojana
Development of Women and Children in Rural Areas (AWCRA)
Integrated Child Development Scheme(ICDS)
Juvenile Justice system
Mid Day Meal Scheme
National Creche Fund
Non- Formal Education Centers Exclusively for Girls
Reproductive and Child health Programme (RCH)
Shishu Greh Scheme

Labour and Employment Scheme-

Employment Assurance Scheme (EAS)
Food for Work Programme
Jawahar Rozgar Yojana
Labour Welfare Fund

Maternity Benefits Scheme

Million Wells Scheme

Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MNREGA)

Prime Minister's Rozgar Yojana (PMRY)

Rural Employment Generation Programme(REGP)

Sampoorna Grameen Rozgar Yojana (SGRY)

Scheme for Working Women Hostels

Scheme for Rehabilitation of Bonded Labourers

Support to Training and Employment Programme for Women (STEP)

Swarnjayanti Gram Swarozgar Yojana(SGSY)

Training of Rural Youth for Self- Employment (TRYSEM)

Urban Scheme

Accelerated Urban Water Programme

Mega City Scheme

Swarna Janyanti Shahari Rozgar Yojana

Social Scheme-

Annapurna Scheme

Freedom Fighters Pension Scheme

Growth Center Scheme

Liberation and Rehabilitation Scheme

Maternity Benefit Scheme

Members of Parliament Local Area Development Scheme

National Family Benefit Scheme

National Old Age Pension Scheme

Prohibition and Drug Abuse Prevention Scheme

Short Stay Homes

Social Defence Scheme

5.6. SOCIAL JUSTICE AND NATURAL RIGHTS.

Article 48 provides for organization of agriculture and animal husbandary.

The State shall endeavour of agriculture and to organise agriculture 'and animal husbandry animal husbandry oil modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle."

The principal purpose of this article, is to direct the, State to endeavour to organise agriculture and animal husbandry on modern and scientific lines and the rest of the provisions of that article are ancillary to this principal purpose. They contend that the States are required to take steps for preserving and improving the breeds and for prohibiting the slaughter of the animals specified therein only with a view to implement that principal purpose, that is to say, only as parts of the general scheme for organising our agriculture and animal husbandry on modern and scientific lines. The directive in Article 48 for taking steps for preventing the slaughter of animals is quite explicit and positive and contemplates a ban on the slaughter of the several categories of animals specified therein, namely, cows and calves and other cattle which answer the description of milch or draught cattle. The protection is confined only to cows and calves and to those animals which are presently or potentially capable of yielding milk or of doing work as draught cattle but does not extend to cattle which at one time were milch or draught cattle but which have ceased to be such. The directive principles of State policy set out in Part IV of the Constitution have to conform to and run as subsidiary to the fundamental rights in Part III.

The most important and leading decision is *Mohd. Hanif Quareshi v. State of Bihar.*[173] Three legislative enactments banning the slaughter of certain animals were passed respectively by the States of Bihar, Uttar Pradesh and Madhya Pradesh. In Bihar, the Bihar Preservation and Improvement of Animals Act, 1956 (Bihar Act II of 1956) was introduced which imposed a total ban on the slaughter of all categories of animals belonging to the species of bovine cattle. In Uttar

[173] 1959 SCR 629 .

Pradesh, the Uttar Pradesh Prevention of Cow Slaughter Act, 1955 (U.P. Act I of 1956) was enacted which also imposed a total ban on the slaughter of cows and her progeny which included bulls, bullocks, heifers and cows. In the State of Madhya Pradesh, it was the C.P. and Berar Animal Preservation Act (Act LII of 1949) which was amended and applied. It imposed a total ban on the slaughter of cows and female calf of a cow. The male calf of a cow, bull, bullock, buffalo (male or female, adult or calf) could be slaughtered only on obtaining a certificate. The bans, as imposed by the three legislations were the subject matter of controversy.

The challenge to the constitutional validity of the three legislations was founded on the following three grounds, as was dealt with in the judgment : (i) that the total ban offended the religion of the Muslims as the sacrifice of a cow on a particular day is enjoined or sanctioned by Islam; (ii) that such ban offended the fundamental right guaranteed to the Kasais (Butchers) under Article 19(1)(g) and was not a reasonable and valid restriction on their right; and (iii) that a total ban was not in the interest of the general public. On behalf of the States, heavy reliance was placed on Article 48 of the Constitution to which the writ petitioners responded that under Article 37 the Directive Principles were not enforceable by any court of law and, therefore, Article 48 had no relevance for the purpose of determining the constitutional validity of the impugned legislations which were alleged to be violative of the fundamental rights of the writ petitioners.

Chief Justice S.R. Das spoke for the Constitution Bench and held :- (i) that a total ban on the slaughter of cows of all ages and calves of cows and calves of she-buffaloes, male or female, was quite reasonable and valid and is in consonance with the Directive Principles laid down in Article 48; (ii) that a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are capable of being used as milch or draught cattle was also reasonable and valid; and (iii) that a total ban on slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they ceased to be capable of yielding milk or of breeding or working as draught animals could not be supported as reasonable in the interests of the general public and was invalid.

The first ground of challenge was simply turned down due to the meagre materials placed before their Lordships and the bald allegations and denials made by the parties. No one specially competent to expound the religious tenets of Islam filed any affidavit and no reference was made to any particular Surah of the Holy Quran which, in terms, requires the sacrifice of a cow. It was noticed that many Muslims do not sacrifice cow on the BakrI'd day. Their Lordships stated, inter alia :- "It is part of the known history of India that the Moghul Emperor Babar saw the wisdom of prohibiting the slaughter of cows as and by way of religious sacrifice and directed his son Humayun to follow this example. Similarly Emperors Akbar, Jehangir, and Ahmad Shah, it is said, prohibited cow slaughter. Nawab Hyder Ali of Mysore made cow slaughter an offence punishable with the cutting of the hands of the offenders. Three of the members of the Gosamvardhan Enquiry Committee set up by the Uttar Pradesh Government in 1953 were Muslims and concurred in the unanimous recommendation for total ban on slaughter of cows. We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the petitioners."

In *Haji Usmanbhai Hassanbhai Qureshi v. State of Gujarat,*[174] the constitutional validity of the Bombay Act as amended by Gujarat Act 16 of 1961 was challenged. The ban prohibited slaughter of bulls and bullocks below the age of 16 years. The petitioners pleaded that such a restriction on their right to carry on the trade or business in beef and allied articles was unreasonable. Yet another plea was urged that the total ban offended their religion as qurbani (sacrifice) at the time of BakrI'd or Id festival as enjoined and sanctioned by Islam. The High Court rejected the challenge on both the grounds. The writ petitioners came in appeal to this Court. The appeal was dismissed. While doing so, this Court took note of the material made available in the form of an affidavit filed by the Under Secretary to the Government of Gujarat, Agriculture, Forest and Cooperation Department wherein it was deposed that because of improvement and more scientific methods of cattle breeding and advancement in the science of looking after the health of

[174] (1986) 3 SCC 12.

cattle in the State of Gujarat, today a situation has been reached wherein the cattle remain useful for breeding, draught and other agricultural purposes above the age of 16 years as well. As the bulls and bullocks upto the 16 years of age continued to be useful, the prescription of the age of 16 years up to which they could not be slaughtered was held to be a reasonable restriction, keeping in mind the balance which has to be struck between public interest which requires useful animals to be preserved, and permitting the appellants (writ petitioners) to carry on their trade and profession. The test of reasonableness of the restriction on the fundamental right guaranteed by Article 19(1)(g) was held to have been satisfied.

In *State of West Bengal v. Ashutosh Lahiri*[175], the Supreme Court has noted that sacrifice of any animal by muslims for the religious purpose on BakrI'd does not include slaughtering of cow as the only way of carrying out that sacrifice. Slaughtering of cow on BakrI'd is neither essential to nor necessarily required as part of the religious ceremony. An optional religious practice is not covered by Article 25(1). On the contrary, it is common knowledge that cow and its progeny, i.e., bull, bullocks and calves are worshipped by Hindus on specified days during Diwali and other festivals like Makr- Sankranti and Gopashtmi. A good number of temples are to be found where the statue of 'Nandi' or 'Bull' is regularly worshipped.

The Parliament availed the opportunity provided by the Constitution (Forty-second Amendment) Act, 1976 to improve the manifestation of objects contained in Article 48 and 48-A. While Article 48-A speaks of "environment", Article 51-A(g) employs the expression "the natural environment" and includes therein "forests, lakes, rivers and wild life". While Article 48 provides for "cows and calves and other milch and draught cattle", Article 51-A(g) enjoins it as a fundamental duty of every citizen "to have compassion for living creatures", which in its wider fold embraces the category of cattle spoken of specifically in Article 48.

Article 48 of the Constitution has also been assigned a higher weightage and wider expanse by the Supreme Court post Quareshi-I. Article 48 consists of

[175] (1995) 1 SCC 189

two parts. The first part enjoins the State to "endeavour to organize agricultural and animal husbandry" and that too "on modern and scientific lines". The emphasis is not only on 'organization' but also on 'modern and scientific lines'. The subject is 'agricultural and animal husbandry'. India is an agriculture based economy. According to 2001 census, 72.2% of the population still lives in villages (See- India Vision 2020, p.99) and survives for its livelihood on agriculture, animal husbandry and related occupations. The second part of Article 48 enjoins the State, de hors the generality of the mandate contained in its first part, to take steps, in particular, "for preserving and improving the breeds and prohibiting the slaughter of cows and calves and other milch and draught cattle".[176]

The Parambikulam Aliyar Project (Regulation of Water Supply) Act, 1993 was held valid as the preamble of the Act, inter alia, was on the lines of Article 48 of the Constitution of India wherein it provided that the State is required to endeavour to organise agriculture on modern and scientific lines and at that moment 2, 02,152 acres of land were getting water supply from the project for irrigation on rotational basis by dividing the entire abacus into three zones and by supplying water once in 18 months on rotational basis in each year. [177]

It is necessary to carry forward and accomplish the social and economic revolutions The social revolution was meant to get India "out of the medievalism based on birth, religion, custom and community and reconstruct her social structure on modern foundations of law, individual merit and secular education," while the economic revolution was intended to bring about "transition from primitive rural economy to scientific and planned agriculture and industry.

The Constitution of India guarantees every citizen the fundamental right to life and personal liberty. Under Article 48A of the Constitution, the State of India is also required to endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. The Constitution also makes it the duty of every citizen of India to protect and improve the natural environment,

[176] *State Of Gujarat v. Mirzapur Moti Kureshi Kassab,* (2005) 8 SCC 534.

[177] *Parambikulam A.P.O. Assn. v. State Of Tamil Nadu,* AIR 1999 SC 3092.

including forests, lakes, rivers and wildlife, and to have compassion for living creatures.

"Forest" was initially a State subject covered by Entry 19 in List II of the Seventh Schedule. In 1976, under the 42nd Amendment the Entry was deleted and Entry 17A in the concurrent List was inserted. The change from the State List to the Concurrent List was brought about following the realisation of the Central Government that `forests' were of national importance and should be placed in the Concurrent List to enable the Central Government to deal with the matter. The same amendment of the Constitution brought in Article 48A in Part IV and Article 51A(g) in Part IVA.

The Supreme Court in the famous case of *M.C. Mehta v. Union of India,*[178] expressed that it is necessary to state a few words about the importance of and need for protecting our environment. Article 48-A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. Article 51-A of the Constitution imposes as one of the fundamental duties on every citizen the duty to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures. The proclamation adopted by the United Nations Conference on the Human Environment which took place at Stockholm from 5th to 16th of June, 1972 and in which the Indian delegation led by the Prime Minister of India took a leading role runs thus:

"1. Man is both creature and moulder of his environment which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights-even the right to life itself.

[178] AIR 1988 SC 1115.

2. The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.

3. Man has constantly to sum up experience and go on discovering, inventing, creating and advancing. In our time man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment. We see around us growing evidence of man-made harm in many regions of the earth; dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies harmful to the physical, mental and social health of man, in the man-made environment; particularly in the living and working environment.

Stressing the importance of saving the environment the Court opined that a point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences.

On December 4, 1985, a major leakage of oleum gas took place from one of the units of Shri Ram and this leakage affected a large number of persons, both amongst the workmen and the public and an Advocate practising in the Tis Hazari Court died on account of inhalation of oleum gas. This leakage resulted from the bursting of the tank containing oleum gas as a result of the collapse of the structure on which it was mounted and it created a scare amongst the people residing in that area. Hardly had the people got out of the shock of this disaster, when within two days, another leakage, though this time a minor one took place as a result of escape of oleum gas from the joints of a pipe. The Supreme Court hearing a PIL filed by a social activist in *M.C. Mehta v. Union of India*[179] expressed the need for establishing environment courts, the Court held that since cases involving issues of environmental pollution, ecological destruction and conflicts over natural resources

[179] (1986) 2 SCC 176.

are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up Enviornment Courts on the regional basis with one professional Judge and two experts drawn from the Ecological Sciences Research Group keeping in view the nature of the case and the expertise required for its adjudication. There would of course be a right of appeal to this Court from the decision of the Environment Court.

The Supreme Court in *Rural Litigation & Entitlement Kendra v. State of U.P*[180] on considering a letter-petition, and an application, containing allegations of unauthorised and illegal mining in the Mussoorie-Dehradun belt, affecting adversely the ecology and environmental order of the area, were directed to be registrered as writ petitions under public interest litigation ordered closure of some of the mines but refused renewal of their mining licences. These mines, however, continued to operate under the orders of various courts which had granted extension of their leases pending the final orders of the courts. The Court directed that if any mining lessee of a mine, which had been ordered to be closed down, was running under the first grant or under Court's orders after its expiry, it would not be entitled to take advantage of that position. The Court recognised the need to strike a balance between preservation and utilisation of deposits, and urged the Government to take a policy decision in the matter. The Government thereupon set up another committee to examine the working of the limestone mining operations in the Doon valley. Speaking on the importance of trees the Court opined that Air and water are the most indispensable gifts of Nature for preservation of life. Abundant sun-shine together with adequate rain keeps Nature's generating force at work. Human habitations all through the Ages have thrived on river banks and in close proximity of water sources. Forests have natural growth of herbs which provide cure for diseases. Our ancestors knew that trees were friends of mankind and forests were necessary for human existence and civilization to thrive. It is these forests that provided shelter for the 'Rishies' and accommodated the ancient 'Gurukulas'. They too provided food and sport for our forefathers living in the State of Nature. That is why there is copious reference to forests in the

[180] (1987) Suppl. SCC 487.

Vedas and the ancient literature of ours. In ancient times trees were worshiped as gods and prayers for up-keep of forests were offered to the Divine. In due course civilization developed and men came to live away from forests. Yet the human community depended heavily upon the forests which caused rains and provided timber, fruits, herbs and sports. With sufficient sun-shine and water there was luxuriant growth of forests in the tropical and semi-tropical zones all over the globe. Then came the age of science and outburst of human population. Man required more of space for living as also for cultivation as well as more of timber. In that pursuit the forests were cleared and exploitation was arbitrary and excessive the deep forests were depleted consequently rainfall got reduced; soil erosion took place. Scientists came to realise that forests play a vital role in maintaining the balance of the ecological system. It has, therefore, been rightly said that there is a balance on earth between air, water, soil and plant.

In the case of Indian Council for *Indian Council for Enviro-Legal Action v. Union of India*[181] the Supreme Court on an application by an environmentalist organisation which brought to light the sufferings and woes of people living in the vicinity of chemical industrial plants in India. The petition relates to the suffering of people of village Bichhri in Udaipur District of Rajasthan. In the Writ Petition it was demonstrated how the conditions of a peaceful, nice and small village of Rajasthan were dramatically changed after Hindustan Agro Chemicals Limited started producing certain chemicals like Oleum (concentrated form of sulphuric acid) and Single Super Phosphate. The entire chemical industrial complex is located within the limits of Bichhri village, Udaipur, Rajasthan. Pursuit of profit of entrepreneurs has absolutely drained them of any feeling for fellow human beings living in that village. The pronouncement of the judgment by this court was based on the principle of `polluter pays', but as the polluters (concerned industries in this case) have taken no steps to ecologically restore the entire village and its surrounding areas or complied with the directions of this court at all. In the impugned judgment, it is also mentioned that since the toxic untreated waste waters were allowed to flow out freely and because the untreated toxic

[181] (1996) 3 SCC 212.

sludge was thrown in the open in and around the complex, the toxic substances have percolated deep into the bowels of the earth polluting the aquifers and the sub-terrain supply of water. The water in the wells and the streams has turned dark and dirty rendering it unfit for human consumption. It has become unfit for cattle to drink and for irrigating the land. The soil has become polluted rendering it unfit for cultivation, which is the main source of livelihood for the villagers. The resulting misery to the villagers needs no emphasis. It spreads disease, death and disaster in the village and the surrounding areas. We may assume it to be so, yet the consequences of their action remain the sludge, the long-lasting damage to earth, to underground water, to human beings, to cattle and the village economy. In the view the Court taking strict stand have directed the polluters to pay compensation along with cost and ordered closure of the polluter industries.

The Court observed, "We are of the opinion that any principle evolved in this 'behalf should be simple practical and suited to the conditions obtaining in this country". The Court ruled that "Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on". Consequently the polluting industries are absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas". The "Polluter Pays" principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

Apart from the constitutional mandate provided in Article 47, 48 A and51 A (g) to protect and improve the environment there are plenty of post independence legislations on the subject but more relevant enactments for our purpose are: The Water (Prevention and Control of Pollution Act 1974 (the Water Act), The Air (Prevention and Control of Pollution) Act, 1981 (the Air

Act) and the Environment Protection Act 1986 (the Environment Act). The Water Act provides for the constitution of the Central Pollution Control Board by the Central Government and the constitution of one State Pollution Control boards by various State Governments in the country. The Boards function under the control of the Governments concerned. The Water Act prohibits the use or streams and wells for disposal of polluting matters. Also provides for restrictions on outlets and discharge of effluents without obtaining consent from the Board. Prosecution and penalties have been provided which include sentence of imprisonment. The Air Act provides that the Central Pollution Control Board and the State Pollution Control Boards constituted under the later Act shall also perform the powers and functions under the Air Act. The main function of the Boards, under the Air Act, is to improve the quality of the air and to prevent control and abate air pollution in the country.

Based on “polluters pay” principal the Supreme Court in a petition filed by Vellore Citizens Welfare Forum against the pollution which is being caused by enormous discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu ordered that Central Government shall implement the "precautionary principle" and the "polluter pays" principle. The authority shall, with the help of expert opinion and after giving opportunity to the concerned polluters assess the loss to the ecology\environment in the affected areas and shall also identify the individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individuals/families. The authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise. The authority shall compute the compensation under two heads namely, for reversing the ecology and for payment to individuals. A statement showing the total amount to be recovered, the names of the polluters from who the amount is to be recovered, the amount to be recovered from each polluter, the persons to who the

compensation is to be paid and the amount payable to each of them shall be forwarded to the Collector\District Magistrates of the area concerned.[182]

Adjudging an issue of high importance the Supreme Court in *S. Jagannath v. Union of India*[183] observer the damage caused to ecology and economics by the acquaculture farming and ordered and directed the Central Government shall constitute an authority under Section 3(3) of the Environment (Protection) Act, 1986 and shall confer on the said authority all the powers necessary to protect the ecologically fragile coastal areas, sea shore, water front and other coastal areas and specially to deal with the situation created by the shrimp culture industry in the coastal States/Union Territories. The Court held that the shrimp culture industry/the shrimp ponds are covered by the prohibition contained in para 2(1) of the CRZ Notification. No shrimp culture pond can be constructed or set up within the coastal regulation zone as defined in the CRZ notification. This shall be applicable to all seas, bays, estuaries, creeks, rivers and backwaters. This direction shall not apply to traditional and improved traditional types of technologies far defined in Alagarswami report which are practised in the coastal low lying areas. All acquaculture industries/shrimp culture industries/shrimp culture ponds operating/set up in the coastal regulation zone as defined under the CRZ Notification shall be demolished and removed from the said area before March 31, 1997.

In conformity with the BASEL Convention and Articles 21, 47 and 48A of the Constitution the Supreme Court in *Research Foundation for Science v. Union of India*[184] the Court vide order dated 6.07.2012 directed the Central Government to ban import of all hazardous/toxic wastes which had been identified and declared to be so under the BASEL Convention and its different protocols. The Central Government is also directed to bring the Hazardous Wastes (Management & Handling) Rules, 1989, in line with the BASEL Convention and Articles 21, 47 and 48A of the Constitution.

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[182] *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647.

[183] AIR 1997 SC 811.

[184] (2012) 11 SCC 693.

It cannot be disputed that no development is possible without some adverse effect on the ecology and environment, and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. A balance has to be struck between the two interests. Where the commercial venture or enterprise would bring in results which are far more useful for the people, difficulty of a small number of people has to be bypassed. The comparative hardships have to be balanced and the convenience and benefit to a larger section of the people has to get primacy over comparatively lesser hardship."

The above paragraphs indicate that while applying the concept of "sustainable development" one has to keep in mind the "principle of proportionality" based on the concept of balance. It is an exercise in which we have to balance the priorities of development on one hand and environmental protection on the other hand.[185]

Natural resources are the assets of entire nation. It is the obligation of all concerned including Union Government and State Governments to conserve and not waste these resources. Article 48A of the Constitution of India requires the State shall endeavour to protect and improve the environment and to safeguard the forest and wild life of the country. Under Article 51A, it is the duty of every citizen to protect and improve the natural environment including forest, lakes, rivers and wild-life and to have compassion for living creatures.[186]

Man-animal conflict often results not because animals encroach human territories but vice-versa. Often, man thinks otherwise, because man's thinking is rooted in anthropocentrism. Remember, we are talking about the conflict between man and endangered species, endangered not because of natural causes alone but because man failed to preserve and protect them, the attitude was destructive, for pleasure and gain. Often, it is said such conflicts is due human population growth, land use transformation, species habitat loss, degradation and fragmentation,

[185] *Research Foundation For Science Technology & Natural Resource Policy v. Union Of India,* (2007) 15 SCC 193.

[186] *T.N. Godavarman Thirumulpad vs Union Of India,* (2006)10 SCC 490.

increase in eco-tourism, access to natural reserves, increase in livestock population, etc. Proper management practices have to be accepted, like conservation education for local population, resettlement of villages, curbing grazing by livestock and domestic animals in forest, etc., including prey-preservation for the wild animals. Provision for availability of natural water, less or no disturbance from the tourists has to be assured. State also has to take steps to remove encroachments and, if necessary, can also cancel the patta already granted and initiate acquisition proceedings to preserve and protect wildlife and its corridors. Areas outside PAs is reported to have the maximum number of man- animal conflict, they fall prey to poachers easily, and often invite ire of the cultivators when they cause damage to their crops. These issues have to be scientifically managed so as to preserve and protect the endangered species, like wild buffalo and other species included in Schedule 1 Part 1 of the Wildlife Protection Act, as well as other species which face extinction.[187]

This Court in *Sansar Chand v. State of Rajasthan*[188], held that all efforts must be made to implement the spirit and provisions of the Wild Life (Protection) Act, 1972; the provisions of which are salutary and are necessary to be implemented to maintain ecological chain and balance. The Stockholm Declaration, the Declaration of United Nations, Conventions on Human Environment signed in the year 1972, to which India is the signatory, have laid down the foundation of sustainable development and urged the nations to work together for the protection of the environment. Conventions on Biological Diversity, signed in the year 1962 at Rio Summit, recognized for the first time in International Law that the conservation of biological diversity is "a common concern of human kind" and is an integral part of the development process.

The Parliament enacted the Biological Diversity Act in the year 2002 followed by the National Biodiversity Rules in the year 2004. The main objective of the Act is the conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the

[187] *T.N. Godavarman Thirumulpad vs Union of India*, (2012) 4 SCC 362.

[188] (2010) 10 SCC 604.

utilization of genetic resources. Bio- diversity and biological diversity includes all the organisms found on our planet i.e. plants, animals and micro-organisms, the genes they contain and the different eco-systems of which they form a part. The rapid deterioration of the ecology due to human interference is aiding the rapid disappearance of several wild animal species. Poaching and the wildlife trade, habitat loss, human-animal conflict, epidemic etc. are also some of the reasons which threaten and endanger some of the species.[189]

The scope of the Centrally Sponsored scheme was examined in *T. N. Godavarman Thirumulpad v. Union of India*[190] (Wilde Buffalo case) and this Court directed implementation of that scheme in the State of Chhattisgarh. The centrally sponsored scheme, as already indicated, specifically refers to the Asiatic lions as a critically endangered species and highlighted the necessity for a recovery programme to ensure the long term conservation of lions. NWAP 2002-2016 and the Centrally Sponsored Scheme 2009 relating to integrated development of wildlife habitats are schemes which have statutory status and as held in Lafarge case (supra) and have to be implemented in their letter and spirit. While giving effect to the various provisions of the Wildlife Protection Act, the Centrally Sponsored Scheme 2009, the NWAP 2002-2016 our approach should be eco-centric and not anthropocentric.

Sustainable development, it has been argued by various eminent environmentalists, clearly postulates an anthropocentric bias, least concerned with the rights of other species which live on this earth. Anthropocentrism is always human interest focussed thinking that non-human has only instrumental value to humans, in other words, humans take precedence and human responsibilities to non-human are based benefits to humans. Eco-centrism is nature-centred, where humans are part of nature and non-humans have intrinsic value. In other words, human interest does not take automatic precedence and humans have obligations to

[189] supra

[190] (2012) 3 SCC 277

non-humans independently of human interest. Eco-centrism is, therefore, life-centred, nature-centred where nature includes both humans and non-humans[191].

The subject "Protection of wild animals and birds" falls under List III, Entry 17B of Seventh Schedule. The Parliament passed The Wild Life (Protection) Act 53 of 1972 to provide for the protection of wild animals and birds with a view to ensuring the ecological and environmental security of the country. The Parliament vide Constitution (42nd Amendment) Act, 1976 inserted Article 48A w.e.f. 03.01.1977 in Part IV of the Constitution placing responsibility on the State "to endeavour to protect and improve the environment and to safeguard the forests and wild life of the country." Article 51A was also introduced in Part IVA by the above-mentioned amendment stating that "it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures".

We notice for achieving the objectives of various conventions including Convention on Biological Diversity (CBD) and also for proper implementation of IUCN, CITES etc., and the provisions of the Wild Life (Protection) Act, Bio-diversity Act, Forest Conservation Act etc. in the light of Articles 48A and 51A(g), the Government of India has laid down various policies and action plans such as the National Forest Policy (NFP) 1988, National Environment Policy (NEP) 2006, National Bio-diversity Action Plan (NBAP) 2008, National Action Plan on Climate Change (NAPCC) 2008 and the Integrated development of wild life habitats and centrally sponsored scheme framed in the year 2009 and integrated development of National Wild- life Action Plan (NWAP) 2002-2016. In Lafarge case (supra) this Court held that National Forest Policy 1988 be read together with the Forest (Conservation) Act, 1980. In our view, the integrated Development of Wile Life habitat under the Centrally Sponsored Scheme of 2009 and the NWAP (2002-

[191] *Centre For Environmental. Law, v. Union of India,* on 15 April, 2013

2016) have to be read along with the provisions of the Wile Life (Conservation) Act.[192]

Article 48 and Article 51-A of the Constitution of India and submitted that the State has a duty to protect and improve environment and safeguard the forests and wildlife in the country, a duty cast upon all the States in the Union of India. The conservatism in Bio-Diversity and the Eco-centric principle, have been universally accepted. The National Forest Policy and the Scheme of 2009 and NWAP (2002-2016) and the plans have legislative force and can be enforced through Courts.[193]

While environmental aspects concern `life', human rights aspects concern `liberty'. In the context of emerging jurisprudence relating to environmental matters, as it is the case in matters relating to human rights, it is the duty of this Court to render Justice by taking all aspects into consideration. With a view to ensure that there is neither danger to environment nor to ecology and at the same time ensuring sustainable development.

Some important directives of social justice is found in Article 49 which provides the protection of monument and places and objects of national importance.

Article 49 of the Constitution of India mandates that it shall be obligation of the State to protect every monument or place or object of artistic or historic interest declared by or under law made by Parliament to be of national importance from spoilation, disfigurement, destruction, removal, disposal or export as the case may be. The State has failed to protect ancient monuments of national importance as it has granted mining leases within 10 kms from fort wall and mining operations and blasting have caused damage to the structures of fort. Thus, there is gross violation of mandate of Article 49 of the Constitution.[194]

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[192] supra

[193] *Lafarge Umiam Mining Private Limited v. Union of India,* (2011) 7 SCC 338.

[194] *M.C.Mehta v. Kamal Nath* (2000) 6 SCC 213.

The framers of the Constitution were very much conscious of the need of protecting the monuments and places/objects of artistic and historic importance. This is why Article 49 was incorporated in the Directive Principles of State Policy (Part IV of the Constitution) whereby an obligation has been imposed on the State to protect every monument or place or object of artistic or historic interest declared by or under law made by Parliament.

For the sake of reference Article 49 is reproduced below: Protection of monuments and places and objects of national importance. - It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoilation, disfigurement, destruction, removal, disposal or export, as the case may be."

In 1951, Parliament enacted the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951, whereby certain monuments etc. were declared to be of national importance. After 7 years, Parliament enacted the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (for short, `the 1958 Act') to provide for the preservation of ancient and historical monuments and archaeological sites and remains of national importance, for the regulation of archaeological excavations and for the protection of sculptures, carvings and other like objects. Similar legislations have been enacted by various State legislatures with reference to 7 entry 12 List II of the Seventh Schedule of the Constitution.

Certain ancient monuments, etc., deemed to be of national importance. - All ancient and historical monuments and all archaeological sites and remains which have been declared by the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (71 of 1951), or by section 126 of the States Reorganisation Act, 1956 (37 of 1956), to be of national importance shall be deemed to be ancient and historical monuments or

archaeological sites and remains declared to be of national importance for the purposes of this Act.[195]

The Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of different parts of the branches have been sufficiently differentiated. Article 50 provides for the separation of judiciary from executive. It provides that there shall be separate judicial service free from executive control.

In *Ram Jawaya Kapur v. State of Punjab*[196], a Constitution Bench of this Court observed: " The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another."

In *State of Karnataka v. Appa Balu Ingale*[197] the Supreme Court has held that judiciary acts as a bastion of the freedom and of the rights of the people. The Judges are participants in the living stream of national life, steering the law between the dangers of rigidity and formlessness in the seamless web of life. Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future to decide objectively, disengaging himself/herself from every personal influence or predilections. The Judges should adapt purposive interpretation of the dynamic concepts under the Constitution and the act with its interpretive armoury to articulate the felt necessities of the time. Social legislation is not a document for fastidious dialects but means of ordering the life of the people. To construe law one must enter into its spirit, its setting and history. Law

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[195] *Archaeological Survey of India v. Narender Anand,* (2012) 2 SCC 562.

[196] AIR 1955 SC 549

[197] AIR 1993 SC 1126

should be capable to expand freedom of the people and the legal order can weigh with utmost equal care to provide the underpinning of the highly inequitable social order. Judicial review must be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are required to be removed re-adjusting the social order through rule of law. In that case, the need for protection of right to take water, under the civil Rights Protection Act, and the necessity to uphold the constitutional mandate of abolishing untouchability and its practice in any form was emphasised.

The Supreme Court in *Divisional Manager, Aravali Golf Club vs. Chander Dass*[198] has opined "If there is a law, judges can certainly enforce it, but judges cannot create a law and seek to enforce it."

There is broad separation of powers under the Constitution, and hence one organ of the State should not encroach into the domain of another organ. The judiciary should not therefore seek to perform legislative or executive functions.[199]

Expression "Judicial Office" has not been defined under the Constitution, nevertheless, it has to be given the meaning in the context of the concept of judiciary as enshrined in the Constitution of India. The constitution seeks to establish an independent judiciary in the country. Article 50 of the Constitution gives a mandate that the State shall take steps to separate the judiciary from the executive in the public services of the State. Chapter V and VI in Part VI of the Constitution proved for the High Courts and subordinate courts in the State. The Scheme under the Constitution for establishing an independent judiciary is very clear.

The independence of judiciary is part of the basic structure of the Constitution. To achieve this objective there has to be separation of judiciary from the executive. The framers of the Constitution did not and could not have meant by

[198] (2008) 1 SCC 683.

[199] *Common Cause v. Union of India,* (2008) 5 SCC 511.

a "judicial office" which did not exist independently and the duties or part of the duties of which could be conferred on any person whether trained or not in the administration of justice. The Directive Principles as enshrined in Article 50 of the Constitution, give a mandate that the State shall take steps to separate the judiciary from the executive which means that there shall be a separate judicial service free from the executive control. [200]

Article 51 provides for promotion of international peace and security. This article has been relied upon to introduce and implement various international instruments particularly the Declaration of Human Rights, and the two Covenants on the Political and Civil Rights, and the Economic Social and Cultural Rights in the interpretation of fundamental rights. The Courts have held that by virtue of these articles international instruments, particularly those to which India is a party, became part of Indian law so long they are not inconsistent with it. Therefore they can be very well relied and enforced.

To implement Article 39(d) of the Constitution of India and Equal Remuneration Convention, 1951(adopted by International Labour Organisation), the Equal Remuneration Act, 1976 came to be enacted providing for the payment of equal remuneration to men and women workers and for the prevention of discrimination on the ground of sex against women in the matter of employment and for matters connected therewith or incidental thereto.[201]

Bhagwati, CJ, speaking on the importance of proper bringing up children in *Sheela Barse v. Secretary, Children Aid Society*[202] held that children are the citizens of the future era. On the proper bringing up of children and giving them the proper training to turn out to be good citizens depends the future of the country. In recent years, this position has been well realised. In 1959, the Declaration of all the rights of the child adopted by the General Assembly of the

[200] *Kumar Padma Prasad v. Union Of India*, AIR 1992 SC 1213.

[201] *Mackinnon Mackenzie & Co. Ltd. V. Audrey D'costa*, (1987) 2 SCC 469.

[202] (1987) 3 SCC 50.

United Nations and in Article 24 of the International Covenant on Civil and Political Rights 1966. The importance of the child has been, appropriately recognised. India as a party to these International Charters having rectified the Declarations, it is an obligation of the Government of India as also the State machinery to implement the same in the proper way. The Children's Act, 1948 has made elaborate provisions to cover this and if these provisions are properly translated into action and the authorities created under the Act become cognizant of their role, duties and obligation in the performance of the statutory mechanism created under the Act and they are properly motivated to meet the situations that arise in handling the problems, the situation would certainly be very much eased.

The Supreme Court giving importance to international treaties in *Apparel Export Promotion Council v. A.K. Chopra*[203], held that there is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty the two most precious Fundamental Rights guaranteed by the Constitution of India. As early as in 1993 at the ILO Seminar held at Manila, it was recognized that sexual harassment of woman at the work place was a form of gender discrimination against woman. In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work

[203] (1999) 1 SCC 759.

and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment. These international instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasized that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law.

India is a member of the United Nations Organization and is also a signatory to the aforesaid Conventions.

In *Peoples Union for Civil Liberty v. Union of India,*[204] the Supreme Court recognised the principle that it is almost an accepted proposition of law that rules of customary international Law, shall be deemed to be incorporated in the domestic law. For holding this the Court relied upon the observation made by Sikri, C.J. in *Keshava Nanda Bharati's case*[205] that in view of Article 51 of the directive principles the Court must interpret the language of the constitution if not intractible in the light of the United Nation Charter and the solemn declaration subscribed to by India.

The Supreme Court also took similar observation made by Khanna, J. in *A.D.M. Jabalpur v. Shivakant Shukla*[206] that if two constructions of the Municipal Law are possible, the court should lean in favour of adopting such construction as would make the provisions of the Municipal Law to be in harmony with international law or treaty obligations. Applying this principle Article 21 of the Constitution was interpreted in conformity with the International Law.

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[204] (1997)1 SCC 301.

[205] (1973) 4 SCC 225.

[206] (1976) 2 SCC 521.

It is almost accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.

Article 51 of the Constitution direct that the State shall endeavour to inter alia, foster respect for international law and treaty obligations in dealings of organised peoples with one another.

5.7. FUNDAMENTAL DUTIES.

The Constitution (Forty Second) Amendment Act, 1976 inserted Part IV A in the Constitution by introducing Article 51 A which provides for Fundamental Duties.

The Indian conception of socialism with democracy with human dignity is by creation of opportunities for the development of each individual and not the destruction of the individual. It is not for the merging of the individual in the society. The Indian socialist society wants the development of each individual but requires this development to be such that it leads to the upliftment of the society as a whole. Fundamental duties in Chapter VI-A of the Constitution to bear meaningful content, facilities and opportunity on equal footing is the fundamental condition of a socialist society. Fundamental Duties are the modernization of the constitution. Fundamental duties have been incorporated in the Indian Constitution to remind every citizen that they should not only be conscious of their rights, but also of their duties. We have borrowed these duties from the constitution of Japan. Constitutions of Japan, Yugoslavia, and Republic of China contain them. The Constitution of Soviet Union (USSR) also contains fundamental duties.

Some of the fundamental duties are already being enforced through ordinary law for example there are laws making any activity disrupting the sovereignty and territorial integrity of India illegal and penal. But some of the other fundamental duties appear to be legally unenforceable for they are vague and imprecise. These can at best be regarded as directory.

Fundamental Duties of citizens serve a useful purpose. In particular, no democratic polity can ever succeed where the citizens are not willing to be active participants in the process of governance by assuming responsibilities and discharging citizenship duties and coming forward to give their best to the country. Some of the fundamental duties enshrined in article 51A have been incorporated in separate laws.

For instance, the first duty includes respect for the National Flag and the National Anthem. Disrespect is punishable by law. To value and preserve the rich heritage of the mosaic that is India should help to weld our people into one nation but much more than article 51A will be needed to treat all human beings equally, to respect each religion and to confine it to the private sphere and not make it a bone of contention between different communities of this land. In sum, Article 51A has travelled a great distance since it was introduced in the Constitution (Forty-second) Amendment Act, 1976, and further consideration should be given to ways and means to popularise the knowledge and content of the Fundamental Duties and effectuate them.

The most important task before us is to reconcile the claims of the individual citizen and those of the civic society. To achieve this, it is important to orient the individual citizen to be conscious of his social and citizenship responsibilities and so shape the society that we all become solicitous and considerate of the inalienable rights of our fellow citizens. Therefore, awareness of our citizenship duties is as important as awareness of our rights. Every right implies a corresponding duty but every duty does not imply a corresponding right. Man does not live for himself alone. He lives for the good of others as well as of himself.

It is this knowledge of what is right and wrong that makes a man responsible to himself and to the society and this knowledge is inculcated by imbibing and clearly understanding one's citizenship duties. The fundamental duties are the foundations of human dignity and national character. If every citizen performs his duties irrespective of considerations of caste, creed, colour and language, most of the malaise of the present day polity could be contained, if not eradicated, and the society as a whole uplifted. Rich or poor, in power or out of power, obedience to citizenship duty, at all costs and risks, is the essence of civilized life.

Dealing with under staffed unrecognised educational institutions, and its consequences the Supreme Court in *State Of Maharashtra v Vikas Sahebrao Roundale*[207] held that Article 51A enjoins every citizen by clause (h) to develop the scientific temper, humanism, the spirit of inquiry and reform and clause (j) enjoins as the fundamental duty 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; (a) respect of national flag and national anthem; (e) to promote harmony and spirit of common brotherhood amongst all the Indian people transcending religious, linguistic and regional or sectional diversities to renounce practice derogatory to the dignity of woman; (f) to value and preserve rich heritage of our composite culture, etc. are some of the basic duties with which the budding students need to be inculcated and imbibed. They should be sowed in the receptive minds in their formative periods so that they take deep roots at maturity. The teacher needs, not only the training at the inception, but also periodical orientations in this behalf so that the children would reap the rich benefit thereof. The ill equipped and ill housed institutions and sub-standard staff therein are counter productive and detrimental to inculcating spirit of enquiry and excellence to the students.

The Supreme Court speaking on the importance and relevance of fundamental duties in *A.I.I.M.S. Students Union v. A.I.I.M.S.*[208] held that almost a

[207] AIR 1992 SC 1926.

[208] AIR 2001 SC 3262.

quarter century after the people of India have given the Constitution unto themselves, a chapter on fundamental duties came to be incorporated in the Constitution. Fundamental duties, as defined in Article 51A, are not made enforceable by a writ of court just as the fundamental rights are, but it cannot be lost sight of that duties in Part IVA - Article 51A are prefixed by the same word fundamental which was prefixed by the founding fathers of the Constitution to rights in Part III. Every citizen of India is fundamentally obligated to develop the scientific temper and humanism. He is fundamentally duty bound to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievements. State is, all the citizens placed together and hence though Article 51A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is the collective duty of the State.

The 86th Amendment made three changes to the Constitution. It added Articles 21A and 51A(k) and amended Article 45. In addition to rejecting an amendment that would have neutered compulsory education, the Parliament made a positive gesture. Though it never passed legislation seeking to implement compulsory education, it had not completely ignored the subject. From Article 51A(k), it becomes clear that parents would be responsible for sending their children to school. Article 51A read with 51A(k) is reproduced as under: "It shall be the duty of every citizen of India who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

Just as Article 51A(a) does not penalize disrespect of the National Flag, Article 51A(k) does not penalize parents/guardian for failing to send children to school. There is, of course, legislation that gives teeth to Article 51A(a) by virtue of The Prevention of Insults to National Honour Act, 1971, Section 3A).

Article 51A(k) indicates that it is parents, not the State, who are responsible for making sure children wake up on time and reach school. Thus, Article 21A read with Article 51A(k) distributes an obligation amongst the State and parents: the State is concerned with free education, parents with compulsory.

Notwithstanding parental duty, the State also has a role to play in ensuring that compulsory education is feasible.[209]

The concept of compassion for living creatures enshrined in Article 51A (g) is based on the background of the rich cultural heritage of India the land of Mahatama Gandhi, Vinobha, Mahaveer, Budha, Nanak and others. No religion or holy book in any part of the world teaches or encourages cruelty. Indian society is a pluralistic society. It has unity in diversity. The religions, cultures and people may be diverse, yet all speak in one voice that cruelty to any living creature must be curbed and ceased. A cattle which has served human beings is entitled to compassion in its old age when it has ceased to be milch or draught and becomes so-called 'useless'. It will be an act of reprehensible ingratitude to condemn a cattle in its old age as useless and send it to a slaughter house taking away the little time from its natural life that it would have lived, forgetting its service for the major part of its life, for which it had remained milch or draught. We have to remember : the weak and meek need more of protection and compassion.[210]

Article 51A(g) states that it is the duty of every citizen of India to protect and improve the natural environment including the wildlife and to have compassion for the living creatures. By the 42nd Amendment Act 1976 of the Constitution “Forests” was added as Entry 17A in the Concurrent List and the “protection of wild animals and birds” was added as Entry 17B. Consequently, both the Central and State Governments/UTs are mandated with the responsibility of protection and conservation of wildlife and its habitat. Chapter IV of the Act deals with the “protected areas”. Earlier headings `Sanctuaries', `National Parks' and `Closed Areas', was substituted by the words “protected areas” by Act 16 of 2003. Section 18 of the Act empowers the State Government to declare its intention to constitute any area other than an area comprised within any reserve forest or the territorial waters as a sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wildlife or

[209] *Ashoka Kumar Thakur v. Union Of India,* (2008) 6 SCC 1

[210] *State Of Gujarat v. Mirzapur Moti Kureshi Kassab,* (2005 8 SCC 534)

its environment. Chapter IV also confers various other powers upon the State Government like acquisition, initiation of acquisition proceedings, declaration of areas as sanctuary, restriction on entry to the sanctuaries etc. [211]

The Supreme Court in having regard to the grave consequences of the pollution of water and air and the need for protecting and improving the natural environment which is considered to be one of the fundamental duties under the Constitution vide Clause (g) of Article 51A of the Constitution are of the view that it is the duty of the Central Government to direct all the educational institutions throughout India to teach at least for one hour in a week lessons relating to the protection and the improvement of the natural environment including forests, lakes, rivers and wild life in the first ten classes. The Court directed that the Central Government shall get text books written for the said purpose and distribute them to the educational institutions free of cost. Children should be taught about the need for maintaining cleanliness commencing with the cleanliness of the house both inside and outside, and of the streets in which they live. Clean surroundings lead to healthy body and healthy mind. Training of teachers who teach this subject by the introduction of short term courses for such training shall also be considered. This should be done throughout India.[212]

Article 51-A of the Constitution imposes as one of the fundamental duties on every citizen the duty to protect and improve the natural environment including forests, lakes, rivers and wild life and to have campassion for living creatures. Realising the importance of the prevention and control of pollution of water for human existence, Parliament passed the Water (Prevention and Control of Pollution) Act, 1974, to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water, for the establishment, with a view to carrying out the purposes aforesaid of Boards for the prevention and control of water pollution, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith Sections 16 and 17 of the Act describes the functions of the Central and the State Board. In

[211] *T.N. Godavarman Thirumulpad v. Union Of India,* (2012) 4 SCC 362

[212] *M.C. Mehta v. Union Of India,* AIR 1988 SC 1115

addition, Parliament also passed the Environmental (Prevention) Act, 1986 which came into effect from November, 1986 throughout India.

The Supreme Court in *Vishaka v. State of Rajasthan*[213] giving effect to Article 51 A (e) issued certain guidelines and norms which would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women.

In *Sansar Chand v. State of Rajasthan*[214] the Supreme Court has opined that Article 51A (g) of the Constitution states that it is the duty of every citizen of India to protect and improve the natural environment including the wild life. The Wildlife (Protection) Act, 1972 was enacted for this constitutional purpose. Chapter III of the said Act prohibits hunting of wild animals except in certain limited circumstances.

The Court requested the Central and State Governments and their agencies to make all efforts to preserve the wild life of the country and take stringent actions against those who are violating the provisions of the Wildlife (Protection) Act, as this is necessary for maintaining the ecological balance in our country.

The National Anthem was first sung on December 27, 1911 at the Calcutta session of the Indian National Congress. Ever since the date of its being adopted by the Constituent Assembly of India, the National Anthem has been sung throughout the length and breadth of India, by every patriot, every citizen and all people of this country. It has been sung even in places beyond India.

The Prevention of Insults to National Honour Act, 1971 (Act No. 69 of 1971) enacted by the Parliament makes it an offence for whoever intentionally prevents the singing of the Indian National Anthem or causes disturbance to any assembly engaged in such singing. Article 51A of the Constitution of India, inserted by Forty- second Amendment, provides for it being the fundamental duty, amongst others, of every citizen of India to abide by the Constitution and respect

[213] AIR 1997 SC 3011

[214] (2010) 10 SCC 604

its ideals and institutions, the National Flag and the National Anthem. The Constitution of India, its ideals and institutions, the National Flag and the National Anthem have been treated almost on par. From the language of Clause (a) of Article 51A, it is clear that the National Anthem is an ideal and an institution for the Indian citizens. [215]

By incorporating Part IVA in the Constitution, the Parliament has emphasized what is obvious, that is, every citizen must do his duty towards the nation as well as the fellow citizens because unless every one does his duty, it is not possible to achieve the goals of equality and justice enshrined in the Preamble. Article 51A enjoins upon every citizen to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem; to cherish and follow the noble ideals which inspired our national struggle for freedom; to uphold and protect the sovereignty, unity and integrity of India; to promote harmony and the spirit of common brotherhood amongst all the people irrespective of religion, language, region etc. and to renounce practices derogatory to the dignity of women; to value and preserve the rich heritage of our composite culture; to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures; to develop the scientific temper, humanism and the spirit of inquiry and reform; to safeguard public property and to abjure violence; and 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.[216]

The objectives of various conventions including Convention on Biological Diversity (CBD) and also for proper implementation of IUCN, CITES etc., and the provisions of the Wild Life (Protection) Act, Bio-diversity Act, Forest Conservation Act etc. in the light of Articles 48A and 51A(g), the Government of India has laid down various policies and action plans such as the National Forest Policy (NFP) 1988, National Environment Policy (NEP) 2006, National Bio-diversity Action Plan (NBAP) 2008, National Action Plan on Climate Change

[215] *Sanjeev Bhatnagar v. Union Of India*, (2005) 5 SCC 330.

[216] *State Of Maharashtra v. Sarabgdharsingh Shivdassing* ... on 14 December, 2010

(NAPCC) 2008 and the Integrated development of wild life habitats and centrally sponsored scheme framed in the year 2009 and integrated development of National Wild- life Action Plan (NWAP) 2002-2016. In Lafarge case (supra) this Court held that National Forest Policy 1988 be read together with the Forest (Conservation) Act, 1980. In our view, the integrated Development of Wile Life habitat under the Centrally Sponsored Scheme of 2009 and the NWAP (2002-2016) have to be read along with the provisions of the Wile Life (Conservation) Act.[217]

In *Government of India v. George Philip*[218] , overstay of leave and absence from duty was held to be not only an act of indiscipline but also subversive of the work culture in the organization, stating:"Article 51A(j) of the Constitution lays down that it shall be the duty of every citizen 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. This cannot be achieved unless the employees maintain discipline and devotion to duty. Courts should not pass such orders which instead of achieving the underlying spirit and objects of Part IV-A of the Constitution has the tendency to negate or destroy the same."

There has to be a balance and proportionality between the right and restriction on the one hand, and the right and duty, on the other. It will create an imbalance, if undue or disproportionate emphasis is placed upon the right of a citizen without considering the significance of the duty. The true source of right is duty. When the courts are called upon to examine the reasonableness of a legislative restriction on exercise of a freedom, the fundamental duties enunciated under Article 51A are of relevant consideration. Article 51A requires an individual to abide by the law, to safeguard public property and to abjure violence. It also requires the individual to uphold and protect the sovereignty, unity and integrity of the country. All these duties are not insignificant. Part IV of the Constitution relates to the Directive Principles of the State Policy. Article 38 was introduced in the Constitution as an obligation upon the State to maintain social order for promotion of welfare of the people. By the Constitution (Forty-Second

[217] *Centre for Environmental. Law, v. U O I on 15 April, 2013*

[218] (2006) 12 SCALE 122

Amendment) Act, 1976, Article 51A was added to comprehensively state the fundamental duties of the citizens to compliment the obligations of the State. Thus, all these duties are of constitutional significance. It is obvious that the Parliament realized the need for inserting the fundamental duties as a part of the Indian Constitution and required every citizen of India to adhere to those duties.[219]

The Supreme Court in *Centre for Public Interest Litigation v. Union of India,*[220] has opined that Spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilisation. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to States as per international norms. In India, the Courts have given an expansive interpretation to the concept of natural resources and have from time to time issued directions, by relying upon the provisions contained in Articles 38, 39, 48, 48A and 51A(g), for protection and proper allocation/distribution of natural resources and have repeatedly insisted on compliance of the constitutional principles in the process of distribution, transfer and alienation to private persons.

Unlike other fundamental rights, the right to education places a burden not only on the State, but also on the parent or guardian of every child, and on the child herself. Article 21A, which reads as follows, places one obligation primarily on the State: "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine".

By contrast, Article 51A(k), which reads as follows, places burden squarely on the parents: "Fundamental duties - it shall be the duty of every citizen of India who is the parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

The Constitution directs both burdens to achieve one end: the compulsory education of children, free from the fetters of cost, parental obstruction, or State

[219] *Re-Ramlila Maidan Incident,* (2012) 5 SCC 1.

[220] (2012) 3 SCC 1.

inaction. The two articles also balance the relative burdens on parents and the State. Parents sacrifice for the education of their children, by sending them to school for hours of the day, but only with a commensurate sacrifice of the State's resources. The right to education, then, is more than a human or fundamental right. It is a reciprocal agreement between the State and the family, and it places an affirmative burden on all participants in our civil society.[221]

The Directive Principles in our Constitution are fore-runners of the U.N.O. Convention on Right to Development as inalienable human right and every persons and all people are entitled to participate in, contribute to and enjoy economic, social cultural and political development in which all human right, fundamental freedoms would be fully realised. It is the responsibility of the State as well as the individuals, singly and collectively, for the development taking into account the need for fuller responsibility for the human rights, fundamental freedoms as well as the duties to the community which alone can ensure free and complete fulfilment of the human being. They promote and protect an appropriate social and economic order in democracy for development. The State should provide facilities and opportunities to ensure development and to eliminate all obstacles to development by appropriate economic and social reforms so as to eradicate all social injustice. These principles are imbedded, as stated earlier, as integral part of our Constitution in the Directive Principles. Therefore, the Directive Principles now stand elevated to inelienable fundamental human rights. Even they are justiciable by themselves. Social and economic democracy is the foundation for stable political democracy. To make them a way of life in the Indian polity, law as a social engineer, is to create just social order, remove the inequalities in social and economic life and socio-economic disabilities with which people are languishing and to require positive opportunities and facilities as individuals and groups of persons for development of human personality in our civilised democratic set up so that every individual would strive constantly to rise to higher levels. Dr. Ambedkar, in his closing speech in the Constituent Assembly on November 25, 1949, had lucidly elucidated the meaning of social and political democracy. He stated that it means a way of life which recognised liberty, equality and franternity as the principles

[221] *Avinash Mehrotra v. Union Of India,* 2009(6) SCC 398

of life. They form an integral union. One cannot divorce from the other; otherwise it would defeat the very purpose of democracy. Without equality, liberty would produce supremacy of the few over the many equality without liberty would kill the initiative to improve the individual`s excellence, political equality without socio-economic equality would run the rusk of democratic institutions to suffer a set back. Therefore, for establishment of just social order in which social and economic democracy would be a way of life inequalities in income should be removed and every endeavour be made to eliminate inequalities in status through the rule of law. "Socialism" brought into the preamble and its sweep elaborately was considered by this Court in several judgments. It was held that the meaning of the word "socialism" in the Preamble of the Constitution was expressly brought in the Constitution to establish an egalitarian social order through rule of law as its basis structure. In Minerva Mills Ltd. case, the Constitution Bench had considered the meaning of the word "socialism" to crystalise a socialistic state securing to its people socio-economic justice by interplay of the Fundamental rights and the Directive Principles.[222]

The decades of the 1970s and 1980s witnessed a concerted move by the Court to transcend its earlier conservative phase and give a positive direction to the Court's intervention in issues concerning the poor and the disadvantaged. It did this through a creative interpretation of constitutional provisions and a welcome assertion of its powers. The judicial innovation of PIL as a tool to enable access to justice defined a new chapter in the evolution of The Supreme Court as 'a central player in people's lives. There has been a discernible shift in the approach of the Court over the past two decades to issues concerting economic and social rights. The explicit adaptation of international law standards has been sporadic although one instance is the case concerning the sexual harassment of women in the works

[222] *Air India Statutory Corporation.v. United Labour Union,* AIR 1997 SC 645.

place. However, there are a number of cases where the orders passed are perfectly consistent with those norms. For instance, the directions issued in the cases concerning emergency medical care, compulsory free primary education and the right to food recognize the State obligation to provide the minimum core of the social right. However, as the decisions in the areas of the right to work and the right to shelter reveal, the judiciary appears to have unquestionably deferred to executive policy that has progressively denuded these rights.

The policy decision to continue with large dams and projects that result in the displacement of millions of people, many of them already socially and economically disadvantaged, has resulted in weakening the ability of such populations to find meaningful livelihood consistent with their right to human dignity. It results in depriving them of a host of other economic and social rights as well. The fact that many of these policies are in a draft form and are inconsistent with state obligations under constitutional and international law only adds to the difficulty. The courts when approached with petitions seeking enforcement of economic and social rights are often required to content with barriers erected by the law and policy divide, the legitimacy and competence conundrum and the conflict of rights and public interests, to name a few.

The need for intervention of the Court is nevertheless underscored by whatever positive impact it has had thus far on policy and law making in the sphere of economic and social rights. It has also helped to establish judicial standards for testing the reasonableness of executive and legislative action. Also, till the objective or providing effective access to justice through an institutionalized model of legal services delivery is achieved, the use of PIL as a legal aid tool will have to persisted with. The unfinished agenda is a long one indeed.

The Bhopal Gas disaster continues to be a grim reminder of the inability of the legal system to cope with the challenges posed by such calamities. it also serves to highlight the pervasive influence of transactional corporations in both law and policy making. The increasing instances of the State withdrawing from its welfare role and resorting to privatization of the control and distribution of basic community resources like water and electricity and for providing health care and

education are a cause for concern for those wishing to assert the obligation of the State in the spheres of economic and social rights. The withdrawal of the State in these areas results in a prominent role for the corporate sector in the control of common resources of the community. While on the one hand this transition requires to be contested on the political and judicial fronts, there is a need for the law to clearly demarcate the liability of the corporate sector for the violation of economic and social rights. The international law standards, as much as domestic law, have to be shaped to meet this challenge. The Indian legal system is faced with the challenge of having to learn from the past and order its future. The Indian people have much hope and expectation of it.

The Court has given many of the Directives the status of Fundamental Right/ other Constitutional or Statutory rights, by giving wide possible interpretations to the Fundamental Rights or any other Constitutional or Statutory rights in the light of the Directive Principles.

Furthermore, the Courts, in many occasions, in appropriate cases, issued many directions/guidelines and laid down policies to give effect to the directive principles either directly or indirectly in order to remove the grievances which have been caused by non implementation of the Directives.

The Amendments made to the Constitution in order to implement the Directive Principles also encourage the Courts to enforce those directives as any other Constitutional Rights though it is not a Fundamental Right.

In view of the above discussions and findings, we can conclude that almost all the Directives have now become executable by the Courts except a few despite the express bar under Article 37. Let us hope for the implementation of the non - implemented directive principles also in the near future.

The Constitution of India the supreme law, envisions social justice as its arch to ensure life to be meaningful and liveable with human dignity. Jurisprudence is the eye of law giving an insight into the environment of which it is the expression. It re- lates the law to the spirit of the time and makes it richer. Law is the ultimate aim of every civilised society as a key system in a given era, to meet

the needs and demands of its time. Justice, according to law, comprehends social urge and commitment. The Constitution commands justice, liberty, equality and fraternity as supreme values to usher in the egalitarian social, economic and political democracy. Social justice, equality and dignity of person are corner stones of social democracy. The concept 'social justice' which the Constitution of India engrafted, consists of diverse principles essential for the orderly growth and development of personality of every citizen. "Social justice" is thus an integral part of "justice" in generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, Dalits, Tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex of social change to relieve the poor etc. from handicaps, penury to ward off distress, and to make their life liveable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectations. Social security, just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity, the State should provide facilities and opportunities to them to reach at least minimum standard of health, economic security and civilised living while sharing according to the capacity, social and cultural heritage. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor etc. are languishing to secure dignity of their person.

The Constitution, therefore, Mandates the State to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to flavour and enliven practical content of 'life'. Social justice and equality are complementary to each other so that both should maintain their

vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results.[223]

Equality without fraternity is characterized as barbaric equality.[224]

Rightly, Dr. Justice Gajendra Gadkar, the former Chief Justice of the Supreme Court in his book[225] states that "the ultimate object of Directive Principles is to liberate the Indian masses in a positive sense to free them from the passivity endangered by centuries of coercion, by society and by nature and by ignorance and from the abject conditions that had prevented them from fulfilling their best selves". Therefore, civil, political, social, economic and cultural rights are necessary to the individual to protect and preserve human dignity, social and economic rights are sine quo non concomitant to assimilate the poor, the depressed and deprived in the national main stream for ultimate equitable society and democratic way of life to create unity, fraternity among people in an integrated Bharat.

[223] *Consumer Education & Research Center v. Union Of India*, AIR 1995 SC 922

[224] NUJS Law, Review, Vol. IV, No.3, 2011.

[225] Dr. Justice Gajendra Gadkar, *The Constitution of India, its philosophy and postulates'* p. 18 of 1969 Edn.

CHAPTER 6.

SOCIAL JUSTICE DIRECTIVES AND CONSTITUTIONALISM.

India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realized only in and through the individuals.

"In an ideal Constitution, the overall social objective is one that allows for state intervention when it produces some net social benefit, without leaving any individuals worse off than they were before the state acted".

This social objective is achieved by the limits prescribed on the government implies the principle of constitutionalism meaning limited govt.

A written Constitution, independent judiciary with powers of judicial review, the doctrine of rule of law, free elections to legislature, accountable and transparent democratic government, Fundamental Rights of the people, federalism, de-centralization of powers are some of the principles and norms which promote Constitutionalism in a country. Preamble to the Indian Constitution lays down principles for the promotion of constitutionalism.[1]

Constitutionalism recognizes the need government but insists upon limitation being placed upon governmental powers. Limited govt. is the central point of constitutionalism. It is the anti-thesis of arbitrary powers. The underlying difference between the 'Constitutionalism' and Constitution' is that a Constitution ought not merely to confer powers on the various organs of the Government but also seek to restrain those powers.[2]

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[1] Richard A. Epstein, *"The Protection of Liberty, Property and Equality"*, Oxford University Press, London, p. 342.

[2] Giovanni Sartori, *"Constitutionalism: A Preliminary Discussion"*, (1962) 56 Am. Pol. SC Rev. 853.

"A good and virtuous constitutionalism having moral foundation protects not only fundamental freedoms but also creates a bridge between conflicting interests and becomes a harbinger to the social needs and produced good legislators and good citizens. The constitutional Courts as sentinel on the qui vive, therefore, function objectively and dispassionately to correct imbalances and keep check on every wing of the State without trespassing upon the field assigned or powers conferred upon the other wings and at the same time maintain a delicate balance on even keel".[3]

It is necessary to consider at this juncture the meaning of the "socialism" envisaged in the Preamble of the Constitution. Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution. The Fundamental Rights and the Directive Principles are the means, as two wheels of the chariot, to achieve the above object of democratic socialism. The word "socialist" used in the Preamble must be read from the goals Articles 14, 15, 16, 17, 21, 23, 38, 39, 46 and all other cognate Articles seek to establish, to reduce inequalities in income and status and to provide equality of opportunity and facilities. Social justice enjoins the Court to uphold government's endeavour to remove economic inequalities, to provide decent standard of living to the poor and to protect the interest of the weaker sections of the society so as to assimilate all the sections of the society in the secular integrated socialist Bharat with dignity of person and equality of status to all.

Justice is an attribute of human conduct. Law, as a social engineering, is to remedy existing imbalances, as a vehicle to establish an egalitarian social order in a Socialist Secular Bharat Republic. The Upanishad says that, "let all be happy and healthy, let all be blessed with happiness and let non be unhappy". Bhagwatgeeta preaches through Yudhishtra that, "I do not long for kingdom, heaven or rebirth, but I wish to alleviate the suffer-ings of the unfortunate'. Prof. Friedlander in his "*Introduction of Social Welfare*" at page 6 states that social welfare is the organized system of social service and institutions are designed to aid individuals

[3] Dr. L.M. Singhvi, *"Constitution of India"*, 2nd Ed., Vol. 1, Modern Law Publications, New Delhi, p. 24.

and groups to attain specified standard of life and health and personal and social relationship which permit them to develop their full capacities and to promote their well-being in harmony with the needs of their families and the community. Welfare State is a rubicon between unbridled individualism and communism. All human rights are derived from the dignity of the person and his inherent worth. Fundamental Rights and Directive Principles of the Constitution have fused in them as fundamental human rights as indivisible and inter- dependent. The Constitution has charged the State to provide facilities and opportunities among the people and groups of people to remove social and economic inequality and to improve equality of status. Article 39(b) enjoins the State to direct its policy towards securing distribution of the ownership and control of the material resources of the community as best to subserve the common good. The founding fathers with hind sight, engrafted with prognosis, not only inalienable human rights as part of the Constitution but also charged the State as its policy to remove obstacles, disabilities and inequalities for human development and positive actions to provide opportunities and facilities to develop human dignity and equality of status and of opportunity for social and economic democracy. Economic and social equality is a facet of liberty without which meaningful life would be hollow and mirage. Social and economic democracy is the foundation on which political democracy would be a way of life in the Indian polity. Law as a social engineering is to create just social order removing inequalities in social and economic life, socio-economic disabilities with which poor people are languishing by providing positive opportunities and facilities to individuals and groups of people.[4]

Rawls in his "Theory of Justice"[5] stated that : "From the beginning I have stressed that justice as fairness applies to the basic structure of society. It is a conception for ranking social forms viewed as closed systems. Some decision concerning these background arrangements is fundamental and cannot be avoided. In fact, the cumulative effect of social and economic legislation is to specify the basic structure. Moreover, the social system shapes the wants and aspirations that

[4] *Samtha v. State of A.P,* (1997) 8 SCC 191.

[5] Rawls, *"Theory of Justice"* p.259.

its citizens come to have. It determines in part the sort of persons they want to be as well as the sort of persons they arc. Thus an economic system is not only an institutional device for satisfying existing wants mid needs but a way of creating and fashioning wants in the future. How men work together now to satisfy their present desires affects the desires they will have later on, the kind of persons they will be. These matters are, of course, perfectly obvious and have always been recognised.

6.1 SOCIALISM IN INDIAN CONSTITUTION.

The framers of the Constitution were very much conscious and aware of the widespread inequalities and disparities in the social fabric of the country as also of the gulf between rich and poor and this is the reason why the goal of justice - social, political and economic was given the place of pre-eminence in the Preamble. The concept of equality enshrined in Part III and Part IV of the Constitution has two different dimensions. It embodies the principle of non-discrimination Articles 14, 15(1), (2) and 16(2). At the same time it obligates the State to take affirmative action for ensuring that unequals (downtrodden, oppressed and have-nots) in the society are brought at a level where they can compete with others (haves of the society) (Articles 15(3), (4), (5), 16(4), (4A), (4B), 39, 39A and 41).[6]

Dr. B.R. Ambedkar, in his closing speech in the *Constituent Assembly* on November 25, 1949, had lucidly elucidated thus :

"What does social democracy mean? It means way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty, would kill individual initiative - we have in

[6] *Union of India v. Pushpa Rani,* (2008) 9 SCC 242.

India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plan, we have a society in which there are some who have immense wealth as against many who live in abject poverty". We cannot afford to have equality in political life and inequality in economic life. How long shall we continue to live this life of contradiction? How long shall we continue to deny equality in our social and economic life? We must remove this contradiction at the earliest possible moment or else those who suffered from inequality will blow up the structure of political democracy which this Assembly has laboriously built up." [7]

The core constitutional objective of "social and economic democracy" in other words, just social order, cannot be established without removing the inequalities in income and making endeavour to eliminate inequalities in status through the rule of law. The mandate for social and economic retransformation requires that the material resources or their ownership and control should be so distributed as to subserve the common good. A new social order, therefore, would emerge, out of the old unequal or hierarchical social order. The legislative or executive measures, therefore, should be necessary for the reconstruction of the unequal social order by corrective and distributive justice through the rule of law.

The Supreme Court in *Minerva Mills Ltd. v. Union of India*,[8] the Constitution Bench had held that the edifice of our Constitution is built upon the concept crystalised in the Preamble. We "the People" resolved to constitute ourselves a socialist State which carries with it the obligation to secure to the people, justice - social, economic and political. We, therefore, put Part IV into our Constitution containing Directive Principles of State Policy which specifies the socialistic role to be achieved.

Speaking for the majority, Chandrachud, C.J. observed as under : "This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist

[7] B. Shiva Rao's, *The Framing of India's Constitution* : Select Documents', Vol. IV, p. 944.

[8] (1981) 1 SCR 206.

State which carried with it the obligation to secure to our people justice-social, economic and political. We, therefore, put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved." At a later stage it was observed that the fundamental rights are not an end in themselves but are the means to an end, the end is specified in part IV.

Bhagwati, J. in his minority judgment after extracting a portion of the speech of the then Prime Minister Jawahar Lal Nehru, while participating in a discussion on the Constitution (First Amendment) Bill, observed that the Directive Principles are intended to bring about a socio-economic revolution and to create a new socio-economic order where there will be social and economic justice for all and everyone, not only a fortunate few but the teeming millions of India, would be able to participate in the fruits of freedom and development and exercise the fundamental rights. It, therefore, appears to be well established that while interpreting or examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other.[9]

In *D.S. Nakara v. Union of India*[10], another Constitution Bench had dealt with the object to amend the Preamble by the Constitution (42nd Amendment) Act and pointed out that the concept of Socialist Republic was to achieve socio-economic revolution to end poverty, ignorance and disease and inequality of opportunity. It was pointed out that socialism is a much misunderstood word. Values deter-mine contemporary socialism - pure and simple. The principal aim of socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people especially to provide security from cradle to grave. The less equipped person shall be assured a decent minimum standard of life and exploitation in any form shall be prohibited. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder. The Preamble directs the centers of power, Legislature, Executive

[9] supra

[10] (1983) 2 SCR 165.

and Judiciary - to strive to set up from a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society under rule of law though it is a long march, but during the journey to the fulfilment of goal every State action including interpretation whenever taken, must be directed and must be so interpreted as to take -the society towards establishing egalitarian socialist State, the goal. It was, therefore, held that "it, therefore, appears to be well established that while interpreting or examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other."

The Court[11] further expressed that the Preamble, theflood light illuminating the path to be pursued by the State to set up a Sovereign Socialist Secular Democratic Republic. Expression 'socialist' was intentionally introduced in the Preamble by the Constitution (Forty-Second Amendment) Act, 1976. In the objects and reasons for amendment amongst other things, ushering in of socio-economic revolution was promised.

The clarion call may be extracted: "The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity, has been engaging the active attention of Government and the public for some time. It is, therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism to make the directive principles more comprehensive."

What does a Socialist Republic imply? Socialism is a much misunderstood word. Values determine contemporary socialism pure and simple. But it is not necessary at this stage to go into all its ramifications. The principal aim of a socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxism and Gandhism leaning heavily towards

[11] ibid.

Gandhian socialism. During the formative years, socialism aims at providing all opportunities for pursuing the educational activity. For want of wherewithal or financial equipment the opportunity to be fully educated shall not be denied. Ordinarily, therefore, a socialist State provides for free education from primary to Ph. D. but the pursuit must be by those who have the necessary intelligence quotient and not as in our society where a brainy young man coming from a poor family will not be able to prosecute the education for want of wherewithal while the ill-equipped son or daughter of a well-to-do father will enter the portals of higher education and contribute to national wastage. After the education is completed, socialism aims at equality in pursuit of excellence in the chosen avocation without let or hindrance of caste, colour, sex or religion and with full opportunity to reach the top not thwarted by any considerations of status, social or otherwise. But even here the less equipped person shall be assured a decent minimum standard of life and exploitation inany form shall be eschewed. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder. Then comes the old age in the life of everyone, be he a monarch or a Mahatma, a worker or a pariah. The old age overtakes each one, death being the fulfilment of life providing freedom from bondage. But there socialism aims at providing an economic security to those who have rendered unto society what they were capable of doing when they were fully equipped with their mental and physical prowess. In the fall of life the State shall ensure to the citizens a reasonably decent standard of life, medical aid, freedom from want, freedom from fear and the enjoyable leisure, relieving the boredom and the humility of dependence in old age. This is what Article 41 aims when it enjoins the State to secure public assistance in old age, sickness and disablement. It was such a socialist State which the Preamble directs the centres of power Legislative Executive and Judiciary-to strive to set up. From a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society is a long march but during this journey to the fulfillment of goal every State action whenever taken must be directed, and must be so interpreted, as to take the society one step towards the goal.[12]

[12] supra

Pt. Jawaharlal Nehru, while participating in the discussion on the Constitution (First Amendment) Bill, had stated that the Directive Principles are intended to bring about a socio-economic revolution and to create a new socio-economic order where there will be social and economic justice for all and for everyone, not only to fortunate few but also the teeming millions of Indians who would be able to participate in the fruits of freedom and development and exercise the fundamental rights.[13]

Dr. Ambedkar, while introducing the Preamble of the Constitution for discussion by the Constituent Assembly, had stated that the purpose of the Preamble is to constitute "a new society in India based on justice, liberty and equality". The Constituent Assembly debates do indicate that the Directive Principles intended to provide life blood to social, economic and political justice to all people. Some of the members like Mahavir Tyagi, Professor K.T. Shah, Dr. Saxena Etc. pleaded for incorporation of socialism as part of the Preamble but Dr. Ambedkar the father of the Constitution, while rejecting the amendment, made it clear that the socio-economic justice provided in the Directive Principles and the Fundamental Rights given in Chapter III would meet the above objective without expressly declaring India as a socialist State in the Constitution. Alladi Krishnaswamy Ayyer supported Dr. Ambedkar and had stated that "the constitution, while it does not commit the country to any particular form of economic structure of social adjustment, gives ample scope for the future legislature and the future Parliament to evolve any economic order and undertake any legislation they choose in public interest". Pandit Jawaharlal Nehru in his speech also emphasised the need to enter into a new social order in which "there would be valid growth in the standard of living of all the people of India with equitable distribution of wealth and equality of opportunity and status of all".[14]

Justice is not synonymous with equality, equality is one aspect of it. Justice is not something which can be captured in a formula once and for all. It is a

[13] *Samtha v. State of A.P,* (1997) 8 SCC 191.

[14] *Constituent Assembly Debates,* November 1948 at pages 230 to 357.

process, a complex and shifting balance between many factors including equality. Justice is never given, it is always a task to be achieved. Justice is just allocation of advantages and disadvantages, preventing the abuse of power, preventing the abuse of liberty by providing facilities and opportunities to the poor and disadvantaged and deprived social segments for a just decision of disputes adapting to change.

Mahatma Gandhiji, the father of the nation, had stated that "true economics never militates against the highest ethical standard, just as all true ethics to be worth its name must at the same time be also good economics. An economies that inculcates Mammon worship, and enables the strong to amass wealth at the expense of the weak, is a false and dismal science. It spells death. True economics, on the other hand, stands for social justice, it promotes the good of all equally, including the weakest, and is indispensable for decent life."[15]

Dr. V.K.R.V. Rao, one of the eminent economists of India, in his "*Indian Socialism Retrospect and prospect*" has stated that a socialist society has not only to bring about equitable distribution but also to maximize production. It has to solve problems of unemployment, low income and mass poverty and bring about a significant improvement in the national standards of living. At page 47, he has stated that socialism, therefore, requires deliberate and purposive action on the part of the State in regard to both production and distribution and the fields covered are not only savings, investment, human skills and use of science and technology, but also changes in property relations, taxation, public expenditure, education and the social services. A socialist society is not just a give-away society nor is it only concerned with distribution of income. It must bring about full employment as also an increase in productivity.[16]

A socialistic society involves a planned economy which lakes note of time and space considerations in the distribution and pricing of output. It would be necessary for both the efficient working of socialist enterprises and the prevention

[15] *'Harijans'* dated October 9,1937

[16] *Samtha v. State of A.P,* (1997) 8 SCC 191

of unplanned and anarchical expansion of private enterprises. The Indian conception of socialism with democracy with human dignity is by creation of opportunities for the development of each individual and not the destruction of the individual. It is not for the merging of the individual in the society. The Indian socialist society wants the development of each individual but requires this development to be such that it leads to the upliftment of the society as a whole. Fundamental duties in Chapter VI-A of the Constitution to bear meaningful content, facilities and opportunity on equal footing is the fundamental condition of a socialist society. The more the talent from backward classes and areas get recognition and support, the more socialist will be the society. Public sector and private sector should harmoniously work. The Indian approach to socialism would be derived from Indian spiritual traditions. Buddhism, Jainism, Vedantic and Bhakti Hinduism, Sikhism, Islam and Christianity have all contributed to this heritage rooted to respect for human dignity and human equality. While imposing restrictions on the right to private property even to the extent of abolishing it where necessary in the social and public interest, it permits private enterprise in economic activity and makes for a mixed economy rather than a completely socialised economy. It abhors violence and class war and heirarchical class structure and pins its faith on non-violence, sacrifice, and dedication to the service of the poor and as a natural consequence, its implementation is envisaged through Parliamentary democracy planned economy and the rule of law rather than through a violent revolution or a dictatorship in any form. Indian socialism, therefore, is different from Marxist or scientific socialism.[17]

To achieve the goal set down in the Preamble, the Directive Principles and fundamental rights, the Constitution envisaged planned economy. The Planning Commission has been given the constitutional status for the above purpose. The Third Five Year Plan document extracts the basic features of the socialist pattern of society thus : "Essentially, this means that the basic criterian 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

[17] Supra.

that they result not only in appreciable increase in national income and employment but also in greater equality in incomes and wealth. 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 concentration of incomes, wealth and economic power. 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. It is neither necessary nor desirable that the economy should become a monolithic type of organisation offering little play for experimentation either as to forms or as to modes of functioning. Nor should expansion of the public sector mean centralization of decision making and of exercise of authority. The accent of the socialist pattern of society is on the attainment of positive goals, the raising of living standards, the enlargement of opportunities for all, the promotion of enterprise among the disadvantaged classes and the creation of a sense of partnership among all sections of the community. These positive goals provide the criteria for basic decisions. The directive principles of State policy in the Constitution have indicated the approach in broad terms; the socialist pattern of society is a more concretised expression of this approach. Economic policy and institutional changes have to be planned in a manner that would secure economic advance along democratic and egalitarian lines."[18]

Mr. G.D.H. Cole, one of the leading socialist of United Kindom, in his speech[19] has stated that socialism is a movement aiming at greater social and economic equality and using extended State action as one of its methods, perhaps the most distinctive but certainly not the only one needed to be taken into account. The affairs of the community shall be so administered as to further the common interests of ordinary men and women by giving to everyone, as far as possible, an equal opportunity to live a satisfactory and contended existence, coupled with a belief that such opportunity is incompatible with the essentially unequal private ownership of the means of production. It requires not merely collective control of the uses to which these are to be put, but also their collective ownership and

[18] ibid.

[19] G.D.H. Cole, '*The Growth of Socialism"*, 'Law and Opinion in England in the 20th Century' at page 79-80.

disinterested administration for the common benefit. This basic idea of socialism involves not only the socialisation of the essential instruments of production, in the widest sense, but also the abolition of private incomes which allow some men to live without rendering or having rendered any kind of useful service to their fellowmen and also the sweeping away of forms of educational preference and monopoly which divide men into social classes. It involves, in effect whatever is needful for the establishment of what socialists call a 'classless society' and in pursuance of this aim its votaries necessarily look for support primarily, though not exclusively, to the working classes, who form the main body of the less privileged under the existing social order. Socialists seek to reduce economic and social inequalities not only in order to remove unearned sources of superior position and influence, but also in order to narrow the gaps between men to such as are compatible with all men being near enough together in ways of living to be in substance equals in their mutual intercourse.

In *Excel Wear Etc. v. Union of India*[20] the Constitution Bench had held that the concept of socialism or socialist state has undergone changes from time to time from country to country and from thinker to thinker. But some basic concept still holds the field. The doctrinaire approach to the problem of socialism be eschewed and the pragmatic one should be adapted. So long as the private ownership of an industry is recognised and governs an overwhelmingly large proportions of an economic structure, it is not possible to say that principles of socialism and social justice can be pushed to such an extreme so as to ignore completely or to a very large extent the interest of another section of the public, namely, the private ownership of the undertaking. In other words, the object of intermediation should be co-existence and flourishing of mixed economy. With the rise of the philosophy of Socialism, the doctrine of State ownership has been often discussed by political and economic thinkers. Broadly speaking, this discussion discloses a difference in approach. To the socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the rationalist, nationalization or State ownership is a matter of expediency dominated

[20] (1979) 1 SCR 1009.

by considerations of economic efficiency and increased output only production. This latter view supported nationalisation only when it appeared clear that State ownership would be more efficient, more economical and more productive. The former approach was not very much influenced by these considerations, and treated it a matter of principle that all important and nation-building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic. The first proceeds on the general ground that all national wealth and means of producing it should come under national control, whilst the second supports nationalisation only on grounds of efficiency and increased output.

In *State of Kamataka v. Shri Ranganatha Reddy,*[21] a Bench of nine Judges of this Court considered nationalisation of the contract carriages. In that behalf, it was held that one of the principal aims of socialism is the distribution of the material resources of the community in such a way as to subserve the common good. This principle is embodied under Article 39(b) of the Constitution as one of the essential directive principles of State polity. Therein, this Court laid stress on the word 'distribute' as used in Article 39(b) being a keyword of the provision emphasising that The key word is distribution and the genius of the Article, if we may say so., cannot but be given full play as it fulfils the basic purpose of restructuring the economic order. Each word in this Article has a strategic role and the whole Article is a social mission. It embraces the entire material resources of the community. Its task is to distribute such resources, its goal is to undertake distribution as best to subserve the common good. It reorganises by such distribution the owner-ship and control." Article 39(b) fulfils the basic purpose of restructuring the economic order and undertakes to distribute the entire material resources of the community, as best to subserve the common good. To exclude ownership of private resources from its coils, is to cipherise its very purpose of redistribution the socialist way. Article 39(b) is ample enough to rope in buses, as motor vehicles, are part of the material resources of the operators. Socially conscious economists will find little difficulty in treating nationalisation of transport as a distributive progress for the good of the community. The Court

[21] (1978) 1 SCR 641.

observed that the State symbolises, represents and acts for the good of society. Its concerns are the ways of meeting the wants of the community, directly or otherwise, and the public sector in our constitutional system, is a strategic tool in' the national plan for transformation from stark Poverty to social justice, transcending administrative and judicial allergies. Serious constitutional problems cannot be studied in a socio economic vacuum, since socio-cultural changes are the source of new values. Our emphasis is on abandoning formal legalistic or sterile logomachy in assessing the vires of statutes regulating vital economic areas, and adopting instead, a dynamic, goal-based approach to problems of constitutionality. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. The Constitution ensouls such a value system in Parts III and IV and elsewhere, and the dialectics of social justice should not be missed if their synthesis is to influence State action and Court pronouncement. Illusory compensation, nexus doctrine and 'distributed to subserve the common good, should not reduce lofty constitutional considerations into hollow concepts.

The social philosophy of the Constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and else-where, ensouls such a value system and the debate in this case puts precisely this soul in peril. Friedman has said in his *'Legal Theory and Social Evolution*'. 'The lawyer cannot afford to isolate himself from the social process. His independence can never be more than relative, and it is only a clear awareness of the political, social and constitutional foundations of, his function in general as well as of particular legal problems that enables him to find the proper balance between Stability and progress." Our thesis is that the dialectics of social justice should not be missed if the synthesis of Part III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socioeconomic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process of the new equity-loaded legality. A judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension in his complex duties. The credal essence of the Constitution consists in its Preamble, Articles 38, 39(b) and

(c), 31 and the bunch of Articles 31A, 31Band 31C. Our emphasis is on abandoning formal legalistics or sterile logomachy in assessing the vires of statutes regulating vital economic are-as, and adopting instead a dynamic, goal-based approach to problems of constitutionality. It is right that the rule of law enshrined in our, Constitution must and does reckon with the roaring current of change which shifts our social values and shrivels our feudal roots, invades our lives and fashions our destiny. The key issues argued at learned length in these appeals cannot suffer 'judicial separation' from the paramount principles in the Preamble and in Article 39(b) and (c). So we have to view the impugned provisions from the vantage point of socio-legal perception. The semantic sin of dubious legislating drafting before entering the thorny thicket of debate on the questions arising in this batch of appeals a cautionary word may be uttered, without disrespect, about the unwitting punishment of the community by our legislative draftsmen whose borrowed skills of Westminster vintage and hurried bills without sufficient study of their economic project, occasionally result in incomprehensibility and incongruity of the law for the lay and the legal. In a country where the people are, by and large, illiterate, where a social revolution is being pushed through by enormous volume and variety of legislation and where new economic adventures requiring unordhoodoz jural techniques are necessitous, if legal drafting is to be equal to the challenge of change, a radicalisation of its methodology and philosophy and an ability for the legislative manpower to express themselves in streamlined, simple, project oriented fashion is essential. In the hope that a role conscious court communicates to a responsive Cabinet, we make this observation.[22]

In *Sanjeev Coke Manufacturing Company v. Bharat Coking Coal Ltd.*[23] another Constitution Bench reiterated the above view; while considering Article 39(b) of the Constitution, at page 1020, this Court had held that the broad egalitarian principle of economic justice was implicit in every directive principle and, therefore, a law designed to promote a directive principle, even if it came into conflict with the formalistic and doctrinaire view of equality before the law, would

[22]ibid.

[23] (1983) 1 SCR 1000.

most certainly advance the broader egalitarian principle and desirable constitutional goal of social and economic justice for all. If the law was aimed at the broader egalitarianism of the Directive Principles, Article 31C protected the law from needless, unending and rancorous debate on the question whether the law contravened Article 14's concept of the equality before the law. The law seeking the immunity afforded by Article 31C must be a law directing the policy of the State towards securing a Directive Principle and the connection with the Directive Principle must not be some remote or tenuous connection. The object of the nationalisation of the coal mine is to distribute nations resources. It was held at page 1023 that though the word 'socialist' was introduced in the Preamble by late amendment of the Constitution, that socialism has always been the goal is evident from the Directive principles of the State policy. The amendment was only to emphasise the urgency. Ownership, control and distribution of national productive wealth for the benefit and use of the community and the rejection of a system of misuse of its resources for selfish ends is what socialism is about and the words and thought of Article 39(b) but echo the familiar language and philosophy of socialism as expounded generally by all socialist writers. Socialism is, first of all, a protest against the material and cultural poverty inflicted by capitalism on the mass of the people. Nationalisation of coal mine for distribution was upheld as a step towards socialism.

In *State of Tamil Nadu v. L. Abu Kavur Bai*[24], the same extended meaning of distribution of material resources in Article 39(b) was given by another constitution Bench to uphold Tamil Nadu State Carriages and Contract Carriages (Acquisition) Act. Similar view was reiterated by a three Judge Bench in *Madhusudan Singh v. Union of India*[25].

Social Justice directive also flows from fundamental rights, as aptly opined by the Supreme Court that it would be incorrect to assume that social content exist only in directive principles and not in the fundamental rights. As held in *M.*

[24] (1984) 1 SCR 725.

[25] (1984) 2 SCC 381.

Nagaraj's[26] case that egalitarian equality exist in Article 14 read with Articles 16(4), (4-A), (4-B). Article 15 and 16 are facets of Article 14. Therefore it would be wrong to suggest that equity and justice find place in the directive principles. Article 16(1) concerns formal equality which is the basic of the rule of law. At the same time, Article 16(4) refers to egalitarian equality. Similarly the general right to equality under Article 14 has to be balanced with Article 15 (4) when excessiveness is detected in grant of protective discrimination. Article 15(1) limits the right of the State by providing that there shall be no discrimination on the ground only of religion, race, caste, sex, etc. and yet it permits classification for certain classes, hence social content exects in fundamental rights as well.

The inalienability and importance of fundamental rights received unprecedented support from the Apex Court of India.[27]

Granville Austin[28] has been extensively quoted and relied on in *Miverva Mills*[29]. Chandrachud, C.J. observed that to destroy the guarantees given by Part III in order to purportedly achieve the goals of Part IV is plainly to subvert the Constitution by destroying the basic structure. Fundamental right enjoys a unique place in the lives of civilized societies and have been described in judgments as "transcendental", "inalienable", and "primordial". They constitute the arc of the Constitution. The Learned Chief Justice held that Part III and Part IV together constitute the core of commitment to social revolution and they together are the conscience of the Constitution. It is to be traced for a deep understanding of the scheme of the Indian Constitution. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Part III and Part IV together constitute the core of our Constitution and combine to form its conscience. "Anything that destroys the balance between the two parts will ipso facto will destroy an essential element of the basic structure of our Constitution.

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[26] *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

[27] '*Annual Survey of Indian Law'*, 2007, The Indian Law Institute, New Delhi, Vol. XLIII.

[28] "*The Indian Constitution, Cornerstone of a Nation*", Granville Austin.

[29] *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law. The principal of constitutionalism is now a legal principle which requires control over the exercise of governmental powers to ensure that it does not destroy the democratic principle upon which it is based. These democratic principles includes the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The principle of constitutionalism underpins the principle of legality which requires the courts to interpret legislations on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for laws protecting fundament rights to be impliedly repealed by future statutes. The protection of fundamental constitutional rights through the common law is the main feature of common law constitutionalism. Under the controlled Constitution, the principle of checks and balances have a important role to play.[30]

In *M. Nagraj v. Union of India*[31], the Supreme Court explained the concept of social justice as flowing out of the Fundamental Rights in the following words: "Social justice is one of the sub-divisions of the concept of justice. It is concerned with the distribution of benefits and burdens throughout a society as it results from social institutions - property systems, public organisations etc. The problem is - what should be the basis of distribution? Writers like Raphael, Mill and Hume define 'social justice' in terms of rights. Other writers like Hayek and Spencer define 'social justice' in terms of deserts. Socialist writers define 'social justice' in terms of need. Therefore, there are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality - "formal equality" and "proportional equality". "Formal equality"

[30] *I.R.Coelho v. State of T.N.*, (2007) 2 SCC 1.

[31] (2006) 8 SCC 212.

means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of "proportional equality" expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy. Under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and no person suffers because of drawbacks which is not his but social. Therefore, axioms like secularism, democracy, reasonableness, social justice etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21."

Thus, the Fundamental Rights, through Articles 14, 15, 16 and 17 reflect the right to equality in its various aspects and aim to foster social equality by empowering the citizens to be free from any form of coercion or restriction by the state or private people. The Directive Principles aim at creating an egalitarian society whose citizens are free from the abject physical conditions that had hitherto prevented them from fulfilling their best selves. They are the creative part of the Constitution, and fundamental to the governance of the country. It is interesting to note that at the time of drafting of the Constitution, some of the Directive Principles were part of the declaration of fundamental rights adopted by the Congress party at Karachi.[32]

Mr. Munshi had even included in his draft list of rights, the "rights of workers" and "social rights", which included provisions protecting women and children and guaranteeing the right to work, a decent wage, and a decent standard of living. The primordial importance of Part IV can be understood by the following words of Dr. Ambedkar, when he insisted on the use of the word "strive" in Article 38: "We have used it because it is our intention that even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these directive principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfillment of these directives.

[32] supra.

Otherwise it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go." Thus, the enforceability of measures relating to social equality was never envisaged as being dependent only on the availability of state resources. Going further, though the Fundamental Rights and Directive Principles may resemble Western constitutional provisions, they can be distinguished in their innate desire to end the inequities of traditional social relations and enhance the social welfare of the population. [33]

Other provisions furthering social equality include Article 334, and those relating to the upliftment of Anglo Indians. Again, Article 23 prohibits the trafficking of human beings and other forms of forced labour and Article 24 protects children under the age of fourteen from enduring the hazards of employment in difficult conditions. Freedom of Religion, freedom of conscience and free profession, practice and propagation of religion; freedom to manage one's religious affairs; and freedom to attend religious instruction or religious worship in certain educational institutions has been 15ensured through Articles 25, 26, 27 and 28 of the Constitution. Articles 29 and 30 deal exclusively with the Cultural and Educational Rights of Minorities while ensuring equal opportunity for all citizens to take admission in any educational institution. The Courts have taken recourse to these provisions often, in their crusade to bring justice to the poor. Through innovative and creative strategies, they have expanded the scope of the Fundamental Rights, in order to render justice to women, children, bonded laborers and other oppressed sections of society. The Courts have also played a significant role in bridging the divide between the colonial legal system and the value based jurisprudence of our Constitution. Notably, over the decades, the Supreme Court has affirmed that both the fundamental rights and Directive Principles must be interpreted harmoniously.

In *Madhu Kishwar v. State of Bihar*[34], it was laid down that law is the manifestation of principles of justice. Rule of law should establish a uniform

[33] ibid.

[34] (1996) 5 SCC 125.

pattern for harmonious existence in a society where every individual should exercise his rights to his best advantage to achieve excellence, subject to the protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps into iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are Trinity for social and economic equality. Therefore, law is the foundation on which the potential of the society stands. If the law is to adapt itself to the needs of the changing society, it must be flexible and adaptable. The constitutional objective of socioeconomic democracy cannot be realised unless all sections of the society participate in the State power equally irrespective of, their cast, community, race, religion and sex.

By 42nd Constitution (Amendment) Act, secularism and socialism were brought in the Preamble of the Constitution to realise that in a democracy unless all sections of the society are provided facilities and opportunities to participate in political democracy irrespective of caste, religion. and sex, political democracy would not last long. Dr. Ambedkar in his closing speech on the draft Constitution stated on November 25, 1949 that "what we must do is not to be attained with mere political democracy; we must make, our political democracy a social democracy as well, Political democracy cannot last unless there lies on the base of it a social democracy". Social democracy means "a way of life which recognizes liberty, equality and fraternity as principles of life". They are not separate items in a trinity but they form union of trinity. To diversify one from the other is to defeat the very purpose of democracy. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things.[35]

The Constitution seeks to establish secular socialist democratic republic in which every citizen has equality of status and of opportunity, to promote among the people dignity of the individual, unity and integrity of the nation transcending

[35] *Indra Sawhney v. Union of India,* (1992) Supp. 3 SCC 217.

them from caste, sectional, religious barriers fostering fraternity among them in an integrated Bharat. The emphasis, therefore, is on a citizen to improve excellence and equal status and dignity of person. With the advancement of human rights and constitutional philosophy of social and economic democracy in a democratic polity to all the citizens on equal footing, secularism has been held to be one of the basic features of the Constitution and egalitarian social order is its foundation.[36]

Security to citizens by the State is also a very sensitive issue. The State has to draw a careful balance between providing security, without violating fundamental human dignity. "The primary task of the State is to provide security to all citizens without violating human dignity. Powers conferred upon the statutory authorities have to be, perforce, admitted. Nonetheless, the very essence of constitutionalism is also that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution."[37]

In *Bhim Singh v. Union of India*[38], while referring to the obligations of the State and its functions, the Court held: "It is also settled by this Court that in interpreting the Constitution, due regard has to be given to the Directive Principles which has been recorded as the soul of the Constitution in the context of India being the welfare State. It is the function of the State to secure to its citizens social, economic and political justice, to preserve liberty of thought, expression, belief, faith and worship" and to ensure equality of status and of opportunity and the dignity of the individuals and the unity of the nation. This is what the Preamble of our Constitution says and that is what which is elaborated in the two vital chapters of the Constitution on Fundamental Rights and Directive Principles of the State Policy."

To fashion a fair and firm State, a State and society in which the individual is all, an individual with an inviolate sphere of autonomy that neither the State nor anyone acting in the name of religion nor any other collectivity can breach, a State

[36] *S.R. Bommai v. Union of India,* (1994) 3 SCC 1.

[37] Re: *Ramlila Maidan Incident,* (2012) 5 SCC 1,

[38] (2010) 5 SCC 538.

and society in which we learn to look upon one another as human beings, in which the habit of partitioning our fellow-men between `them' and `us' is gone; a State and society in which a man of God is known not by the externals - by his appearance, by the rituals he observes, by the religious office he holds, - but by the service he renders to his fellow-men, a State and society in which each of us recognises all our traditions as the common heritage of us all, a State and society in which we shed the dross in religion and perceive the unity and truth to which the mystics of all traditions have born testimony, a state and society in which we learn, in which we examine, in which we begin to think for ourselves - fashioning such a State and society is a programme worthy of those who aspire to humanism and secularism.[39]

Pluralism is the keynote of Indian culture and religious tolerance is the bedrock of Indian secularism. It is based on the belief that all religions are equally good and efficacious the pathways to perfection or God-realisation. It stands for a complex interpretive process in which there is a transcendence of religion and yet there is a unification of multiple religions. It is a bridge between religions in a multi-religious society to cross over the barriers of their diversity. Secularism is the basic feature of the Constitution as a guiding principle of State policy and action. Secularism in the positive sense is the cornerstone of an egalitarian and forward - looking society which our Constitution endeavours to establish. It is the only possible basis of a uniform and durable national identity in a multi - religious and socially disintegrated society. It is a fruitful means for conflict-resolution and harmonious and peaceful living. It provides a sense of security to the followers of all religions and ensures full civil liberties, constitutional rights and equal opportunities.[40]

Table showing number of statues corresponding to particular economic, social and cultural rights in provisions in the Indian Constitution:

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[39] Arun Shourie *"Religion in Politics"*, 1986 at pages 332-33.

[40] *Valsamma Paul v. Cochin University,* (1996) 3 SCC 545.

Provision of the Indian Constitution	Corresponding Law Enacted by the Indian Parliament
Article 14 – Equality before the law and equal protection of laws Article 39(d) – Equal pay for equal work	Equal Remuneration Act, 1976
Article 15(3) – Affirmative action Article 39(f) – Right of Children against exploitation	Protection of Women in Domestic Violence Act, 2005 Juvenile Justice (Care and Protection of Children) Act, 2000 The Child Labour (Prohibition Regulation) Act, 1986
Article 17 – Prohibition of untouchability	Protection of Civil Rights Act, 1955, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1986, The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993
Article 23 – Prohibition of traffic in human being and forced labour	The Immoral Traffic (Prevention) Act,1956 The Bonded Labour System (Abolition) Act, 1976 The Contract Labour (Regulation and Abolition) Act, 1970
Article 24 – Prohibition of employment of children below 14 years in hazardous occupation	Factories Act, 1948 The Child Labour (Prohibition and Regulation) Act, 1986
Article 39 A – Equal justice and free legal aid	The Legal Services Authorities Act, 1987
Article 41 – Right to work	The National Rural Employment Guarantee Act, 2005.
Article 42 – Just and humane conditions of Work	Minimum Wages Act, 1948

Article 43 – Living wage for workers	Payment of Wages Act, 1936, The Employees State Insurance Act, 1948, Maternity Benefit Act, 1961, The Beedi and Cigar Workers (Conditions of Employment) Act, 1966
Article 46 – Promotion of interest of SCs Scheduled Tribes STs and weaker sections	Scheduled Cases and (prevention of Atrocities) Act, 1988
Article 47 – Right to minimum standard of living and public health	Mental Heath Act, 1987
Article 51(c) – Respect of international law and treaty obligations	The Protection of Human Rights Act, 1993 The Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995,

6.2. CONSTITUTIONALISM, CHECK AND BALANCE.

'Constitutionalism' means limited government or limitation on government. It is antithesis of arbitrary powers.

Constitutionalism recognizes the need for government with powers but at the same time insists that limitation be placed on those powers. The antithesis of constitutionalism is despotism. It envisages checks and balances by restraining the powers of governmental organs by not making them uncontrolled and arbitrary.

Social objective is achieved by the limits prescribed on the government, implies the principle of constitutionalism meaning limited government. A written Constitution, independent judiciary with powers of judicial review, the doctrine of rule of law, free elections to legislature, accountable and transparent democratic government, Fundamental Rights of the people, federalism, de-centralization of powers are some of the principles and norms which promote Constitutionalism in a

country. Preamble to the Indian Constitution lays down principles for the promotion of constitutionalism. Constitutionalism recognizes the need government but insists upon limitation being placed upon governmental powers. Limited govt. is the central point of constitutionalism. It is the anti-thesis of arbitrary powers. The underlying difference between the 'Constitutionalism' and 'Constitution' is that a Constitution ought not merely to confer powers on the various organs of the Government but also seek to restrain those powers.[41]

Constitutionalism comes from political philosophy and takes the position that a government, in order to be legitimate must have legal limits on its powers. Thus, the government's authority ends up depending upon actually staying within those limits. A government which goes beyond its limits loses its authority and legitimacy.

If the constitution confers unrestrained power on either the legislature or the executive, it might lead to an authoritarian, oppressive government. Therefore, to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with 'Constitutionalism'; it should have some inbuilt restrictions on the powers conferred by it on governmental organs.

There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates, or, if the power of judging be not separated from the legislative and executive powers. Jefferson said : All powers of government - legislative, executive and judicial result in the legislative body. The concentration of these powers in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not by a single person. One hundred and seventy-three despots would surely be as oppressive as one. And, Montesquieu's own words would show that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the

[41] Giovanni Sartori, "*Constitutionalism: A Preliminary Discussion*", (1962) 56 Am. Pol. SC Rev. 853.

fundamental principles of a free Constitution are subverted. In Federalist No. 47, James Madison suggests that Montesquieu's doctrine did not mean that separate departments might have "not partial agency in or no control over the acts of each other." His meaning was, according to Madison, no more than that one department should not possess the whole power of another. The Judiciary, said the Federalist, is beyond comparison the weakest of the three departments of power. It has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. Of the three powers Montesque said, the Judiciary is in some measure next to nothing. If he realised the relative weakness of the Judiciary at the time he wrote, it is evidence of his vision that he appreciated the supreme importance of its independence. There is no liberty, he said, if the judicial power to be separated from the legislative and executive[42].

While introducing the Draft Constitution in the Constituent Assembly, Dr. Ambedkar who was one of the chief architects of the Constitution said that our Constitution avoided the tight mould of federalism in which American Constitution was caught and could be "both unitary as well as federal according to the requirements of time and circumstances". We have what may perhaps be described by the phrase, 'cooperative federalism' a concept different from the one in vogue when the federations of United States or of Australia were set up. The American Constitution provides for a rigid separation of governmental powers into three basic divisions, the executive, legislative and judicial. It is an essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. The Australian constitution follows the same pattern of distribution of powers. Unlike these Constitution, the Indian Constitution does not expressly vest the three kinds of power in three different organs of the State. But the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions. The principle of separation of powers "is not a doctrinaire concept to be made use of with pedantic rigour. There must be sensible approximation, there must be elasticity of

[42] *Indira Nehru Gandhi v. Raj Narain*, 1975 Suppl. SCC 1.

adjustment in response to the practical necessities of Government which cannot foresee today. The truth of the matter is that the existence, and the limitations on the powers of the three departments of government are due to the normal process of specialisation in governmental business which becomes more and more complex as civilization advances. The Legislature must make laws, the Executive enforce them and the Judiciary interpret them because they have in their respective fields acquired an expertise which makes them competent to discharge their duly appointed functions. [43]

The Moghal Emperor, Jehangir, was applauded as a reformist because soon after his accession to the throne in 1605, he got a golden chain with sixty bells hung in his palace so that the common man could pull it and draw the attention of the ruler to his grievances and sufferings. The most despotic monarch in the modern world prefers to be armed, even if formally, with the opinion of his judges on the grievances of his subjects. The political usefulness of the doctrine of separation of powers is now widely recognised though a satisfactory definition of the three functions is difficult to evolve. But the function of the Parliament is to make laws, not to decide cases. The British Parliament in its unquestioned supremacy could enact a legislation for the settlement of a dispute or it could, with impunity, legislate for the boiling of the Bishop of Rochester's cook. The Indian Parliament will not direct that an accused in a pending case shall stand acquitted or that a suit shall stand decreed. Princely India, in some parts, often did it. The reason of this restraint is not that the Indian Constitution recognizes any rigid separation of powers. Plainly, it does not. The reason is that the concentration of powers in any one organ may, by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged. Neither in Montesquieu's analysis nor in Locke's are the governmental powers conceived as the familiar trinity of legislative, executive and judicial powers. Montesquieu's "separation" took the form not of impassable barriers and unalterable frontiers, but of mutual restraints, or of what afterwards came to be known as "checks and balances". The three organs must act in concert, not that their respective functions should not ever touch one another. If this limitation is

[43] ibid.

respected and preserved," it is impossible for that situation to arise which Locke and Montesque regarded as the eclips. No Constitution can survive without a conscious adherence to its fine checks and balances. Just as Courts ought not to enter into problems entwined in the "political thicket", Parliament must also respect the preserve of the courts. The principle of separation of powers is a principle of restraint which "has in it the precept, inmate in the prudence of self-preservation (even if history has not repeatedly brought it home), that discretion is the better part of valour". Courts have, by and large, come to check their valorous propensities. In the name of the Constitution, the Parliament may not also turn its attention from the important task of legislation to deciding court cases for which it lacks the expertise and the apparatus. If it gathers facts, it gathers facts of policy. If it records findings, it does so without a pleading and without framing any issues. And worst of all, if it decide.[44]

If we notice the evolution of Separation of Power doctrine, traditionally the checks and balances dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable Social and Economic entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of checks and balances to include governmental inaction. Otherwise we envisage the country getting transformed into a state of repose. Social engineering as well as Institutional engineering therefore forms part of this obligation. Separation of power in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose, to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand Separation of Power as operating in vacuum. Separation of power doctrine has been reinvented in modern times.[45]

[44] ibid.

[45] *State of U.P. v. Jeet S. Bisht*, (2007) 6 SCC 586.

There is broad separation of powers under the Constitution, and the judiciary should not ordinarily encroach into the executive or legislative domain. The theory of separation of powers, first propounded by the French philosopher Montesquieu in his book `*The Spirit of Laws*' still broadly holds the field in India today. Thus, in *Asif Hameed v. State of Jammu and Kashmir*[46], a three Judge bench of this Court observed. "Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self imposed discipline of judicial restraint".

The rationale of the doctrine of Separation of Powers, to my mind, is to uphold individual liberty and rule of law. Vesting of all power in one authority obviously promotes tyranny. Therefore, the principle of Separation of Powers has to be viewed through the prism of constitutionalism and for upholding the goals of

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[46] AIR 1989 SC 1899

justice in its full magnitude. The doctrine is normally associated with the French Philosopher Montesquieu, but the origin of this principle can be traced back to Aristotle who opined that government should be composed of three organs, namely, the deliberative (i.e legislative), the magisterial (i.e., executive) and the judicial. However the scope of this doctrine was not worked out fully until Locke and Montesquieu elaborated this concept in 18th Century. Following the principles of John Locke, James Madison wrote in the Federalist Papers, (esp. No.47) that:- The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

The value of this doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of persons. This concept of separation of power or of divided authority is clearly woven in the fabric of American Constitutional Law.[47]

In our Constitution there is no such defined and express incorporation of the doctrine of Separation of Power, save and except that the Executive power of the Union is vested in the President under Article 53(1) and similarly the Executive power of the State is vested on the Governor under Article 154(1). But so far as legislative and judicial powers are concerned they are not vested on any authority. Under Article 50, one of the directive principles of State policy, State is to take steps to separate the judiciary from the executive in the public services of the State. But this has nothing to do with the vesting of power. Under our Constitution the executive is endowed with certain legislative powers, for instance the Ordinance making powers under Article 123 and Article 213. It also has certain judicial powers under Article 103 and Article 192. The legislature is also empowered to exercise certain judicial powers under Article 105 and Article 195. The judiciary also exercises certain legislative and executive powers under Articles 145, 146, 227 and 229.

[47] *University Of Kerala v. Kerala* on 11 November, 2009

In addition, the executive also exercises substantial quasi-judicial powers under several statutory provisions whereby Tribunals have been set up. These Tribunals, with almost the trappings of a Court, decide the lis between the parties. Of course, the same is subject to well known grounds of interference by writ court under judicial review. The Parliament, the highest legislative body in this Country also exercises quasi-judicial power in the case of impeachment of judges vide Article 124(5) and Article 217 and also in respect of contempt of legislatures by resorting to Article 194(3).

It may perhaps be said that the framers of our Constitution never wanted to introduce the doctrine of Separation of Powers rigidly to the extent of dividing the three organs into water-tight compartments. In this context the direction of Justice Bhagwati (as His Lordship then was) in the Constitution Bench decision in *Minerva Mills v. Union of India*[48], is very apt and is quoted:-".Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that "the concentration of powers in any one organ may" to quote the words of Chandrachud, J., (as he then was) in *Indira Gandhi case*[49], "by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged"

The Supreme Court declared Separation of Powers to be a part of the Basic Structure of the Constitution.

The Supreme Court in the case of *Bhim Singh v. Union of India*[50], Indian Constitution does not recognize strict separation of powers. The constitutional principle of separation of powers will only be violated if an essential function of

[48] (1980) 3 SCC 625

[49] *Indira Gandhi v. Raj Narain,* (1975)Supp SCC 1

[50] (2010) 5 SCC 538

one branch is taken over by another branch, leading to a removal of checks and balances.

The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.[51]

Court described Common Law constitutionalism in precise manner which may reveal our vehement exigencies. The protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism.

The constitutionalism or constitutional system of Government abhors absolutism - it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself." Moreover, when our theories have been glorified with such emblazonment why in execution part it is sterile. We are just enriching our theories with intellectual twists which can be exemplified as Constitutionalism is about limits and aspirations. The Constitution embodies aspiration to social justice, brotherhood and human dignity. It is a text which contains fundamental principles. Fidelity to the text qua fundamental principles did not limit judicial decision making. The tradition of the written constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living constitution.[52]

[51] *I.R. Coelho (Dead) by LRs. v. State of Tamil Nadu,* (1999) 7 SCC 580

[52] *Rameshwar Prasad v. Union of India,* (2006) 2 SCC 1.

As observed by Chandrachud, CJ, in *Minerva Mills Ltd.*[53] case "The Constitution is a precious heritage and, therefore, you cannot destroy its identity".

On one hand, our judiciary elicit such intellectual responses that "Faith in the judiciary is of prime importance. Ours is a free nation. Among such people respect for law and belief in its constitutional interpretation by courts require an extraordinary degree of tolerance and cooperation for the value of democracy and survival of constitutionalism" [54]

Separation of powers in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged, nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of powers as operating in vacuum. Separation of powers doctrine has been reinvented in modern times.

If we notice the evolution of separation of powers doctrine, traditionally the checks and balances dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable social and economic entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of checks and balances to include governmental inaction. Otherwise we envisage the country getting transformed into a state of repose. Social engineering as well as institutional engineering therefore forms part of this obligation.[55]

Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These

[53] *Minerva Mills v. Union of India,* (1980) 3 SCC 625.

[54] *Indra Sawhney v.Union of India,* 1992 Supp (3)SCC 212.

[55] *State Of West Bengal v. The Committee For Protection of Democratic Rights,* (2010) 3 SCC 571.

would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary. [56]

It has been held by the Supreme Court in *Bar Council of India v. Union of India on 3 August, 2012* that the Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of the courts). Similarly while constituting Tribunals, the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of the judiciary or the standards of the judiciary, the court may interfere to preserve the independence and standards of the judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive."

In kindred spirit, the Supreme Court in *M. Nagaraj v. Union of India*[57], Justice Kapadia, writing for the Constitutional Bench, observed: "The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adopted to the various crisis of human affairs. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges."

[56] *I.R. Coelho (Dead) by LRs. v. State of Tamil Nadu,* AIR 2007 SC 861.

[57] AIR 2007 SC 71.

Accordingly, in *State of U.P. v. Jeet S. Bisht*[58], even though the matter was referred to another Bench, owing to a split decision Justice S.B. Sinha aptly described the modern understanding of the separation of powers thus: "Separation of power in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. Separation of power doctrine has been reinvented in modern times. The modern view, which is today gathering momentum in Constitutional Courts world over, is not only to demarcate the realm of functioning in a negative sense, but also to define the minimum content of the demarcated realm of functioning."

In *Dayaram v. Sudhir Batham*[59], the Supreme Court doubted the competence of this Court to issue such directions, which were allegedly to be legislative in nature. Therefore, the matter was referred to a larger bench, and such larger bench held, that in exercise of the powers conferred upon it by Article 32 read with Article 142 of the Constitution, the directions issued by this Court were valid and laudable, as the same had been made to fill the vacuum that existed in the absence of any legislation, to ensure that only genuine SC/ST and OBC candidates would be able to secure the benefits of certificates issued, and that bogus candidates would be kept out. Simply filling up an existing vacuum till the legislature chooses to make appropriate laws, does not amount to taking over the functions of the legislature.

It is a fundamental principle of our constitutional scheme, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. Under our Constitution we nave no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for

[58] (2007) 6 SCC 586.

[59] (2012) 1 SCC 333.

this broad separation of powers is that "the concentration of powers in any one organ may" by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which we are pledged.[60]

6.3. BASIC STRUCTURE DOCTRINE.

The Constitution of India lays down the framework on which Indian polity is run. The Constitution declares India to be a sovereign socialist democratic republic, assuring its citizens of justice, equality, and liberty. The Constitution lays down the basic structure of government under which the people chose themselves to be governed. It establishes the main organs of government - the executive, the legislature and the judiciary. The Constitution not only defines the powers of each organ, but also demarcates their responsibilities. It regulates the relationship between the different organs and between the government and the people.[61]

The Constitution is superior to all other laws of the country. Every law enacted by the government has to be in conformity with the Constitution. The Constitution lays down the national goals of India - Democracy, Socialism and National Integration. It also spells out the Fundamental Rights, Directive Principles and Duties of citizens. The Draftsmen of the Indian Constitution took inspiration from Constitutions all over the world and incorporated their attributes into the Indian Constitution. For example Part III on Fundamental Rights is partly derived from the American Constitution and Part 1V on Directive Principles of State Policy from the Irish Constitution.[62]

A Constitution should be a dynamic document. It should be able to adapt itself to the changing needs of the society. Sometimes under the impact of new powerful social and economic forces, the pattern of government will require major changes. Keeping this factor in mind the Draftsmen of the Indian Constitution

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[60] *Minerva Mills Ltd. v. Union of India,* (1980) 3 SCC 625

[61] Basu, D.D., *Commentaries on the Constitution of India*, 2005.

[62] Supra.

incorporated Article 368 in the Constitution which dealt with the procedure of amendment. Due to Article 368 the Indian Constitution can neither be called rigid nor flexible but in fact it is partly rigid and partly flexible. Articles of the Indian Constitution can be amended by a simple majority in the Parliament (Second Schedule, Article 100(3), 105, 11, 124, 135, 81, 137), or by special majority that is majority of the total membership of each house and by majority of not less than two thirds of the members of each house present and voting , or by Ratification by the State Legislatures after special majority (Article 73, 162, Chapter 1V of Part V, Chapter V of Part V1, Seventh Schedule, representation of the State in Parliament and provisions dealing with amendment of the Constitution).[63]

Constituent power is the area in the history of Indian Constitutional Law which has lead to most serious disagreements between Parliament and Judiciary, the conflict involving Parliamentary Supremacy on one hand and on the other Judicial review of the Scope and extent of the power and the manner in which such power is to be exercised. Constituent power is termed as a power which is exercised by a representative body authorized by a Constitution to amend the Constitution. This amending power is one of the most desirable powers in a Constitution, if a Constitution as a fundamental document is to continue. John Burgess is of the opinion that the first and most important part is the organization of the State for the accomplishments of future changes in the Constitution, which is the amendment clause.[64]

Classification of amendment procedures can if classified in two heads as rigid and flexible. Rigid procedures means difficult to amend the constitution like that of U.S., Australia, Canada and Switzerland and flexible procedure means in which procedure to amend is easy, and can be done even by passing a normal legislation like that of United Kingdom. But in Indian constitution though the procedure is classified as Rigid but it has practically proved to a flexible one. In India Article 368 provides the power of amendment. The procedure to be followed in India in not strictly rigid or flexible, and further there is a difference in

[63] ibid.

[64] Seervai, H.M., *Constitutional Law of India*, 2006.

procedure when it affects the federal character of the Union. An amendment can be proposed in either of the Houses. In India all constitutional amendments can be generally effectuated by a Special Majority, i.e., it must be passed by both the houses, with more than 50% of total number of members along with two thirds of members present and voting.[65]

In either of the two procedures after the bill is passed it is reserved for Presidential assent, which in turn is bound to give it. In India the procedure has proved to be far more flexible, till now as much as 96 amendments have been made. Dr. Ambedkar in the Constituent Assembly while defending the procedure contented that the procedure for amendment in the Indian Constitution is a simple procedures, as compared to US, Australia or Canada, and deliberately models of convention and referenda are avoided. He further said that it may be possible that in future this power may be used for partisan motives and hence some rigidity is required in the procedure.[66]

During the 50 years of the Constitution, more than 80 amendments have taken place. The founding fathers of the Indian constitution who granted more rights to the people without balancing them with their duties, perhaps did not foresee the emergence of present political environment, wherein the political players of various segments in the country are more interested in fulfilling their individual aspirations than the aspirations of the people. There is an element of truth in this criticism. The fact is that the ease in the amending process of the Indian Constitution is due to the one party dominance both at the Centre and the State .Yet, on close examination it will be seen that there were compelling circumstances which led to the constitutional amendments. While some amendments were a natural product of the eventual evolution of the new political system established under the Constitution in 1950, there were others necessitated by practical difficulties. The first amendment took place in June, 1950.[67]

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[65] Supra.

[66] ibid.

[67] Seervai, H.M., *Constitutional Law of India*, 2006.

Provisions for amendment of the constitution is made with a view to overcome the difficulties which may encounter in future in the working of the constitution. The time is not static; it goes on changing .The social, economic and political conditions of the people go on changing so the constitutional law of the country must also change in order toward it to the changing needs, changing life of the people. If no provisions were made for amendment of the constitution, the people would have recourse to extra constitutional method like revolution to change the constitution. The framers of the Indian constitution were anxious to have a document which could grow with a growing nation, adapt itself to the changing circumstances of a growing people. The Constitution has to be changed at every interval of time. Nobody can say that this is the finality. A constitution which is static is a constitution which ultimately becomes a big hurdle in the path of the progress of the nation.[68]

Restriction on parliament power of Amending Provisions in the Constitution and Judicial Review: The framers of the Indian constitution were also aware of that fact that if the constitution was so flexible it would be like playing cards of the ruling party so they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesirable changes. India got independence after a long struggle in which numerous patriots sacrificed their life. They knew the real value of the freedom so they framed a constitution in which every person is equal and there is no discrimination on the basis of caste, creed, sex and religion. They wanted to build a welfare nation where the social, economical, political rights of the general person recognize. The one of the wonderful aspect of our constitution is Fundamental rights and for the protection of these rights they provided us an independent judiciary. According to constitution, parliament and state legislature in India have the power to make the laws within their respective jurisdiction. This power is not absolute in nature. The constitution vests in judiciary, the power to adjudicate upon the constitutional validity of all the laws. If a laws made by parliament or state legislature violates any provision of the

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[68] Jain, M.P., *Indian Constitution Law*, 2006.

constitution, the Supreme Court has power to declare such a law invalid or ultra virus. So the process of judicial scrutiny of legislative acts is called Judicial Review. Article 368 of the Constitution gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. With the intention of preserving the original ideals envisioned by the constitution-makers. To Abraham Lincoln, democracy meant a Government of the people, by the people and for the people. So in democratic nation whenever any law passed by parliament violates any provision of constitution or takes away any fundamental rights of the person, the Supreme Court has right and power to strike down that law or act. According to me this jurisdiction of Supreme Court is essential for protection of basic features of the constitution.[69]

In *I.R. Coelho (Dead) By LRs. v. State of Tamil Nadu and Ors*[70] view taken by the Supreme Court - The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law.

The first time the question whether fundamental rights can be amended under Article 368 came for consideration of the Supreme Court in *Shankari Prasad v.Union of India*[71]. In that case the Validity of the First Constitutional Amendment which added Article 31-A and 31-B of the Constitution was challenged. It was contended that though it may be open to Parliament to amend the provisions in respect of the fundamental rights, the amendments, would have to be tested in the light of the provisions contained in Art.13(2) of the Constitution. The Supreme Court, with a bench of five judges, unanimously rejected the contention that in so far as the First Amendment took away or abridged the fundamental rights

[69] ibid.

[70] AIR1999 SC 3197.

[71] AIR 1951 SC 458.

conferred by Part III it should not be upheld in the light of the provisions of article 13(2). Shastri J: delivering the judgment of the court said that although "law" must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in the exercise of legislative power, and constitutional law, which is made in the exercise of constituent power. Dicey defines constitutional law as including "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State." The terms of Article 368 arc perfectly general and empower Parliament to amend the Constitution, without any exception whatever.

Shastri J. was here implementing Dicey's doctrine of parliamentary sovereignty. He recognized that an amendment in terms of Article 368 was the "exercise of sovereign constituent power" and that there was no indication that the constitution-makers intended to make fundamental rights immune from constitutional amendment. Therefore "law" in Article 13 must be taken to mean rules or regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power. Article 13 (2) did not affect amendments made under Article 368.[72]

Notwithstanding the First Amendment, agrarian legislative measures adopted by the States were effectively challenged in the High Courts and two further amendments were passed to save the validity of those measures. The Constitution (Fourth Amendment) Act, 1955, amended Article 31-A, while the Constitution (Seventeenth Amendment) Act, 1964, amended Article 31-A, again and added 44 Acts to the Ninth schedule.

The validity of the Seventeenth Amendment was challenged in the case of *Sajjan Singh v.State of Rajasthan*[73]. The main contention before the five-judge bench of the Supreme Court was that the Seventeenth Amendment limited the jurisdiction of the High Courts and, therefore, required ratification by one-half of the States under the provisions of Article 368. The court unanimously disposed of

[72] supra

[73] (1965) 1 SCR 933.

this contention, but members of the court chose to deal with a second submission, that the decision in the *Shankari Prasad case*[74] should be reconsidered. The Chief Justice (Gajendragadkar C.J.) in delivering the view of the majority (Gajendragadkar C.J., Wanchoo and Raghubar Dayal JJ.) expressed their full concurrence with the decision in the earlier case. The words "amendment of this constitution" in Article 368 plainly and unambiguously meant amendment of all the provisions of the Constitution; it would, therefore, be unreasonable to hold that the word "law" in article 13(2) took in Constitution Amendment Acts passed under Article 368.

They went on to point out that, even if the powers to amend the fundamental rights were not included in Article 368, Parliament could by a suitable amendment assume those powers. The Chief Justice also dealt in his judgment with the wording of article 3lB. That article, he considered, left it open to the Legislatures concerned to repeal or amend Acts that had been included in the Ninth Schedule. But the inevitable consequence would be that an amended provision would not receive the protection of Article 31B and that its validity could be examined on its merits.[75]

Hidayatullah and Mudholkar JJ., in separate judgments, gave notice that they would have difficulty in accepting the reasoning in *Shankari Prasad's*[76] case in regard to the relationship of Articles 13 (2) and 368. Hidayatullah J. said that he would require stronger reasons than those given in that case to make him accept the view that the fundamental rights were not really fundamental, but were intended to be within the power of amendment in common with other parts of the Constitution. The Constitution gives so many assurances in Part III that it would be difficult to think that they were the play things of a special majority." Mudholkar J. took the view that the word "law" in Article 13 (2) included an amendment to the Constitution under Article 368. Article 368 does not say that when Parliament makes an amendment to the Constitution it assumes a different capacity, that of a

[74] supra

[75] supra

[76] Supra.

constituent body. The learned Judge recalled that India had a written constitution, which created various organs at the Union and State levels and recognized certain rights as fundamental.

The judgments in *Sajjan Singh's*[77] case were to provide the outlines of what was to become, and still is, a national debate on the method by which the Indian Constitution can be amended. As an Indian commentator has pointed out the doubts expressed by Hidayatullah and Mudholkar JJ. in *Sajjan Singh's*[78] case about the correctness of the decision in *Shankari Prasad's*[79] case were to be confirmed by the majority in the next case to be considered.

The doubts of the minority judges in *Sajjan Singh's*[80] case as to the correctness of the decision in *Shankari Prasad's* [81]case were raised before a bench of eleven judges of the Supreme Court in *Golakhnath v. State of Punjab*[82] this case, in which the validity of the First and Seventeenth Amendments to the Constitution in so far as they affected fundamental rights was again challenged. The Fourth Amendment was also challenged. This time a majority of six judges to five decided that Parliament had no power to amend any of the provisions of Part III, so as to take away or abridge the fundamental rights enshrined therein. The majority were, however, faced with the problem that, if the First, Fourth and Seventeenth Amendments were at a late stage to be invalidated, the impact on social and economic affairs would be chaotic. On the other hand, the court considered that it had a duty to correct errors in the law. It, therefore, adopted a doctrine of prospective overruling under which the three constitutional amendments concerned would continue to be valid, and the decision to the effect that Parliament had no power to amend the provisions of Part III would operate for the future only.

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[77] Supra.

[78] Supra.

[79]ibid.

[80] ibid.

[81] ibid.

[82] (1967) 2 SCR 762.

Given this "policy and doctrinaire decision to favour Fundamental Rights", the majority judgment of Subha Rao C.J. proceeded to accept the following propositions:

(i) Article 368 with its marginal note "Procedure for amendment of the Constitution" dealt only with the procedure for amendment. Amendment was a legislative process and the power of Parliament to make amendments was contained in article 248 and Entry 97 in List I of the Seventh Schedule (the Union List) which confer residuary legislative powers on the Union Parliament. (ii) An amendment to the Constitution, whether under the procedural requirements of Article 368 or under any other Article, is made as part of the normal legislative process. It is, therefore, a "law" for the purpose of article 13(2).

The judgment of three of the dissentients.(Wanchoo, Bhargava and Mitter JJ.) in the *Golak Nath's*[83] case was delivered by Wanchoo J. The learned observed that Article 368 carried the power to amend all parts of the constitution including the fundamental rights in part III of the constitution. They reaffirmed the correctness of the decisions in cases of *Shankri Prasad*[84] and *Sajjan Singh's*[85] case.

To get over the decision of the Supreme Court in *Golaknath's*[86] case the Constitution 24th Amendment Act was passed in 1971. The Twenty-fourth Amendment made changes to articles 13 and 368: (i) A new clause was added to Article 13: "(4) Nothing in this Article shall apply to any amendment of this Constitution made under Article 368."(ii) Amendments were made to Article 368: a) The article was given a new marginal heading: "Power of Parliament to amend the Constitution and procedure therefore." b) A new clause was added as clause (I): "(I) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article. c)

[83] Supra.

[84] ibid.

[85] ibid.

[86] ibid.

Another clause was added as clause (3): "(3) Nothing in Article 13 shall apply to any amendment under this article."

Another amendment to the old Article 368 (now Article 368(2)) made it obligatory rather than discretionary for the President to give his assent to any Bill duly passed under the article.

The Supreme Court recognized basic structure concept for the first time in the historic *Kesavananda Bharati v. State of Kerala*[87] case in 1973. Ever since the Supreme Court has been the interpreter of the Constitution and the arbiter of all amendments made by parliament. In this case validity of the 25th Amendment act was challenged along with the Twenty-fourth and Twenty-ninth Amendments. The court by majority overruled the *Golak Nath's*[88] case which denied parliament the power to amend fundamental rights of the citizens. The majority held that Article 368 even before the 24th Amendment contained the power as well as the procedure of amendment. The Supreme Court declared that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution and parliament could not use its amending powers under Article368 to 'damage', 'weaken', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the constitution. This decision is not just a landmark in the evolution of constitutional law, but a turning point in constitutional history.

It is a landmark of the Supreme Court of India, and is the basis in Indian law for the exercise by the Indian judiciary of the power to judicially review, and strike down, amendments to the Constitution of India passed by the Indian Parliament which conflict with or seek to alter the Constitution's basic structure. The judgment also defined the extent to which the Indian Parliament could restrict the right to property, in pursuit of land reform and the redistribution of large landholdings to cultivators, overruling previous decisions that suggested that the right to property could not be restricted.[89]

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[87] (1973) 4 SCC 225.

[88] ibid.

[89] supra

To have a clear view of the conception of the basic structure theory it is necessary to have a study of the majority view of the judgment in *Kesavananda Bharati v. State of Kerala*[90].

Sikri C. J. held that the fundamental importance of the freedom of the individual has to be preserved for all times to come and that it could not be amended out of existence. According to the learned Chief Justice, fundamental rights conferred by Part III of the Constitution cannot be abrogated, though a reasonable abridgement of those rights could be effected in public interest. There is a limitation on the power of amendment by necessary implication which was apparent from a reading of the preamble and therefore, according to the learned Chief Justice, the expression "amendment of this Constitution", in Article 368 means any addition or 'change in any of the provisions of the Constitution within the broad contours of the preamble, made in order to carry out the basic objectives of the Constitution. Accordingly, every provision of the Constitution was open to amendment provided the basic foundation or structure of the Constitution was not damaged or destroyed.

Shelat and Grover, JJ. held that the preamble to the Constitution contains the clue to the fundamentals of the Constitution. According to the learned Judges, Parts III and IV of the Constitution which respectively embody the fundamental rights and the directive principles have to be balanced and harmonized. This balance and harmony between two integral parts of the Constitution forms a basic element of the Constitution which cannot be altered. The word 'amendment' occurring in Article 368 must therefore be construed in such a manner as to preserve the power of the Parliament to amend the Constitution, but not so as to result in damaging or destroying the structure and identity of the Constitution. There was thus an implied limitation on the amending power which precluded Parliament from abrogating or changing the identity of the Constitution or any of its basic features.

Hegde and Mukherjea, JJ. held that the Constitution of India which is essentially a social rather than a political document is founded on a social

[90] (1973) 4 SCC 225.

philosophy and as such has two main features basic and circumstantial. The basic constituent remained constant; the circumstantial was subject to change. According to the learned Judges, the broad contours of the basic elements and the fundamental features of the Constitution are delineated in the preamble and the Parliament has no power to abrogate or emasculate those basic elements of fundamental features. The building of a welfare State, the learned Judges said, the ultimate goal of every Government but that does not mean that in order to build a welfare State, human freedoms have to suffer a total destruction. Applying these tests, the learned Judges invalidated Article 31C even in its un-amended form.

Jaganmohan Reddy, J. held that the word 'amendment' was used in the sense of permitting a change, in contradistinction to destruction, which the repeal or abrogation brings about. Therefore, the width of the power of amendment could not be enlarged by amending the amending power itself. The learned Judge held mat the essential elements of the basic structure of the Constitution are reflected in its preamble and that some of the important features of the Constitution are justice, freedom of expression and equality of status and opportunity. The word 'amendment' could not possibly embrace the right to abrogate the pivotal features and the fundamental freedoms and therefore, that part of the basic structure could not be damaged or destroyed. According to the learned Judge, the provisions of Article 31C, as they stood then, conferring power on Parliament and the State Legislatures to enact laws for giving effect to the principles specified in Clauses (b) and (c) of Article 39, altogether abrogated the right given by Article 14 and were for that reason unconstitutional. In conclusion, the learned Judge held that though the power of amendment was wide, it did not comprehend the power to totally abrogate or emasculate or damage any of the fundamental rights or the essential elements of the basic structure of the Constitution or to destroy the identity of the Constitution. Subject to these limitations, Parliament had the right to amend any and every provision of the Constitution.

Khanna, J. broadly agreed with the aforesaid views of the six learned Judges and held that the word 'amendment' postulated that the Constitution must survive without loss of its identity, which meant that the basic structure or framework of the Constitution must survive any amendment of the Constitution.

According to the learned Judge, although it was permissible to the Parliament, in exercise of its amending power, to effect changes so as to meet the requirements of changing conditions, it was not permissible to touch the foundation or to alter the basic institutional pattern. Therefore, the words "amendment of the Constitution" in spite of the width of their sweep and in spite of their amplitude, could not have the effect of empowering the Parliament to destroy or abrogate the basic structure or framework of the Constitution.

The Basic Structure concept was again reaffirmed in the case of *Indira Nehru Gandhi v. Raj Narayan*[91]. The Supreme Court applied the theory of basic structure and struck down Clause (4) of Article 329-A, which was inserted by the 39th Amendment in 1975 on the ground that it was beyond the amending power of the parliament as it destroyed the basic feature of the constitution. The amendment was made to the jurisdiction of all courts including the Supreme Court, over disputes relating to elections involving the Prime Minister of India.

Basic Features of the Constitution according to the *Election case*[92] verdict again, each Judge expressed views about what amounts to the basic structure of the Constitution.

Justice Y.V. Chandrachud listed four basic features which he considered unamendable:

a) Sovereign Democratic Republic status.
b) Equality of Status and Opportunity of an individual.
c) Secularism and freedom of conscience and religion.
d) 'Government of laws and not of men' i.e. the Rule of Law.

After the decision of the Supreme Court in *Kesavananda Bharati*[93] and *Indira Nehru Gandhi*[94] case the Constitution (42nd Amendment) Act, 1976

[91] AIR 1975 SC 2299.

[92] ibid.

[93] ibid.

[94] ibid.

was passed which added two new clauses, namely, clause (4) and (5) to Article 368 of the Constitution. It declared that there shall be no limitation whatever on the constituent power of parliament to amend by way of addition, variation or repeal of the provisions of the Constitution under this Article. This Amendment would put an end to any controversy as to which is supreme, Parliament or the Supreme Court. Clause (4) asserted the supremacy of the Parliament. It was urged that Parliament represents the will of the people and if people desire to amend the Constitution through Parliament there can be no limitation whatever on the exercise of this power. This amendment removed the limitation imposed on the amending power of the Parliament by the ruling of the Supreme Court in *Kesavananda Bharati's*[95] case. It was said that the theory of 'basic structure' as invented by the Supreme Court is vague and will create difficulties. The amendment was intended to rectify this situation.

In the case of *Minerva Mill v. Union of India*[96] the validity of 42nd Amendment Act was challenged on the ground that they are destructive of the 'basic structure' of the Constitution. The Supreme Court by majority by 4 to 1 majority struck down clauses (4) and (5) of the Article 368 inserted by 42nd Amendment, on the ground that these clauses destroyed the essential feature of the basic structure of the constitution. It was ruled by court that a limited amending power itself is a basic feature of the Constitution. The historical Judgement laid down that:

The amendment made to Article 31C by the 42nd Amendment is invalid because it damaged the essential features of the Constitution. Clauses (4) and (5) are invalid on the ground that they violate two basic features of the Constitution viz. limited nature of the power to amend and judicial review. The courts cannot be deprived of their power of judicial review. The procedure prescribed by Clause (2) is mandatory. If the amendment is passed without complying with the procedure it would be invalid. The Judgment of the Supreme Court thus makes it clear that the Constitution is Supreme not the Parliament. Parliament cannot have unlimited

[95] ibid.

[96] (1980) 3 SCC 625.

amending power so as to damage or destroy the Constitution to which it owes its existence and also derives its power.[97]

Article 323-A and 323-B, both dealing with tribunals, were inserted by the 42nd Amendment. Clause 2(d) of Art.323-A and Clause 3(d) of 323-B provided for exclusion of the jurisdiction of the High Court under Art.226 and 227 and the Supreme Court under Art.32.The Supreme Court in *L. Chandra Kumar v. Union of India*[98] held these provisions as unconstitutional because they deny judicial review which is basic feature of the Constitution. It held that the power of judicial review vested in the High court under Article 226 and right to move the Supreme Court under Article 32 is an integral and essential feature of the Constitution.

Kesavananda Bharati[99] case over ruled *Golaknath's*[100] case but did not re-establish Parliamentary Supremacy. It stated that fundamental rights may be amended by the Parliament, but not all of them. Those fundamental rights which constitute the basic structure of the Constitution cannot be abridged. *Golaknath's*[101] case gave primacy to fundamental rights. *Kesavananda Bharati*[102] case recognizes that some other provisions in the Constitution may be equally important. If they form the basic structure they are unamendable. Under Article 368 the Parliament cannot rewrite the entire Constitution and bring in a new one.

By invalidating part of Article 31-C *Kesavananda Bharati*[103] case prevented the State Legislature from exercising power to virtually amend the Constitution. Article 31-C lays down that if a State Legislature makes a law which contains a declaration that it is to giving effect to the policy contained in Article 39 (b) and (c) then no court may scrutinize it. Thus a state legislature could make

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[97] supra

[98] (1997) 3 SCC 261.

[99] ibid.

[100] ibid.

[101] ibid.

[102] ibid.

[103] ibid.

review proof law. *Kesavananda Bharati*[104] case denied them such power. Power of judicial review shall remain with the court, legislative declaration cannot destroy it.

Kesavananda Bharati[105] *case* is an example of judicial creativity of the first order. It protected the nation from the attacks on the Constitution by a passing 2/3 majority which may be motivated by narrow party or personal interests. The basic feature cannot be mauled.

Summary of the effect of the various judgments of the Supreme Court:

Parliament has limited powers to amend the constitution. Parliament cannot damage or destroy the basic features of the Constitution. The Procedure prescribed for the amendment is mandatory. Non compliance with it will result in invalidity of the amendment. Clauses (4) and (5) inserted in Article 368 by the 42nd Amendment Act are invalid because they take away the right of judicial review. Parliament cannot increase its amending power by amending Article 368.

Golaknath's[106] *case* and later *Kesavananda Bharati's*[107] case were subjected to a lot of criticism. It was said that there are no express limitations to the amending power. The courts are enlarging their powers by inventing implied limitations. It was contended that the doctrine of basic features leads to uncertainty. Nobody can foretell with certainty what the basic features are. The Parliament does not know where it stands—what power it possesses. Without uncontrolled power the Parliament cannot bring about socio-economic reforms.

The answer to the comments is that the Supreme Court has adopted a purposive approach. Most of the amendments that were invalidated were no part of any socio-economic reforms. Some of them had nothing to do with public welfare. Some provisions of the 39th and 42nd Amendments were made to ensure power to one individual and one party. The standard of political morality is low. Within

[104] ibid.

[105] ibid.

[106] ibid.

[107] ibid.

political parties democracy hardly breathes and power is concentrated in the hands of a single individual or a coterie. Majority of the people are apathetic and easily led by attractive slogans. All these situations compelled the Supreme Court to rule in favour of limited powers and protect the freedom of the people. Uncertainty is part of life. Most of the legal concepts e.g. negligence, reasonableness, public interest and natural justice are not susceptible to exact definitions. The 39th and 42nd Amendments have clearly shown that unlimited amending power can be and effective instrument to usher dictatorship. The doctrine of implied powers is a safety device to prevent such occurrence.[108]

The Supreme Court in *S.P. Sampath Kumar v. Union of India*[109], decided on 9th December, 1986 that judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution, but Parliament can certainly without in any way violating the basic structure doctrine amend the Constitution so as to set up an effective alternative institutional mechanism or arrangement for judicial review.

A five Judges Bench in *Ashok Kumar Thakur v. Union of India*[110] wherein Constitution (93rd Amendment) Act, 2005 and the enactment of the Central Educational Institutions (Reservation in Admission) Act, 2006 were impugned. Referring Article 19(1)(g) Court held that if any constitutional amendment is made which moderately abridges the principle under Article 19(1)(g), it cannot be held that it violates the basic structure of the Constitution. For determining whether a particular feature of the Constitution is part of basic structure, it has to be examined in each individual case, keeping in mind, the scheme of the Constitution, its object and purpose, and the integrity of the Constitution as a fundamental instrument for the complete governance. Further it was pointed out that the principle of equality is a delicate, vulnerable and supremely precious concept for our society and has embraced a critical and essential component of constitutional identity. Principles of equality of course cannot be completely taken away so as to leave citizens in a state of lawlessness, but it was pointed out that the facets of the

[108] http://www.legalserviceindia.com/article/html accessed on 12.02.2011.

[109] (1987) 1 SCC 124.

[110] (2008) 6 SCC 1.

principle of equality can always be altered, especially to carry out the directive principles of State policy.

Similar view has been taken in *State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal*[111], where the Court was examining the powers of the High Court under Article 226 of the Constitution to order investigation by the Central Bureau of Investigation in respect of a cognizable offence. In conclusion the Bench held as follows: The fundamental rights, enshrined in Part III of the Constitution are inherent and cannot be extinguished by any constitutional or statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure.

Fundamental rights enshrined in Part III can be extinguished by Constitutional amendments and if it abrogates or abridges such rights, would not as such, abrogate or abridge the basic structure. The test is whether it has the effect of nullifying the over arching principles of equality, secularism, liberty and so on. Some doctrines die hard. That certainly is true of the doctrine of basic structure of the Constitution.[112]

If one finds that the constitutional amendment seeks to abrogate core values/ over-arching principles like secularism, egalitarian equality, etc. and which would warrant re-writing of the Constitution then such constitutional law would certainly violate the basic structure. In other words, such over-arching principles would fall outside the amendatory power under Article 368 in the sense that the said power cannot be exercised even by the Parliament to abrogate such over-arching principles.[113]

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[111] 2010 (3) SCC 571

[112] *Glanrock Estate (P) Ltd. v The State of Tamil Nadu*, (2010) 10 SCC 96

[113] supra

The decision in *I.R. Coelho v. State Tamil Nadu*[114] had clarified that the constitutional amendments which have been placed in the Ninth Schedule after the *Keshavananda Bharati*[115] decision are not immune from judicial review. Even though there is some uncertainty as to whether constitutional amendments can be scrutinized with respect to the fundamental rights enumerated in Part III, there is no obstruction to their scrutiny on the basis of principles such as equality, democracy and fraternity, since all of them find a place in the Preamble to our Constitution.

The Supreme Court in *K. Krishna Murthy v. Union of India*[116] were are required to examine the constitutional validity of some aspects of the reservation policy prescribed for the composition of elected local self-government institutions were challenged as being violative of principles such as equality and democracy, which are considered to be part of the `basic structure' doctrine. It held the policy constitutionally valid since they are in the nature of provisions which merely enable State Legislatures to reserve seats and chairperson posts in favour of backward classes. It further opined that concerns about disproportionate reservations should be raised by way of specific challenges against the State Legislations.

But we must have a clear perception that the Basic Structure concept with regard to our Constitution is exhaustive. It is hazardous to define what is the Basic Structure of the Constitution as what is basic does not remain static for all time to come. However, the basic features have been culled out from various pronouncements of this Court.[117]

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[114] (2007) 2 SCC 1.

[115] (1973) 4 SCC 425.

[116] (2010) 7 SCC 202.

[117] *J&K, National Panthers Party v. The Union of India,* (2011) 1 SCC 228.

D.D. Basu in his most famous book[118] have enumerated the list which have been declared as basic structure. In the book these features have been noted as basic structure of the Constitution

(a) Supremacy of the Constitution.

(b) Rule of law.

(c) The principle of Separation of Powers.

(d) The principles behind fundamental rights.

(e) The objectives specified in the Preamble to the Constitution.

(f) Judicial review Article32 and Articles 226, 227.

(g) Federalism

(h) Secularism.

(i) The sovereign, democratic, republican structure.

(j) Freedom and dignity of the individual.

(k) Unity and integrity of the Nation.

(l) The principle of equality, not every feature of equality, but the quintessence of equal justice

(m) The rule of equality in public employment.

(n) The `essence' of other Fundamental Rights in Part III.

(o) The concept of social and economic justice-to build a welfare State; Part IV in toto.

(p) The balance between Fundamental Rights and Directive Principles.

(q) The Parliamentary system of government.

(r) The principle of free and fair elections.

(s) Limitations upon the amending power conferred by Art. 368.

(t) Independence of the judiciary; but within the four corners of the Constitution and not beyond that.

(u) Independent and efficient judicial system.

(v) Powers of the Supreme Court under Articles 32, 136, 141, 142.

(w) Effective access to justice.

In a recent Constitution Bench judgment of this Court in *Union of India v. R. Gandhi, President, Madras Bar Association*[119], Justice Raveendran, speaking

[118] D.D. Basu, *Shorter Constitution of India* ,14th Edition, at pages 2236-2238

[119] (2010) 11 SCC 1

for the unanimous Bench held:- The fundamental right to equality before law and equal protection of laws guaranteed by Article 14 of the Constitution, clearly includes a right to have the person's rights, adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognised principles of adjudication. Therefore wherever access to courts to enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum, such legislative Act is open to challenge if it violates the right to adjudication by an independent forum. Therefore, though the challenge by MBA is on the ground of violation of principles forming part of the basic structure, they are relatable to one or more of the express provisions of the Constitution which gave rise to such principles. Though the validity of the provisions of a legislative Act cannot be challenged on the ground it violates the basic structure of the Constitution, it can be challenged as violative of constitutional provisions which enshrine the principles of the rule of law, separation of powers and independence of the judiciary.

In *L. Chandra Kumar v. Union of India*[120], Chief Justice Ahmadi, after an analysis of different decisions of this Court, affirmatively held that judicial review is one of the basic features of our Constitution. Such a finding of this Court, obviously means that there cannot be an administrative review of a decision taken by a judicial or a quasi judicial authority which has the trappings of a court. Since judicial review has been considered an intrinsic part of constitutionalism, any statutory provision which provides for administrative review of a decision taken by a judicial or a quasi judicial body is, therefore, inconsistent with the aforesaid postulate and is unconstitutional.

Under our constitutional scheme, an executive authority cannot entertain an appeal from an order passed by the judicial authority even though such judicial authority is acting in a quasi-judicial capacity.[121]

[120] AIR 1997 SC 1125

[121] *Amrik Singh Lyallpuri v. Union Of India*, (2011) 6 SCC 535

Modern constitutionalism, to which Germany is a major contributor too, especially in terms of the basic structure doctrine, specifies that powers vested in any organ of the State have to be exercised within the four corners of the Constitution, and further that organs created by a constitution cannot change the identity of the constitution itself.[122]

An independent and efficient judicial system is one of the basic structures of our Constitution. If sufficient number of Judges are not appointed, justice would not be available to the people, thereby undermining the basic structure. It is well known that justice delayed is justice denied. Time and again the inadequacy in the number of Judges has adversely been commented upon. Not only have the Law Commission and the Standing Committee of Parliament made observations in this regard, but even the Head of the judiciary, namely, the Chief Justice of India has had more occasion than one to make observations in regard thereto. Under the circumstances, we feel it is our constitutional obligation to ensure that the backlog of the cases is decreased and efforts are made to increase the disposal of cases. Apart from the steps which may be necessary for increasing the efficiency of the judicial officers, we are of the opinion that time has now come for protecting one of the pillars of the Constitution, namely, the judicial system[123]

This Court which stands as a sentinel on the quiver over the rights of people of this country has to interpret the Constitution in its true spirit with insight into social values and suppleness of the adoption to the changing social needs upholding the basic structure of the Constitution for securing social justice, economic justice and political justice as well as equality of status and equality of opportunity. Part-III dealing with 'Fundamental Rights' and Part-IV dealing with 'Directive Principles of State Policy' which represent the core of the Indian Constitutional philosophy envisage the methodology for removal of historic injustice and inequalities -either inherited or artificially created - and social and

[122] *Ram Jethmalani v. Union Of India,* JT 2011 (7) SC 104.

[123] *Brij Mohan Lal v. Union of India*, (2012) 6 SCC 502.

economic disparity and ultimately for achieving an egalitarian society in terms of the basic structure of our Constitution as spelt out by the preamble.[124]

6.4. SOCIAL WELFARE STATE.

State is an important legal institution as it is a source of all the powers and rights. It is a working conception of life as a whole. A state is an association of human beings established for the attainment of certain ends by certain means. The relationship between state and law is inherent. A state maintains peace and administration in a society through law. By the time the role of the state has been changed. Now the state is a social welfare state. A social welfare state means such a social system whereby then state assumes primary responsibility for the welfare of its citizens, as in matters of health care, education, employment, and social security.

Concept of government in which the state plays a key role in protecting and promoting the economic and social well- being of its citizens. It is based on the principles of equality of opportunity, equitable distribution of wealth, and public responsibility for those who lack the minimal provisions for the good life. The term may be applied to a variety of forms of economic and social organization. A basic feature of the welfare state is social insurance, intended to provide benefit during periods of greatest need (e.g. old age, illness, unemployment).

The welfare state also usually includes public provision of education, health services, and housing. A Welfare state is a concept of government where then state plays a key role in the protection and promotion of the economic and social well- being of its citizens. It is based on the principles of quality of opportunity, equitable distribution of wealth, and public responsibility for those unable to avail themselves of the minimal provisions for a good life. Then general term may cover a variety of forms of economic and social organization.[125]

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[124] 1992 Supp (3) SCC 212.

[125] http://www.answers.com/topic/welfare-state accessed on 21.03.2010.

The welfare state refers to the provision of welfare services by the state. It is an ideal model where the state assumes primary responsibility for the welfare of its citizens. This responsibility is comprehensive, because all aspects of welfare are considered; a "safety net" is not enough. It is universal, because it covers every person as a matter of right. A welfare states may be identified with general systems of social welfare. In many "welfare states", welfare is not actually provided by the state, but by a combination of independent, voluntary and government services.

According to studies of philosophical theory, one can ascertain that a welfare state is a system in which ultimate responsibility of government is well-being of all citizens. Similarly if one studies according to economic theory**,** it can be very well ascertained that a welfare state is a social system based on political responsibility for improvement in condition of all citizens.[126]

Before independence, state was a police state who's main function was to collect revenue, maintain peace and to control administration. But, gradually, a drastic change has occurred in the form of state. After independence, Indian state is blossomed as a "social welfare state". Due to which the functions of the state have highly increased. Initially there was a rule of king which was replaced by the government later on. This government have three organs- Legislature, Executive and Judiciary. Being the representative of the state, the government started performing all the functions of all the state. However, the aforesaid three organs are detached from each other. So that anarchy and arbitrariness can not be developed.

At the time of independence, the constitution makers were highly influenced by the feeling of social equality and welfare of the people. They accepted that this sacrosanct work could only be done by state. For the same reason, they incorporated such provisions in the constitution of India which made the role of state important and went towards social welfare and ideal state.

[126] supra

Preamble, in general, is the form of expression and intend that the constitution makers which reflects that idea of a socialist state. The words, "Socialist", "secular", "democratic" and "republic" have been inserted in the preamble. Which reflects it's from as a "social welfare state." The expression "socialist" was intentionally introduced in the Preamble.[127]

The Supreme Court has held that the principal aim of a socialist state is to eliminate inequality in income, status and standards of life. The basic frame work of socialism is to provide a proper standard of life to the people, especially, security from cradle to grave. Amongst there, it envisaged economic equality and equitable distribution of income. This is a blend of Marxism & Gandhism, leaning heavily on Gandhian socialism. From a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society reveals a long march, but, during this journey, every state action, whenever taken, must be so directed and interpreted so as to take the society one step towards the goal.[128]

Earlier in a landmark judgment, the Supreme Court held that the addition of the word 'socialist' might enable the courts to learn more in favour of nationalisation and state ownership of an industry. But, so long as private ownership of industries is recognised which governs an overwhelming large principles of socialism and social justice can not be pushed to such an extent so as to ignore completely, or to a very large extant, the interest of another section of the public, namely the private owners of the undertaking.[129]

Similarly, the word 'secularism' is also adopted by 42nd Constitutional (Amendment) Act, 1976. The multifarious religious groups co-existed in India, but in spite of this, the constitution stands for secular state 'secularism' that there is no official religion but state protects all religions equally. Religion is irrelevant

[127] 42nd Constitutional (Amendment) Act, 1976.

[128] *D. S. Nakara v. Union of India*, (1983) 1 SCC 305.

[129] *Excel Wear v Union of India*, AIR 1979 SC 25.

for the enjoyment of fundamental rights. Over and above, some fundamental rights have guaranteed freedom of worship and religion.

In *S.R. Bommai v. Union of India*[130], the Supreme Court has held that 'secularism' is the basic feature of the Constitution. In *Aruna Roy v. Union of India*[131], the Supreme Court has held that 'secularism' has a positive meaning which is developing, understanding and respect towards different religion.

'Democracy' is a unique feature of the Constitution of India. It signifies the power of the people of India. The electorate choose representatives who run the government. It can be determined as 'of the people for the people and by the people', the government and the elected representative of the government are responsible for the people of India. In a 'republic', the political sovereignty vests in the hands of people and the head of the state are only a person elected by the people for a fixed term.[132]

In addition to these, our preamble has secures social, economical, political justice equality of status and opportunity to all including fraternity to all. There are so many other provisions in the Constitution which enable India as a "Social Welfare State".

Part IV of the Constitution of India is concerned with Directive Principles of the state policy. This part is the foundation of social welfare system. However, these principles are neither enforceable nor binding on the state but are simply guidelines for the state, which the state has to consider at the time of policy making. Part IV is just like alight which shows a path to the state. Earlier, it was believed that the state was mainly concerned with the maintenance of law& order and protection of life, liberty & property of its subjects, such a restrictive role of the state is no longer a valid concept in the modern context. We are living in an era of welfare state which requires it to promote the prosperity & well-being of

[130] (1994) 3 SCC 1.

[131] AIR 2003 SC 3176.

[132] ibid.

the people. The Directive Principles lay down certain economic and social policies to be followed by the various governments in India. They impose certain obligation on the state to take positive action in order to promote welfare of the people and achieve economic democracy.[133]

The Directive Principles is the ideals which the Union and State Government must keep in mind while formulating it's policies. They lay down certain social, economical and political principal suitable in peculiar conditions prevailing in India. The idea of welfare state envisaged by our constitution can only be achieved if the states endeavour to implement them with high sense of moral duty.

The Supreme Court has held some Directive Principles as Fundamental Rights through judicial activism. In *Randhir Singh v. Union of India*[134], the Supreme Court has held that principle of "equal pay for equal work" though not a fundamental right but it is certainly a constitutional goal, so it can be enforced. In *H.M. Hoskot v State of Maharashtra*[135] and *Hussainara Khatoon v. Home Secretary, State of Bihar*,[136] the Supreme Court has declared that "legal aid" & "speedy trial" are fundamental rights under Article 21 which are also provided in Directive Principles under Article 39A. In *Mohini Jain v. Stale of Karnataka*[137] and *Unni Krishnan v. State of A.P.*,[138] the Supreme Court has held that 'right to Education' is a fundamental right under Article 21. This right to education has been recognised as a separate fundamental right by the Parliament under Article 21A which has been inserted in the 86th Constitutional (Amendment) Act, 2002.

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[133] Jain, M.P.: "*Constitutional Law of India"* (Second Edition, 1970); Page 669.

[134] AIR 1982 SC 879.

[135] AIR 1978 SC 1548.

[136] AIR 1979 SC 1332.

[137] (1992) 3 SCC 666.

[138] (1993) 1 SCC 645.

By these cases, it is clear that the Judiciary is playing a pivotal role to promote Indian state as a social welfare state. In addition to these, Public Interest Litigations (PILs) have also played an important role in this field and have maintained social order. All efforts seems to have been made towards a socialist state where the basic needs of the citizen of the state need to be fulfilled.

The classification of enumerated rights can be based on who they are directed against and whether they involve a 'duty of restraint' or a 'duty to facilitate entitlements'. The language of a substantive right usually indicates whether it is directed against state agencies, private actors or both. For instance in the Indian Constitution, civil-political rights such as 'freedom of speech, assembly and association' are directed against the State, since the text expressly refers to the State's power to impose reasonable restrictions on the exercise of the same. This implies that under ordinary conditions the State has an obligation not to infringe on these liberties. This 'duty of restraint' forms the basis of rights with a 'negative' dimension. Hence in the early years of the Indian constitutional experience, civil liberties and the protection against deprivation of life and liberty were understood mainly as imposing duties of restraint on governmental agencies as well as private citizens. However, in contrast to these justiciable 'negative' rights the directive principles of state policy allude to several socio-economic objectives which had a 'positive' dimension. Even though the directive principles are non-justiciable, there language is couched in the terms of positive obligations on governmental agencies to enable their fulfillment.[139]

The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to

[139] See generally: Sandra Fredman, "*Human Rights Transformed – Positive Rights and Positive Duties"* (New Delhi: Oxford University Press, 2008), especially 'Chapter 4: *Justiciability and the role of the courts'* at p. 93-123.

safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.[140]

The Indian Courts have responded to this hierarchy between 'negative' and 'positive' rights by trying to collapse the distinction between the same. While the fundamental rights of citizens enumerated in Part III of the Constitution are justiciable before the higher judiciary, Part IV deals with the 'Directive Principles of State Policy' that largely enumerate objectives pertaining to socio-economic entitlements. The Directive Principles aim at creating an egalitarian society whose citizens are free from the abject physical conditions that had hitherto prevented them from fulfilling their best selves. They are the creative part of the Constitution, and fundamental to the governance of the country. However, the key feature is that the Directive Principles are 'non-justiciable' but are yet supposed to be the basis of executive and legislative actions. It is interesting to note that at the time of drafting of the Constitution, some of the provisions which are presently part of the Directive Principles were part of the declaration of fundamental rights adopted by the Congress party. K.M. Munshi (a noted lawyer and a member of the Constituent assembly) had even included in his draft list of rights, the 'rights of workers' and 'social rights', which included provisions protecting women and children and guaranteeing the right to work, a decent wage, and a decent standard of living. Subsequently, the objective of ensuring these entitlements was included in the Directive Principles.[141]

Today the Government, in a welfare State is the regulator and dispenser of special services and provider of a large number of benefits. The valuables dispensed by Government take many forms, but they all share one characteristic.

[140] *Paschim Banga Khet Mazdoor Samity v. State of W.B.*, (1996) 4 SCC 37.

[141] The framers included 'Directive Principles of State Policy' following the example of the Irish Constitution.

They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds: leases, licences, contracts and so forth. With the inereasing magnitude and range of governmental functions as we move closer to a wefare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, it cannot be said that they do not enjoy any legal protection nor can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure.[142]

The Supreme Court in *Vincent vs. Union of India* [143]opined that, "In a welfare State, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health. In a series of pronouncements during the recent years, this court has culled out from the provisions of Part- IV of the Constitution, the several obligations of the State and called upon it to effectuate them in order that the resultant picture by the constitution fathers may become a reality."

In *Kirloskar Brothers Ltd. v Employees State Insurance Corporation*[144], the Supreme Court opined that "The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations under taken by the Government in the welfare State. The Government discharges this obligation by running hospitals and health centers which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital

[142] *Ramana Dayaram Shetty. v. The International Airport* A*uthority of India,* AIR 1979 SC 1628

[143] AIR (1987) SC 990

[144] 1996 (2) SCC 682

to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21."

A recent judgment in the case of *Lala Ram (D) By L.R. v. Union of India* the Supreme Court vide judgment dated 24.01.2013 tried to elaborate the meaning of a welfare State. It held A welfare state denotes a concept of government, in which the State plays a key role in the protection and promotion of the economic and social well-being of all of its citizens, which may include equitable distribution of wealth and equal opportunities and public responsibilities for all those, who are unable to avail for themselves, minimal provisions for a decent life. It refers to “Greatest good of greatest number and the benefit of all and the happiness of all”. It is important that public weal be the commitment of the State, where the state is a welfare state. A welfare state is under an obligation to prepare plans and devise beneficial schemes for the good of the common people. Thus, the fundamental feature of a Welfare state is social insurance. Anti-poverty programmes and a system of personal taxation are examples of certain aspects of a Welfare state. A Welfare state provides State sponsored aid for individuals from the cradle to the grave. However, a welfare state faces basic problems as regards what should be the desirable level of provision of such welfare services by the state, for the reason that equitable provision of resources to finance services over and above the contributions of direct beneficiaries would cause difficulties. A welfare state is one, which seeks to ensure maximum happiness of maximum number of people living within its territory. A welfare state must attempt to provide all facilities for decent living, particularly to the poor, the weak, the old and the disabled i.e. to all those, who admittedly belong to the weaker sections of society. Articles 38 and 39 of the Constitution of India provide that the State must strive to promote the welfare of the people of the state by protecting all their economic, social and political rights. These rights may cover, means of livelihood, health and the general well-being of all sections of people in society, specially those of the young, the old, the women and the relatively weaker sections of the society. These groups generally require special protection measures in almost every set up. The happiness of the people is the

ultimate aim of a welfare state, and a welfare state would not qualify as one, unless it strives to achieve the same.

With the advance of industrialization the Laissez Faire Theory was gradually replaced by the theory of the Welfare State, and in legal parlance there was a corresponding shift from positivism to sociological jurisprudence. The 19th Century had not yet fully got over laissez faire, and it was only in the 20th Century that the concepts of social justice and social security, as integral parts of the general theory of the Welfare State, were firmly established. In India, Article 38(1) of the Constitution states "the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life". Thus, it is the duty of the State under our Constitution to function as a Welfare State, and look after the welfare of all its citizens.[145]

In *Common Cause, A Registered Society v. Union of India,*[146] the two Judge Bench considered the legality of discretionary powers exercised by the then Minister of State for Petroleum and Natural Gas in the matter of allotment of petrol pumps and gas agencies. While declaring that allotments made by the Minister were wholly arbitrary, nepotistic and motivated by extraneous considerations the Court said: “The Government today in a welfare State provides large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases, contracts, quotas and licences etc. Government distributes largesses in various forms. A Minister who is the executive head of the department concerned distributes these benefits and largesses. He is elected by the people and is elevated to a position where he holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people”.

[145] *Union of India v. Prabhakaran Vijaya Kumar,* (2008) 9 SCC 527.

[146] (1996) 6 SCC 530

The allotment of land by the State or its agencies/instrumentalities to a body/organization/institution which carry the tag of caste, community or religion is not only contrary to the idea of Secular Democratic Republic but is also fraught with grave danger of dividing the society on caste or communal lines. The allotment of land to such bodies/organizations / institutions on political considerations or by way of favoritism or nepotism or with a view to nurture the vote bank for future is constitutionally impermissible. This, however, does not mean that the State can never allot land to the institutions/organisations engaged in educational, cultural, social or philanthropic activities or are rendering service to the Society except by way of auction. Nevertheless, it is necessary to observe that once a piece of land is earmarked or identified for allotment to institutions/organisations engaged in any such activity, the actual exercise of allotment must be done in a manner consistent with the doctrine of equality.[147]

In an appeal before the Supreme Court for compensation due for the land taken by the government authorities, without resorting to any procedure prescribed by law, the Court opined that depriving the appellants of their immovable properties, was a clear violation of Article 21 of the Constitution. In a welfare State, statutory authorities are bound, not only to pay adequate compensation, but there is also a legal obligation upon them to rehabilitate such persons. The non-fulfillment of their obligations would tantamount to forcing the said uprooted persons to become vagabonds or to indulge in anti-national activities as such sentiments would be born in them on account of such ill-treatment. Therefore, it is not permissible for any welfare State to uproot a person and deprive him of his fundamental/constitutional/human rights, under the garb of industrial development.[148]

Asserting the importance of pensionary benefits to all the retired employees the Supreme Court in *D.S. Nakara and Others v. Union of India*[149], has very clearly recorded the following :- " Having set out clearly the society which we

[147] *Akhil Bhartiya Upbhokta Congress v. State of M.P.* (2011) 5 SCC 29.

[148] *Tukaram Kana Joshi v. M.I.D.C.* (2013) 1 SCC 353.

[149] (1983) 1 SCC 305.

propose to set up, the direction in which the State action must move, the welfare State which we propose to build up, the constitutional goal of setting up a socialist State and the assurance in the Directive Principles of State Policy especially o security in old age at least to those who have rendered useful service during their active years, it is indisputable, nor was it questioned, that pension as a retirement benefit is in consonance with and in furtherance of the goals of the Constitution. The goals for which pension is paid themselves give a fillip and push to the policy of setting up a welfare State because by pension the socialist goal of Security of cradle to grave is assured at least when it is mostly needed and least available, namely, in the fall of life."

Addressing to one of the most important issues in recent times the Supreme Court in *Dev Sharan v. State of U.P.*[150] opined that admittedly, the Land Acquisition Act, a pre-Constitutional legislation of colonial vintage is a drastic law, being expropriatory in nature as it confers on the State a power which affects person's property right. Even though right to property is no longer fundamental and was never a natural right, and is acquired on a concession by the State, it has to be accepted that without right to some property, other rights become illusory. This Court is considering these questions, especially, in the context of some recent trends in land acquisition. This Court is of the opinion that the concept of public purpose in land acquisition has to be viewed from an angle which is consistent with the concept of a welfare State. It further expressed its view that the concept of public purpose cannot remain static for all time to come.

In *Bhimandas Ambwani (D) Thr. Lrs. v. Delhi Power Company Ltd.* the Supreme Court vide order dated 12 February, 2013, directed the Land Acquisition Collector to make the award after hearing the parties for the land was taken over about half a century ago and stood completely developed. The Court expressed anguish and opined depriving the appellants of their immovable properties, was a clear violation of Article 21 of the Constitution. In a welfare State, statutory authorities are bound, not only to pay adequate compensation, but there is also a legal obligation upon them to rehabilitate such persons. The non-fulfillment of

[150] (2011) 4 SCC 769

their obligations would tantamount to forcing the said uprooted persons to become vagabonds or to indulge in anti-national activities as such sentiments would be born in them on account of such ill-treatment. Therefore, it is not permissible for any welfare State to uproot a person and deprive him of his fundamental/constitutional/human rights, under the garb of industrial development.

Despite complicated social realities, it is submitted that Rule of Law, independence of the judiciary and access to justice are conceptually interwoven. All the three bring to bear upon the quality of aspirations which are guaranteed under our Constitution. In order to fulfil the aspiration, it is important that the system must be a successful legal and judicial system. This would involve improvement of better techniques to manage courts more efficiently, cutting down costs and duration of proceedings and to ensure that there is no corruption in the judiciary and the establishment of the judiciary and would also require regular judicial training and updating. Merely widening the access to justice is not enough to secure redress to the weaker sections of the community. Post Independence, it was evident that litigation in India was getting costlier and there was agonizing delay in the process. After the adoption of the Constitution and creation of a Welfare State, the urgency of some structural changes in the justice delivery system is obviously a major requirement.[151]

After independence the concept of social justice has become a part of our legal system. This concept gives meaning and significance to the democratic ways of life and of making the life dynamic. The concept of welfare state would remain in oblivion unless social justice is dispensed with. Dispensation of social justice and achieving the goals set forth in the constitution are not possible without the active, concerted and dynamic efforts made by the person concerned with the justice dispensation system. The prevailing ailing socio- economic-political system in the country needs treatment which can immediately be provided by judicial incision. Such a surgery is impossible to be performed unless

[151] *Imtiyaz Ahmad v. State of U.P*, (2012) 2 SCC 688.

the Bench and the Bar make concerted effort. The role of the members of the Bar has thus assumed great importance in the post independent era in the country.[152]

From the analysis of the above, it is clear that the appropriate balance between different activities of the State is the very foundation of the socio-economic security and proper enjoyment of the right to life. It is the function of the State to secure to its citizens social, economic and political justice, to preserve liberty of thought, expression, belief, faith and worship" and to ensure equality of status and of opportunity and the dignity of the individuals and the unity of the nation. This Court has a duty to interpret statutes with social welfare benefits in such a way as to further the statutory goal and not to frustrate it. In doing so this Court should make an effort to protect the rights of weaker sections of the society in view of the clear constitutional mandate. Thus, social justice, the very signature tune of our Constitution and being deeply embedded in our Constitutional ethos in a way is the arch of the Constitution which ensures rights of the common man to be interpreted in a meaningful way so that life can be lived with human dignity.

6.5. GLOBALISATION, LIBERALISATION, PRIVATISATION, AND THE CONCEPT OF WELFARE STATE.

India is considered to be the largest democracy of the world, which is governed by an elaborate and detailed written constitution. The Preamble of the Constitution has used the terms like "Socialist", "Social and Economic Justice", "Equality" etc, these terms indicate that the state would extensively involve in social welfare of people, and would try to establish an egalitarian society.

Moreover a separate chapter of Directive Principles of State Policy has been devoted towards the welfare responsibilities of the government, which lays down the norms of ideal governance for people's welfare. However on proper analysis it can be seen that the current economic policies of the government, which are largely influenced by globalisation and capitalism, are not in

[152] *Ramon Services Pvt. Ltd. v. Subhash Kapoor*, (2001) 1 SCC 118.

conformity with its welfare obligations. On the one hand economy is growly very fast but its benefit is confined to 10-15% population; the rich poor divide is increasing continuously; the agriculture sector is neglected from the focus of economic development; the small scale industries have been devastated by the impact of neo-liberal policies; the regional disparities have been increased substantially. There is an urgent need to change the economic policies with people focussed plan both in terms of expenditure and implementation, with special focus on development of agriculture, elimination of poverty and inequality, enforcement of corporate environmental responsibility, revival of small scale industries, and financial inclusion.[153]

India is considered to be a welfare state and moreover the largest democracy in the world. The people in India have been considered as the supreme authority in our country, as it is declared by the Preamble of Indian Constitution that sovereignty vests not in the Parliament but in the people of Union of India. "Social Welfare" has been (at least theoretically) at the centre of our policy making from the time of independence itself. From the "First Five Year Plan" itself Programmes and schemes have been launched related to social welfare issues as like agriculture and rural development, employment and labour welfare, healthcare, education, etc**.** Indeed in the initial 20-25 years in spite of scarcity of economic means the government was focussed on the welfare policies and inclusive development. In today's time it seems that the concept of social welfare has not been taken by the government as sincerely, as it must have. The attitude of the government is not very friendly and cooperative towards the people, and it is visible from the recent debate on the Lokpal Bill and the controversy relating to the determination of poverty line for poor people.[154]

The government does not seem to be sincere about its responsibility towards serving the people as many scams and irregularities have come up in the

[153] www.vifindia.org accessed on 25.11.2012.

[154] Recently Planning Commission deputy chairman Montek Singh Ahluwalia says the poverty line for poor is Rs. 26/- in rural and Rs. 32/- in urban areas, The Times of India, October 2, 2011.

central and state governments. The skewed policies relating to the expansion of capitalism, the forceful acquisition of lands from poor peasants, and neglect for the development of agriculture and rural development are making the situation worse.[155]

In *Narmada Bachao Andolan v. Union of India*[156], there was a challenge to the validity of the establishment of a large dam. It was held by the majority at page 762 as follows :-

"It is now well settled that the Courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the Courts are ill-equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution."

It is evident from the above that it is neither within the domain of the Courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our Courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical.

Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial

[155] ibid.

[156] (2000) 10 SSC 664.

and error" as long as both trial and error are bona fide and within limits of authority.[157]

Rawls in his "*Theory of Justice*"[158] stated that: "From the beginning I have stressed that justice as fairness applies to the basic structure of society. It is a conception for ranking social forms viewed as closed systems. Some decision concerning these background arrangements is fundamental and cannot be avoided. In fact, the cumulative effect of social and economic legislation is to specify the basic structure. Moreover, the social system shapes the wants and aspirations that its citizens come to have. It determines in part the sort of persons they want to be as well as the sort of persons they arc. Thus an economic system is not only an institutional device for satisfying existing wants mid needs but a way of creating and fashioning wants in the future. How men work together now to satisfy their present desires affects the desires they will have later on, the kind of persons they will be. These matters arc, of course, perfectly obvious and have always been recognised. They were stressed by economists as different as Marshall and Marx. Since economic arrangements have these effects, and indeed must do so, the choice of these institutions involves some view of human good and of the design of institution to realize it. This choice must, therefore, be made on moral and political as well as on economic grounds."

Justice K.K. Mathew, a former Judge of the Supreme Court, in his book[159] has stated that that "Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind. The institution performs many different functions. One of these functions is to draw a circle around the activities of each private individual or Organisation. Within that circle, the owner has a greater degree of freedom than without." The learned Judge stated that "In a society with a mixed economy, who can be sure that freedom in relation to property might not be regarded as an aspect of individual freedom? People without property have a tendency to become slaves. They

[157] supra

[158] Rawls in his "*Theory of Justice"* at p.259

[159] Justice K.K. Mathew, *'Democracy, Equality and Freedom'* at p.37

become the property of others as they have no property themselves. They will come to say: "make us slaves, but feed us". Liberty, independence, selfrespect, have their roots in property. To denigrate the institution of property is to shut one's eyes to the stark reality evidenced by the innate instinct and the steady object of pursuit of the vast majority of people. Protection of property interest may quite fairly be deemed in appropriate circumstances an aspect of freedom." At page 39[160], he further stated that "There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely. This is why the Constitution-makers wanted that the ownership of the material resources of the community should be so distributed as to subserve the common good. People become a society based upon relationship and status." He further stated that "the economic rights provide man with freedom from fear and freedom from want, and that they are as important if not more, in the scale of values,"

The Supreme Court *Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde*[161] quoted the speech of Dr. B.R. Ambedkar, while winding up the debates on the Draft Constitution, on the floor of the Constituent Assembly that the real reason and Justification for inclusion of the Directive Principles in the Constitution is that the party in power disregard of its political ideologies, will not sway away by its ideological influence but "should have due regard to the ideal of economic democracy which is the foundation and the aspiration of the Constitution." "Whoever may capture the governmental power will not be free to do what he likes to do in the exercise of the power. He cannot ignore them. He may not have to answer for the breach in a court of law, but he will certainly have to answer for them before the electorate when the next election comes." Dr. Ambedkar further stated that: "We must make our political democracy a social democracy as well. Political democracy,, cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items

[160] supra

[161] 1995 SCC, Supl. (2) 549

in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. In politics we will be recognising the principles of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one vote one value. If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up".

The development of a global economy has implications for national welfare policies. The nation state is being 'hollowed out', with power being dispersed to localities, independent organisations, and supra-national bodies (like NAFTA or the European Union). Mishra argues, in *Globalization and the Welfare State*[162], that globalization limits the capacity of nation-states to act for social protection. Global trends have been associated with a strong neo-liberal ideology, promoting inequality and representing social protection as the source of 'rigidity' in the labour market. International organisations like the World Bank and International Monetary Fund have been selling a particular brand of economic and social policy to developing countries, and the countries of Eastern Europe, focused on limited government expenditure, selective social services and private provision.

The welfare state has after the end of the Second World War become the most used system of making capitalism and democracy compatible in the affluent countries of the West. Thereby it has disproved Karl Marx and John Stuart Mill who thought that those two were incompatible. Since the emergence of the welfare state came about a new concept, globalization has been evolved and deals with the intensification of cross border social transactions. Every state has to compete economically with all other states including far away countries with

[162] R Mishra, *"Globalization and the Welfare State"*, Macmillan, 2000

different political systems, language and culture. Will the globalization change the welfare state?[163]

The validity of the decision of the Union of India to disinvest and transfer 51% shares of M/s Bharat Aluminium Company Limited (hereinafter referred to as 'BALCO') came up for consideration before the Supreme Court. The Court opined that in a democracy, it is the prerogative of each elected Government to follow it's own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the Court. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the Courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate forum is the Parliament and not the Courts.[164]

The Preamble of our Constitution uses two other concepts which create responsibilities on the state to involve actively in social welfare, namely “social” and “economic justice”. Under the concept of social justice the state is required to ensure that the dignity of socially excluded groups is not violated by the powerful, and they are considered on equal footing with others. In *Consumer Education and Research Centre v. Union of India*[165] the Supreme Court has held that “Social justice, equality and dignity of person are corner stones of social democracy. The concept 'social justice' which the Constitution of India engrafted,

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[163] Caramani, Daniele, *Comparative Politics*, Oxford Univeristy Press (eds) (2008)

[164] *Balco Employees Union (Regd.) v. Union Of India*, (2002) 2 SCC 333.

[165] AIR 1995 SC 922.

consists of diverse principles essential for the orderly growth and development of personality of every citizen."

Under economic justice it is contemplated that the state would not make any distinction among its citizens on the basis of their possession of economic resources. Economic justice also requires the state to try to narrow down the gap of resourceful and poor by distributive justice in terms of income and wealth. To achieve the ideals of social and economic welfare the state is required to involve in different social welfare schemes as like reservation for SC/ST/OBCs, MGREGA, Mid Day Meal Scheme, Sarva Sikha Abhiyan, etc.[166]

However recently seeing some light the Supreme Court in a case for reinstatement of a worker, have opined that this Court has a duty to interpret statutes with social welfare benefits in such a way as to further the statutory goal and not to frustrate it. In doing so this Court should make an effort to protect the rights of weaker sections of the society in view of the clear constitutional mandate. Thus, social justice, the very signature tune of our Constitution and being deeply embedded in our Constitutional ethos in a way is the arch of the Constitution which ensures rights of the common man to be interpreted in a meaningful way so that life can be lived with human dignity. Any attempt to dilute the constitutional imperatives in order to promote the so called trends of Globalisation, may result in precarious consequences. At this critical juncture the judges' duty is to uphold the constitutional focus on social justice without being in any way misled by the glitz and glare of globalization.[167]

The stock plea raised by the public employer in the cases of illegal retrenchment, with the attractive mantras of globalisation and liberalization, that the initial employment/engagement of the workman- employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment, cannot be accepted by courts being unmindful of the accountability of the wrong doer and indirectly punishing

[166] ibid

[167] *Harjinder Singh Vs. Punjab State Warehousing Corporation* , (2010) 3 SCC 192.

the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood. It needs no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer - public or private. [168]

With the advent to new globalised policies there have been a continuous changes in the law of the land. Notable one law namely the Arbitration and Conciliation Act, 1996 has been resorted to in disputes regarding business in the current economic scenario. The Arbitration and Conciliation Act, 1996 made certain drastic changes in Law of Arbitration to meet the liberal policy and globalisation of commerce and delay in disposal of cases in Court. This Act is codified in tune with the model law on International Commercial Arbitration as adopted by United Nation Commission on International Trade Law (UNCITRAL) with main objective to amplify the powers of Arbitral Tribunal and minimize the supervisory role of Courts in the Arbitral process.

A Coram of 11 Judges, not a common feature in the Supreme Court of India, sat to hear and decide *T.M.A.Pai Foundation v. State of Karnataka*[169]. It was expected that the authoritative pronouncement by a Bench of such strength on the issues arising before it would draw a final curtain on those controversies. The subsequent events tell a different story. It is observed that the 11-Judge Bench decision in *Pai Foundation case*[170] is a partial response to some of the challenges posed by the impact of Liberalisation, Privatisation and Globalisation (LPG), but

[168] supra

[169] (2002) 8 SCC 481

[170] supra

the question whether that is a satisfactory response, is indeed debatable. It was further pointed out that 'the decision raises more questions than it has answered'[171]

The new economic policy namely the Liberalisation, Privatisation and Globalisation (LPG), model has had a huge negative impact on the labour rights. Its seems that the labour rights in the country are taking the bite. Earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention to the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

We may refer to the latest of a series of decisions on this question. In *U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey* [172], the Supreme Court following Allahabad Jal *Sansthan v. Daya Shankar Rai*[173] and *Kendriya Vidyalaya Sangathan v. S.C. Sharma*[174] held as follows: A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.

Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the court realising that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was

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[171] *Annual Survey of Indian Law*, 2002 at p.251, 254.

[172] (2006)1 SCC 479

[173] (2005) 5 SCC 124.

[174] (2005) 2 SCC 363.

spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. The changes brought about by the subsequent decisions of the Supreme Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalisation, privatisation and outsourcing, is evident. No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case.[175]

The Supreme Court in *Jagbir Singh v. Haryana State Agriculture Marketing*[176], dealing with an industrial dispute contending that the services were retrenched illegally in violation of Section 25F of Industrial Disputes Act, 1947 wherein the claimant claimed reinstatement with continuity of service and full back wages, while granting compensation has held that it would be, thus, seen that by catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee. Therefore, the view of the High Court that the Labour Court erred in granting reinstatement and back wages in the facts and circumstances of the present case cannot be said to suffer from any legal flaw. However, in our view, the High Court erred in not awarding compensation to the appellant while upsetting the award of reinstatement and back wages. As a matter of fact, in all the judgments of this Court referred to and relied upon by the High Court while upsetting the award of reinstatement and back wages, this Court has awarded compensation. While awarding compensation, the host of factors, inter-alia, manner and method of

[175] *Metropolitan Transport Corpn. v. Venkatesan,* (2009) 9 SCC 601.

[176] AIR 2009 SC 3004.

appointment, nature of employment and length of service are relevant. Of course, each case will depend upon its own facts and circumstances.

The new economic policy namely the Liberalisation, Privatisation and Globalisation (LPG), model has had a huge negative impact on social justice legislation particularly in cases of affirmative action. Reservation is aimed at securing equal and protective discrimination. Recently, the purpose of reservation although in a different context has been stated by the Supreme Court in *A.I.I.M.S. Students Union v. A.I.I.M.S*[177]. It was observed: "Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation.

Any reservation, apart from being sustainable on the constitutional anvil, must also be reasonable to be permissible. In assessing the reasonability one of the factors to be taken into consideration would be whether the character and quantum of reservation would stall or accelerate achieving the ultimate goal of excellence enabling the National constantly rising to higher levels. In the era of globalisation, where the nation as a whole has to compete with other nations of the world so as to survive, excellence cannot be given an unreasonable go by and certainly not compromised in its entirety. [178]

The Court further opined that Public health can be improved by having the best of doctors, specialists and super specialists. Under-graduate level is a primary or basic level of education in medical sciences wherein reservation can be understood as the fulfilment of societal obligation of the State towards the weaker segments of the society. Beyond this, a reservation is a reversion or diversion

[177] 2002 (1) SCC 428

[178] supra

from the performance of primary duty of the State. Permissible reservation at the lowest or primary rung is a step in the direction of assimilating the lesser fortunates in mainstream of society by bringing them to the level of others which they cannot achieve unless protectively pushed. Once that is done the protection needs to be withdrawn in the own interest of protectees so that they develop strength and feel confident of stepping on higher rungs on their own legs shedding the crutches. Pushing the protection of reservation beyond the primary level betrays bigwigs desire to keep the crippled crippled for ever. Rabindra Nath Tagores vision of a free India cannot be complete unless knowledge is free and tireless striving stretches its arms towards perfection.[179]

6.6. CURRENT ECONOMIC POLICIES AND NEGLECT FOR SOCIAL WELFARE.

The model of globalisation was adopted in the hope that it would bring prosperity to the nation in the terms of higher production and economic growth. Indeed from 1991 onwards the gross domestic product of our country has gone up 8-9%, and India has emerged as global economic power. India has attracted a great deal of foreign investment, and the amount of international trade has increased manifold. But it has been observed by the scholars that the benefits of globalization has been confined to elite sections of society, and its impact in terms of social welfare has been by and far negative.[180]

The economic policies of our country are focussing (from 1991 onwards) more and more on the expansion of capitalism and privatisation, and continuously focus is diluted from the issues of social welfare. There has been an inherently negative impact of the neo-liberal economic policies. There has been a considered increase in the Rich Poor Divide. The gap between the rich and poor has been

[179] supra

[180] www.vifindia.org accessed on 25.11.2012.

widened all over the world. At global level the richest 10% of the population earned 79 times higher than the poorest 10% used to, in 1980; till 2003 the income of top 10% population was 117 times higher than those of poorest 10%.[181] In India the high rate of GDP has substantially benefitted only the upper 10-15% people, and depressed employment for marginalised section of society.[182] The top 10% of the population has a share of around 52% in the national wealth, and on the other hand the share of bottom 10% has been reduced to 0.21%.[183]

There has been continuous neglect for agriculture. From 1991 agriculture and farmers have been neglected by the government, and the average budgetary expenditure for irrigation is less than 0.35%.[184] The agriculture investment, has been decreased. The expenditure on agriculture has decreased continuously. In the last many years there were many cases of suicides by the farmers, which is the evidence of pitiful conditions of agrarian sector.

There has been devastation of Small Scale Industries. It was observed that more than 3 lakh small scale industries and more than three lakh handloom and power loom units were closed down due to the impact of globalization, because of decreasing bank loans to the SSIs. The allotment of funds to the SSIs has also been decreasing continually in terms of percentage. Even in the terms of growth performance the SSIs are lagging behind from the time of inception of globalization. The SSIs are very important units for providing self employment in rural and suburban area, and they have potential to make people self sufficient,

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[181] supra

[182] Praful Bidwai, *'Shining and Starving'* (2011) 28(17) Frontline,

[183] Praful Bidwai, '*The Question of Inequality'* (2007) 24(21) Frontline,

[184] Era Sezhiyan, '*Globe for Rich- Zero for Poor: Globalisation of Indian Economy*' (2007) XLV(20) Mainstream Weekly

hence by neglecting the SSIs the government is definitely deviating from its welfare obligations towards people.[185]

There has been great ecological damage as there has been total indifference from the side of government, and it has compromised the environment frequently for the sake of foreign investment. It has been seen that the government has failed to enforce the corporate environmental responsibility, so much so that the people affected by the Bhopal disaster could not be provided adequate compensation till now.[186]

Regional Disparities in Development has been one of the major factors for some states lacking behind. It has been seen that the impact of the economic policies of the government has not resulted in inclusive and equitable development, but rather big disparities have arisen in different regions. Generally speaking the southern states and western states have acquired accelerated economic growth, and the north eastern and central parts of nation are lagging behind. Financial inclusion, has been is a distant dream. Financial inclusion which has been an issue of concern from the time of independence itself is still a distant dream. Half of the population in India does not possess a bank account, 90% people have no access to credit or life insurance cover, and 98% had no participation in the capital market.[187]

It seems that the Courts have also the effects of liberalisation in their judgments. In 1988 a case concerning the regularization of the services of a large number of casual (non-permanent) workers in the posts and telegraphs department of the Government, the Court was prepared to invoke the Directive Principles of

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[185] C Narasimha Rao, *"Globalisation, Justice, and Development"* (Serials Publication, New Delhi 2007), pg 280.

[186] ibid.

[187] Business Standard, *'Financial Inclusion Imperative to Reap Demographic Dividend'* (January 24, 2011)

State Policy and recognize the lack of choice of the disadvantaged worker. It said that the Government cannot take advantage of its dominant position, and compel any worker to work even as a casual labourer on starvation wages. It may be that the causal labourer has agreed to work on such low wages. That he has done because he has no other choice. It is poverty that has driven him to that state. The Government should be a model employer. We are of the view that on the facts and in the circumstances of this case the classification of employees into regularly recruited employees and casual employees for the purpose of the paying less than the minimum pay payable to employees in the corresponding regular cadres particularly in the lowest rungs of the department where the pay scales are the lowest is not tenable. However, in October 2005 the question whether this decision requires reversal was considered by the present Supreme Court in a case involving the question of regularizing the services of causal workers who had been working for the state government in Karnataka for period ranging between ten and twenty years.

This trend can also be attributed to the impact of the economic policies that have accompanied liberalization. In 1983, the Court was prepared to recognize the right of workmen of a company to be heard at the stage of the winding up of such company. The Court invoked Article 43A, a constitutional directive principle, which required these State to take suitable steps to secure participation of workers of Management.[188]

However, in 2001, in a challenge by workmen to the decision of the Government to divest its shareholding in a public sector undertaking in favour of a private party, the Court refused to recognize any right in the workmen to be consulted. The Supreme Court has also declined to read into the law concerning abolition of contract labour any obligation on the employer to re-employ such labour on a regular basis in the establishment.

In the context of both the right to work and right in work, the trend of judicial decisions has witnessed a moving away from recognition and enforcement

[188] *National Textiles Workers Union v. P.R. Ramakrishnan,* (1983) 1 SCC 228.

of such rights and towards deferring to executive policy that has progressively denuded those rights.[189]

There is no express recognition of the right to shelter under the Indian Constitution. The judiciary has nevertheless stepped into recognize this right as forming part of Article 21 itself. However, the Court has never really acknowledged a positive obligation on the State to provide housing to the homeless. Even in much cited decision in *Olga Tellis v. Bombay Municipal Corporation*,[190] where the Court held that the right to life included the right to livelihood, it disagreed with the contention of the pavement dwellers that since they would be deprived of their livelihood if they were evicted from their slum and pavement dwellings, their eviction would be tantamount to deprivation of their life and hence be unconstitutional. This trend has continued ever since. However in a case involving Municipal Corporation of Delhi the Court held that the Municipal Corporation of Delhi had no legal obligation to provide pavement squatters alternative shops for rehabilitation, as the squatters had to legal enforceable right. In Sodan Sing's case, the Supreme Court reiterated that the question whether there can be at all be a fundamental right of a citizen to occupy a particular place on the pavement where he can squat and engage in trade must be answered in the negative. In a case concerning slum dwellers in Ahmedabad, despite the Court making observations about the Directive Principles of State Policy creating positive obligation on the State 'to distribute its largesse to the weaker sections of the society envisaged in Article 46 to make socioeconomic justice in a reality, no actual relief was granted to the slum dwellers. As in the area of the right to work, there has been a marked regression in the area of the right to shelter, compounded by the bringing of PIL cases to the courts by other classes of residents seeking eviction of slum dwellers as part of the protection and enforcement of the former's rights to a clean and healthy environment.

[189] supra

[190] (1985) 3 SCC 545.

The Supreme Court in *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation*[191], by quoting Mahatma Gandhi has opined that Mahatma Gandhiji, the father of the nation, in *Swaraj* at page 92, stated that, "from the very beginning it has been my firm belief that agriculture provides the only unfailing and perennial support to the people of this country. India lives in villages". Villagers are poor and most of them are unemployed or underemployed who need productivity which would add to the wealth of the nation. This vast human resources and man power remain idle, since majority own little or marginal land holdings out depend on agriculture as their livelihood. Cottage, agro-based or medium industries in rural areas give them economic status to the owner, employment potential for sustenance to the workmen and fair price to the producer. The father of the nation laid, therefore, emphasis to establish cottage industries, "to utilize the idle hours of the nation and bring work to the people in their homes, particularly when they had no other work to do." He further stated, "I want the dumb millions of our land to be healthy. I want them to grow spiritually. If we feel the need of the machine we certainly will have them. Every machine that helps an individual has a place". But he emphasised only on such industries which would be, "self-sufficient, self-reliant and free from exploitation".

The founding fathers of the Constitution in Article 43 directed that, "the State shall endeavour to promote cottage industries on an individual and cooperative basis in rural areas". Without social progress and economic development, democracy and freedom would not take firm roots. Without social stability, it would be impossible to achieve economic development. Without economic development there would be no social progress and without social progress it would be impossible for the people to take the destiny in their own hands in a democracy. Out Constitution, therefore, accepted mixed economy as the base and the economic policy and planning echo regeneration of social and economic justice. Articles 38 and 39 aim in that pursuit that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the inequalities in income should be minimised. Facilities and opportunities should be provided to eliminate inequalities

[191] (1993) 2 SCC 279.

in status and opportunity among the individual and groups of people. Our Bharat needs simultaneously greater progress by building industries with modern technological advances on all fronts and should create greater employment opportunities. To accelerate economic development the fiscal resources, human resources, their abilities and expertise need harness. In the mixed economy the public undertakings as well as private sector need necessary assistance and encouragement. The growth of the private sector should not be stifled, cribbed or cabined. The bureaucracy should adopt positive approach to stimulate production and productivity in every sector of economy so as to increase the size of the national cake. [192]

Scheduled Castes and Scheduled Tribes are the weaker sections of the society who have been deprived of their economic status by obnoxious practice of untouchability and the tribes living in the forest area far away from the civilised social life. To augment their economic status and to bring them on par into the main stream of the society, the State with a view to render economic justice envisaged in the Preamble and Articles 38 and 46 of the Constitution distributed the material resources, namely, the land for self-cultivation. It is an economic empowerment of the poor. It is common knowledge that many a member of the deprived classes live upon the agriculture either by cultivation on lease hold basis or as agricultural labour. Under these circumstances, the State having implemented the policy of economic empowerment to do economic justice assigned lands to them to see that they remain in possession and enjoy the property from generation to generation.[193]

Right to development is an inalienable human right by virtue of which every human person is entitled to participate in contribution to, and to enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised. All human rights derive from dignity and worth in man. Democracy blossoms the person's full freedom to achieve

[192] supra

[193] *R. Chandevarappa v. State of Karnataka*, (1995) 6 SCC 309.

excellence. The socio-economic content in directive principles is all pervasive to make the right to life meaningful to the Indian citizens. For national unity, equality of status and dignity of persons envisaged in the Constitution, social and economic reforms in a democracy are necessary. Welfare is a form of liberty inasmuch as it liberates men from social conditions which narrow their choices and brighten their self development. Article 46 of the Constitution mandates the State to promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Political democracy must be made a social democracy as a way of life. It recognises and affords to realise liberty, equality and fraternity as the principles of life. Economic empowerment, thereby, is the foundation to make equality of status, dignity of person and equal opportunity a truism. Social revolution through rule of law lies in effectuation of the fundamental rights and directive principles a supplementary and complementary to each other. Political democracy would stabilize socio-economic democracy to make it a way of life. It was, therefore, held that the State is enjoined to provide adequate means of livelihood to the poor, weaker sections of the society, the dalits and tribes and to distribute material resources of the community to them for common welfare etc. Therefore, civil, political, social, economic and cultural rights are necessary to the individual to protect and preserve human dignity, social and economic rights are sine quanon concomitant to assimilate the poor, the depressed and deprived, i.e., the dalits and tribes in the national main stream for ultimate equitable society and democratic way of life to create unity, fraternity among people in an integrated Bharat.[194]

With the advent of globalization, we are witnessing a shift from Formalism to a Value-laden approach to law.

In lines of the new economic policy the Supreme Court have propounded a new concept "Level playing field", In *Reliance Energy Limited v. Maharashtra*

[194] *Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde* , JT (1995) 3 SC 563

State Road Development Corporation Ltd.[195] The Court held that standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". In includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of *I.R. Coelho vs. State of Tamil Nadu*[196], that Article 21/14 is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is

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[195] (2007) 8 SCC 1.

[196] (2007) 2 SCC 1

legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

However earlier in the case of *Union of India v. International Trading Co.*[197], the Division Bench of this Court speaking through Pasayat, J. had held : It is trite law that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

Indian Supreme Court has achieved world-wide acclaim in fashioning new rights under Part III of the Constitution and also using Directive Principles as interpretive devices for giving a contemporaneous meaning to Part III. Innovations in the field of PIL or Social Interest Litigation as some people like to call it, have been institutionalized; methods and rules in that regard have been streamlined to a great extent through later directives of this court. The journey of PIL from rhetoric to a trusted court procedure showcases in ample the potential of constructive exchange between organs of polity, remaining well within their limits. At the same time, we are not unmindful of some decisions which have brought disrepute to the institution as well the innovation itself.

James Madison once when similarly situated remarked, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. As has been mentioned, subsequent directives of SC have come down heavily on such instances. Although this phase has been widely documented but the last such mention was by Sandra Fredman[198] where the author (Sandra Fredman) sees inspiration in the wide-ranging work of Indian Supreme Court for European Court of Justice.

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[197] (2003) 5 SCC 437

[198] Sandra Fredman, *"Public Law, "Human Rights Transformed: Positive Duties and Positive Rights"*, 2006 Autumn at pg. 513

It was noted therein:"Two points should, however, be noted (about Indian Supreme Court's record on Public Interest Law). First, the Court has adapted its procedure to enable it to adjudicate polycentric issues more appropriately. Wide standing rules require the court to conduct some of its own fact-finding, sometimes through establishing its own commissions. It has also fashioned its own remedial orders to provide ongoing management.

For example, in the "Right to Food" case, it has issued a continuing mandamus to require states to fully implement specific schemes including mid-day meals at school. Secondly, affirmation of wide duties is often used to counter maladministration rather than to initiate new projects. Thus the right to livelihood of pavement dwellers gave rise only to a duty to consult before removing them; and the right to a road gave rise only to a duty to complete a project for which funds had already been allocated. In the right to food case, a primary problem was maladministration: the Court found that about half of the food subsidy was being spent on holding excess stocks; reducing stocks would free up large resources to distribute food and provide hot mid-day meals for school children.

On the other in the Annual Report of the National Human Rights Commission[199], this is what is stated about our country: “It is said that one third of the world’s poor are Indians, who lacked clean drinking water, basic sanitation and minimum standards of health care, food and nutrition….Persistence of such a situation constitutes a failure of governance which had urgently to be remedied for it is on the pillars of good governance that promotion of human rights in the final analysis rests.”

Ensuring food security is the dying need of the hour. The green revolution converted India, from a begging bowl into a bread basket. Now there is a talk about the need for second Green Revolution. However such revolution in no where in sight. Over 40 per cent of farmers interviewed by the National Sample Survey

[199] *‘Annual Report of the National Human Rights Commission*’ -1997-98.

Organization has expressed a desire to quit farming if there is another option available.[200]

Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated equals. Thus, any public employment has to be in terms of the constitutional scheme. A sovereign government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary appointments or engaging workers on daily wages. Going by a law newly enacted, The National Rural Employment Guarantee Act, 2005, the object is to give employment to at least one member of a family for hundred days in an year, on paying wages as fixed under that Act. But, a regular process of recruitment or appointment has to be resorted to, when regular vacancies in posts, at a particular point of time, are to be filled up and the filling up of those vacancies cannot be done in a haphazard manner or based on patronage or other considerations. Regular appointment must be the rule.[201]

The deprivation of the weaker section we had for long but time has now come to cry halt and it is for the law courts to rise up to the occasion and grant relief to a seeker of a just cause and just grievance. Economic justice is not a mere legal jargon but in the new millenium, it is the obligation for all to confer this economic justice to a seeker. Society is to remain, social justice is the order and economic justice is the rule of the day. Narrow pedantic approach to statutory documents no longer survives. The principle of corporate jurisprudence is now being imbibed on to industrial jurisprudence and there is a long catena of cases in regard thereto the law thus is not in a state of fluidity since the situation is more or

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[200] M.S. Swaminathan, '*The Media and the Farm Sector*', The Hindu, November 11, 2009, p-10, quoted in Calcutta Law Times, 2011, Vol. II, June, Part III.

[201] *Secretary, State of Karnataka v. Umadevi,* (2006) 4 SCC 1.

less settled. As regards interpretation widest possible amplitude shall have to be offered in the matter of interpretation of statutory documents under industrial jurisprudence. The draconian concept is no longer available. Justice social and economic, as noticed above ought to be made available with utmost expedition so that the socialistic pattern of the society as dreamt of by the founding fathers can thrive and have its foundation so that the future generation do not live in the dark and cry for social and economic justice.[202]

One of the earliest pronouncements on the subject came from this Court in *Rustom Cavasjee Cooper v. Union of India* [203](commonly known as "Bank Nationalization Case") wherein this Court held that it is not the forum where conflicting policy claims may be debated, it is only required to adjudicate the legality of a measure which has little to do with relative merits of different political and economic theories. The Court observed: "This Court is not the forum in which these conflicting claims may be debated. Whether there is a genuine need for banking facility in the rural sector, whether certain classes of the community are deprived of the benefit of the resources of the banking industry, whether administration by the Government of the commercial banking sector will not prove beneficial to the community and will lead to rigidity in the administration, whether the Government administration will eschew the profitmotive, and even if it be eschewed, there will accrue substantial benefits to the public, whether an undue accent on banking as a means of social regeneration, especially in the backward areas, is a doctrinaire approach to a rational order of priorities for attaining the national objectives enshrined in our Constitution, and whether the policy followed by the Government in office or the policy propounded by its opponents may reasonably attain the national objectives are matters which have little relevance in determining the legality of the measure. It is again not for this Court to consider the relative merits of the different political theories or economic policies." This Court has the power to strike down a law on the ground of want of authority, but

[202] *G.B. Pant University of Agriculture & Technology, Pantnagar v. State of Uttar Pradesh,* (2007) SCC 109.

[203] (1970) 1 SCC 248

the Court will not sit in appeal over the policy of the Parliament in enacting a law. The Court cannot find fault with the Act merely on the ground that it is inadvisable to take over the undertaking of banks which, it is said by the petitioner, by thrift and efficient management had set up an impressive and efficient business organization serving large sectors of industry."

In *Premium Granites v. State of T.N.* [204]this Court clarified that it is the validity of a law and not its efficacy that can be challenged. "It is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right."

In *Delhi Science Forum v. Union of India* [205]a Bench of three learned Judges of the Supreme Court, while rejecting a claim against the opening up of the telecom sector reiterated that the forum for debate and discourse over the merits and demerits of a policy is the Parliament. It restated that the services of this Court are not sought till the legality of the policy is disputed, and further, that no direction can be given or be expected from the courts, unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provisions.

In *BALCO Employees' Union (Regd.) v. Union of India*[206], this Court further pointed out that the Court ought to stay away from judicial review of efficacy of policy matters, not only because the same is beyond its jurisdiction, but also because it lacks the necessary expertise required for such a task. Affirming the previous views of this Court, the Court observed that while dealing with economic

[204] (1994) 2 SCC 691.

[205] (1996) 2 SCC 405.

[206] (2002) 2 SCC 333.

legislations, the Courts, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those cases where the view reflected in the legislation is not possible to be taken at all. The Court went on to emphasize that unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere.

In *BALCO*[207] , the Court took notice of the judgment in *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India*[208] and observed that some matters like price fixation are based on such uncertainties and dynamics that even experts face difficulty in making correct projections, making it all the more necessary for this Court to exercise non- interference. "The function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts."

In *State of Madhya Pradesh v. Narmada Bachao Andolan*[209], the Supreme Court said that the judiciary cannot engage in an exercise of comparative analysis over the fairness, logical or scientific basis, or wisdom of a policy. It held that the Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer, or more scientific or logical, or wiser. The wisdom and advisability of the policies are ordinarily not

[207] Supra.

[208] (1992) 2 SCC 343.

[209] (2011) 7 SCC 639.

amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power.

In *Villianur Iyarkkai Padukappu Maiyam v. Union of India* [210], this Court held as follows:"It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts."

In *Bajaj Hindustan Limited v. Sir Shadi Lal Enterprises Limited* [211], this Court held "that economic and fiscal regulatory measures are a field where Judges should encroach upon very wearily as Judges are not expert in those matters".

The Supreme Court in *Bhavesh D. Parish v. Union of India*[212] , took the view that, in the context of the changed economic scenario, the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalisation of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all.

In *Arun Kumar Agrawal v. Union of India*, the Supreme Court on 09 May 2013 has again expressed that the process concerning economic and commercial

[210] (2009) 7 SCC 561.

[211] (2011) 1 SCC 640.

[212] (2005) 5 SCC 471.

matters is one which gives liberty to States and its instrumentalities to take appropriate decision after weighing advantages and disadvantages of the same and this Court sitting in this jurisdiction, is not justified in interfering with those decisions, especially when there is nothing to show that those decisions are contrary to law or actuated to mala fide or irrelevant considerations.

It is clear from the above observations of this Court that it will be very difficult for the courts to visualise the various factors like commercial/technical aspects of the contract, prevailing market conditions, both national and international and immediate needs of the country. However in some cases where procedure in public policies are not transparent the Court have taken up the cause.

In *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.*[213], the Supreme Court has opines that the natural resources are vested with the Government as a matter of trust in the name of the people of India. Thus, it is the solemn duty of the State to protect the national interest. Even though exploration, extraction and exploitation of natural resources are within the domain of governmental function, the Government has decided to privatise some of its functions. For this reason, the constitutional restrictions on the Government would equally apply to the private players in this process. Natural resources must always be used in the interests of the country, and not private interests. In a constitutional democracy like ours, the national assets belong to the people. The Government holds such natural resources in trust. Legally, therefore, the Government owns such assets for the purposes of developing them in the interests of the people. In the present case, the Government owns the gas till it reaches its ultimate consumer The structure of our Constitution is not such that it permits the reading of each of the Directive Principles of State Policy, that have been framed for the achievement of conditions of social, economic and political justice in isolation. The structural lines of logic, of ethical imperatives of the State and the lessons of history flow from one to the other. In the quest for national development and unity of the nation, it was felt that the "ownership and control of the material resources of the community" if distributed in a manner that does not result in common good, it

[213] (2010) 7 SCC 1.

would lead to derogation from the quest for national development and the unity of the nation. Consequently, Article 39(b) of the Constitution should be construed in light of Article 38 of the Constitution and be understood as placing an affirmative obligation upon the State to ensure that distribution of material resources of the community does not result in heightening of inequalities amongst people and amongst regions. In line with the logic of the constitutional matrix just enunciated, and in the sweep of the quest for national development and unity, is another provision. Inasmuch as inequalities between people and regions of the nation are inimical to those goals, Article 39(c) posits that the "operation of the economic system" when left unattended and unregulated, leads to "concentration of wealth and means of production to the common detriment" and commands the State to ensure that the same does not occur.

The country witnessed a similar political spat a little while earlier, based on the allocation of the 2G spectrum. On that occasion the controversy was brought to this Court by way of a public interest litigation,for determination as to whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution? The allocation of spectrum to the licensees are declared illegal and are quashed. TRAI was directed to make fresh recommendations for grant of licence, investigation was directed by the CBI, Directorate of Enforcement and others agencies. The judgment whereof is reported as *Centre for Public Interest Litigation v. Union of India,*[214]. Extensive revenue loss, in the course of allocation of the 2G spectrum was duly noticed. On each occasion when the issue of allocation of natural resources, results in an alleged loss of revenue, it is portrayed as a loss to the nation. The issue then becomes a subject matter of considerable debate at all levels of the Indian polity. Loss of one, essentially entails a gain to the other. On each such occasion loss to the nation, translates into the identification of private players as the beneficiaries. If one were to accept the allegations appearing in the media, on account of defects in the disposal mechanism, private parties have been beneficiaries to the tune of lakhs of crores of Indian Rupees, just for that

[214] (2012) 3 SCC 1

reason. In the current debate, rival political parties have made allegations against those responsible, which have been repudiated with counter allegations.

Recently in the case of *Vodafone International Holdings v. Union of India*[215] the Supreme Court quashed the order of the High Court order which had held that an acquisition of a company abroad for operation in India is liable to pay tax in India. The Supreme Court has held that the sale of CGP share by HTIL to Vodafone would amount to transfer of a capital asset within the meaning of Section 2(14) of the Indian Income Tax Act and the rights and entitlements flow from FWAs, SHAs, Term Sheet, loan assignments, brand license etc. form integral part of CGP share attracting capital gains tax. Consequently, the demand of nearly Rs.12,000 crores by way of capital gains tax, in my view, would amount to imposing capital punishment for capital investment since it lacks authority of law and, therefore, stands quashed.

One of the most notable features of economic globalization has been the increased importance of foreign direct investment around the World. Some view is as an engine of economic growth and development while others look upon it as a panacea for all ills. Liberalization policies have led to rapid growth in FDI flows in recent years. Basing on the benefits associated with FDI several developing; as well developed countries compete fiercely for FDI. They try to attract foreign investors by providing financial and fiscal incentives, undertaking corporate restructuring and economic reforms and inviting foreign investors in the privatization of state-run units. Recently the Government have cleared a bill and made way for FDI in retail.

The Supreme Court has cleared the hurdles for the implementation of FDI in multi-brand retail sector saying that the "consumer is king and if that is the philosophy working behind the policy then what is wrong". A bench headed by Justice R M Lodha comprising justices Madan B Lokur and Kurien Jospeh observed the following: that the policy aimed at throwing out the middleman, who are curse to Indian economy has to be welcomed. It further held that the policy does not suffer from any unconstitutionality or illegality requiring it

[215] (2012) 6 SCC 613

to be quashed as The impugned policy cannot be said to suffer from any of the vires. It opined that this court does not interfere in the policy matter unless the policy is unconstituional, contrary to statutory provisions or arbitrary or irrational or there is total abuse of power. It held that the policy was for the benefit of the consumer, farmers and the retailers with the objective to eliminate middlemen. The policy is to free the economy from the middleman. Middleman is sucking our economy. These are suckers to be thrown out for direct benefit of consumers. If that is the objective of the policy what is wrong with it."

There has been a consistent effort for privatization of education in India. In a socialist pattern the state is under the responsibility to provide education to its citizen, but the concern is what will it happen when the education system will completely be run under the globalization, liberalization, privatization model. Recently a news paper[216] reported that a 20 year student to fund her education had put on sale her virginity on internet. One Natsu from Japan won the bid for $7,80,000.

What the people of this country have been witnessing, particularly in the last ten years, is the aggressive commodification of higher education. All issues of access, equity and quality raised by our policy planners are just slogans to mislead the people and they have not presented any balance between these issues.

Policies and economics should be in the sprit of the Constitution.[217]

In the present scenario we see, the Ministry of Human Resources Development (MHRD) has introduced four Bills in parliament on 3 May 2010 – i) The Foreign Educational Institutions (Regulation of Entry & Operations) Bill, 2010, ii) The Prohibition of Unfair Practices in Technical Educational Institutions, Medical Educational Institutional Institutions and Universities Bill, 2010, iii) The *Educational Tribunals Bill, 2010,* and iv) The National Accreditation Regulatory Authority for Higher Education Institutions Bill, 2010. *Other two Bills which have*

[216] Virginity on Sale, "*The Telegraph"*, dated 26.10.2012, at page 2

[217] *Journal of Indian Law Institute*, Vol.53, No.2, 2011.

been circulated are draft v) The Higher Education and Research Bill, 2010 and vi) The Universities for Innovation Bill, 2010.

The foreign educational institutions will launch courses which the market needs, create false impression about their courses through advertisements, charge exorbitantly high fees for courses which have immediate employment potential. Since competition entails reduction in costs, infrastructure, laboratories and libraries will find least investment and the teachers and non-teaching staff will be appointed without necessary qualifications on such terms which will be exploitative as is in existence in most private institutions in the country today. The Universities for Innovation Bill will provide an alternative route to foreign universities for establishing their campuses in India. This route will give them greater power, freedom and prestige with the removal of most of the restrictions, proposed in the foreign educational institutions bill.

The General Agreement on Trade in Services (GATS) covered in the WTO, a product of the Uruguay Round, is a legally enforceable agreement aimed at deregulating international markets in services, including education. Before this agreement, trade agreements used to be in relation to tariffs and eliminating other barriers for the goods produced in one country and sold in other countries.

Young women in USA and Europe, main forces behind the GATS and WTO, are resorting to selling their eggs for thousands of pounds a time to childless couples as a way of paying off their fees and student loans they had taken to meet the cost of higher education. The average graduate begins the search for a job with debts of more than 10,000 pounds. According to a report, “American clinics are allowed to reward donors handsomely for the unpleasant and potentially risky procedure. Some of them, aware of British students’ financial problems are now targeting women here. Graduates and those with high IQs are in particular demand. Many commissioning couples, desperate to have children, are also prepared to pay premium prices for specific physical attributes and good looks.” Depending upon the looks, educational background like Ph.D., ‘good’ family profile, rare ethnic groups like Jewish, Asians and east Africans, the women get about 2,400 to 10,300 pounds. Eggs are collected from women by administering drugs to induce artificial

menopause. The menstrual cycle is then restarted with more drugs designed to cause multiple eggs to ripen, instead of the normal one-a-month released naturally. A young healthy donor can produce 15 or 20 eggs, sometimes many more, in a single cycle of treatment. The procedure is very painful and sometimes causes severe trauma to the donor. According to another report, one girl (18 years of age) under debt while pursuing higher education decided to sell her virginity to the highest bidder. She claimed "she has been inundated with offers, including one of 10,000 pounds, since she placed an advert on the Internet.[218]"

It is the responsibility of the whole society to rise to the occasion and take measures so that the process of dismantling the higher education system in the country is reversed and not allowed to be an Educational Industiral Complex.

The Constitution is a living and organic document. It cannot remain static and must grow with the nation. The Constitutional provisions have to be construed broadly and liberally having regard to the changed circumstances and the needs of time and polity. India is a democratic country with a written Constitution. Rule of Law is the basis for governance of the country and all the administrative structures are expected to follow it in both letter and spirit. It is expected that Constitutionalism is a natural corollary to governance in India. But the experience with the process of governance in India in the last six decades is a mixed one.

The idea of welfare state is that the claims of social justice must be treated as cardinal and paramount. Social justice is not a blind concept or a preposterous dogma. It seeks to do justice to all the citizen of the state. Democracy, therefore, must not show excess of valour by imposing unnecessary legislative regulations and prohibitions, in the same way as they must not show timidity in attacking the problem of inequality by refusing the past the necessary and reasonable regulatory

[218] *MID-DAY (Mumbai), 2004, "Student puts her virginity on sale to highest bidder", January 28.*

measures at all. Constant endeavour has to be made to sustain individual freedom and liberty and subject them to reasonable regulation and control as to achieve socio-economic justice. Social justice must be achieved by adopting necessary and reasonable measures. That, shortly stated, is the concept of social justice and its implications. Citizens zealous of their individual freedom and liberty must co-operate with democracy which seeks to regulate freedom and liberty in the interest of social good, but they must be able to resist the imposition of any restraints on individual liberty and freedom which are not rationally and reasonably required in the interests of public good, in a democratic way.

It is in the light of these difficult times that the rule of law comes into operation and the judges have to play their role without fear or favour, uninfluenced by any considerations of dogma or isms. The term social justice is a blanket term so as to include both social justice and economic justice.

Since no society is static, and social processes are constantly changing, a good legal system is one which ensures that laws adapt to the changing situations and ensure social good. Any legal system aiming to ensure good should ensure the basic dignity of the human being and the inherent need of every individual to grow into the fullness of life. The hope of the Indian masses does not lie in the legal system alone, but in their conscious awakening and fight for social and economic justice. Knowledge of their legal rights however, can be an important motivating force in this. Many NGO's and individuals are emerging in different parts of the country to take up the cause of social change and change for a more just India, where justice will not merely be talked about in intellectual discussions on the intricacies of law, or written about in books, which the masses can't read, or exchanged for good old money, but actually lived and experienced by the majority of the people.

Prof. Upendra Baxi in his book entitled stated[219]:

The processes of globalization, thriving upon the heavily critiqued ideologies of developmentally and its eventual demise, seek to reproduce the soft

[219] Prof. Upendra Baxi, *'The Future of Human Rights'*

state. That notion is, however, now reconstructed in several important ways. The 'progressive state' at least in, and for, the South, in now conceived not as a state in its internal relations with its own people but in relation to the global community of foreign investors. A progressive state is one that is a good host state for global capital. A progressive state is one that protects global capital against political instability and market failures. A progressive state is one that represents accountability not so much directly to its peoples, but to the World Bank and international Monetary Fund. A progressive state is one that instead of promoting world visions of a just international order learns the virtues of debt repayment on schedule. Finally, a progressive state is one that gleans conceptions of good governance neither from the histories of struggles against colonization and imperialism nor from its internal social and human rights movements but from the global institutional gurus of globalisation.

Democracy must forever guard against the temptation to transform itself into a system under which the ruling majority claims infallibility for itself.[220]

[220]Prof: M.V. Pylee, An Introduction to the Constitution of India, 2nd Vikash Publishing House.

CHAPTER 7

CONCLUSION.

The Preamble of the Constitution sets out the aims and aspirations of the people of India and these have been translated into the various provisions of the Constitution. As a welfare State, India is committed to the welfare and development. For a welfare state to thrive and to maintain its constitutional goal, legislation aimed at social welfare is cardinal for the common good and common interest of the people. Directive Principles impose an obligation of the state to take positive action for creating socio-economic condition in which there will be an egalitarian social order with social and economical justice to all, so that individual liberty will become a cherished value and the dignity of an individual a living reality. Thus the Directive Principles enjoy a very high place in the Constitutional scheme and it is only in the frame work of the socio-economic structure envisaged in the Directive Principles that the fundamental rights are intended to operate. Further The Constitution declares the Fundamental Rights of a citizen and lays down that all laws made abridging or taking away such rights shall be void.

In our study we have been able to find out that unquestionably the Constitution of India is a social document. A study of the philosophy of the Constitution does safely indicate that the intention of the makers of the Constitution was to make the document a social document and that the Constitution still remains to be a social document.

We have been able to study that the fundamentals of the Indian Constitution are contained in the Preamble which secures its citizens, Justice, social, economic and political, Liberty of thought, expression, belief, faith and worship, Equality of status and opportunity, and to promote among them all Fraternity assuring the dignity of the individual and the unity of the nation. The theme of the objectives permeates throughout the entire constitution. It was to give effect to this objective the Fundamental Rights and the Directive Principles of the State policy was enacted in Part III and Part IV of the Constitution, and through them the dignity of the individual was sought to be achieved and maintained. It can be thus safely said that the preambular promises are the goal of the Constitution.

Rightly the constitution makers had decided to incorporate Fundamental Rights in the Constitution because of several reasons, such as, consciousness of the massive minority problem in India, memories of the protracted struggle against the despotic British Rule, acknowledgement of the Gandhian ideals, the climate of international opinion and the American experience.

But it can be seen from the past history that inclusion of Fundamental Rights under the Indian Constitution was also a reasonable step towards the natural apprehension of any such autocratic rule and arbitrariness in future and to prevent it. In other words, to limit the government acts.

The courts are also playing a crucial role in guaranteeing these rights to the people besides broadening them with changing circumstances and conditions and making them even more efficient for protection against any arbitrary act on the part of the govt. or any individual.

It is very well noted that under the Indian Constitution Fundamental Rights have been provided in different forms. Only a free society can ensure the all-round progress of its members which ultimately helps the advancement of human welfare. Therefore, every democracy pays special attention to securing this basic objective to the maximum extent without, at the same time, endangering the security of the State itself. The Fundamental Rights envisaged in Part III of the Constitution of India has a tremendous contribution in rendering social justice to the country at large and till date it thrives to maintain its constitutional goal, in guiding legislation aimed at social welfare for the common good and common interest of the people.

Part III of the Constitution dealing with the Fundamental Right Chapter has played a pivotal role in ensuring the principle that the right to Fundamental Right is a necessary concomitant to social justice or else such rights would be rendered illusory.

From the study one thing is crystal clear that the edifice of our Constitution is built upon the concepts crystallized in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our

people justice, social, economic and political. We therefore, put Part IV into our Constitution containing Directive Principles of State Policy which specify the socialistic goal to be achieved. Legislation is always based on the quintessence of the public opinion. India after attaining independence by a series of social welfare legislations based on the mandate of our Constitution proved that law could be active and dynamic. No longer was the State seen as standing to one side of the society and performing the role of a night watchman, but as a manager of social and economic interests.

It is argued that since the directive principles are not enforceable by any court, they are not laws, much less constitutional laws and therefore their non-observance by the State does not entail legal consequences. For the same reason a law giving effect to the directive principle has to observe all the constitutional limitations such as fundamental rights and in case it violates these limitations, it must be held unconstitutional. The idea seems to have changed during the course of time, and over last few years one can on evaluating the judgment of the Supreme Court find that the Directive Principles have been given much more importance.

It is noticed that the amendments made to the Constitution in order to implement the Directive Principles have also encouraged the Courts to enforce those directives as any other Constitutional Rights though it is not a Fundamental Right.

We from the study can definitely conclude that almost all the Directives have now become executable by the Courts except a few, despite the express bar under Article 37 and thus can safely come to an inference holding that the Directive Principles are the means to achive the goal of the preambular promise.

The reality of inequality, and its possible solution, is manifest in the Preamble, followed by the Fundamental Rights and Directive Principles. The Preamble makes explicit, the resolve to create a “socialist and democratic republic” in order to secure political justice, equality, liberty and dignity. The principle

assertion being that in order to obliterate social injustice, upholding the dignity of the human personality is paramount. The Indian Constitution, as a social document, seeks to foster this by striving to create the requisite social, cultural, political and economic conditions that are required to attain this noble goal.

Equality before law connotes absence of any discrimination in law. The concept of equal protection required the State to mete out differential treatment to persons in different situations in order to establish an equilibrium amongst all.

The basic rule as from the study reveals that equals should be treated equally and un-equals must be treated unequally. It is observed that this doctrine of equality is one of the corner-stone of our Constitution as the same is to be duly implemented.

The constitutional goal is the establishment of a socialist democracy in which justice-economic, social and political is secure and all men are equal and have equal opportunity, and we can safely argue that equality embodies social justice.

For a welfare state to thrive and to maintain its constitutional goal, legislation aimed at social welfare is cardinal for the common good and common interest of the people. Directive Principles of State Policy, and Fundamental rights together constitute the 'conscience' of the Constitution, and represents the basic rights inherent in human beings in this country.

The courts are continuously playing a crucial role in guaranteeing these rights to the people besides broadening them with changing circumstances and conditions and making them even more efficient for protection against any arbitrary act on the part of the govt. or any individual.

On the study of the cases before the Supreme Court with regard to issues of social welfare it is observed that the Supreme Court has played the role of the sentinel on the qui vive, and survivor on call. It has on almost all occasion have reminded the State that it is constitutionally obligated to enforce the fundamental rights of all the citizens of the country and to protect them from exploitation and to provide guidance and direction for facilities and opportunities to them for securing

socio-economic justice, empowerment, securing life and liberty to make all enjoy the fundamental rights ensured to them under the Constitution.

In this study we have seen that the Supreme Court has given many of the Directives the status of Fundamental Right and other Constitutional or Statutory rights, by giving wide possible interpretations to the Fundamental Rights or any other Constitutional or Statutory rights in the light of the Directive Principles.

Furthermore, the Courts, in many occasions, in appropriate cases, issued many directions/guidelines and laid down policies to give effect to the directive principles either directly or indirectly in order to remove the grievances which have been caused by non implementation of the Directives.

It can be safely said that the present directives is in furtherance of the Constitutional goals for establishment of political democracy, and to ensure social and economic justice and minimizing inequalities in income, status, facilities and opportunities for the establishment of an egalitarian social order in Secular Socialist Democratic Bharat Republic.

Globalization, Liberalization and Privatization are the inevitable consequence of the development all around the globe. It is eminent that the global economy will search for new markets to sell their products. However it has to be understood that a Welfare State has certain criteria that needs to remain static or there is a threat that the basic fabric of nation would be put to jeopardy. The Globalization, Liberalization and Privatization should be suitably adapted to the existing global condition as well as the peculiar situation of the Indian conditions in order to lead toward overall prosperity of mankind.

India is a multi-cultural pluralistic society with tremendous diversity. There are a large number of religions, castes, languages, ethnic groups, cultures, etc. in our country.

Concept of socialism or a socialist state has undergone changes from time to time from country to country and from thinkers to thinkers. But some basic concept still holds the field.

Undoubtbly in the beginning of the new economic era doubts were serious about the working of a Welfare State when provisions of social welfare legislations were being curbed to befit liberalization. Labour laws in the country had started taking the bites in the guise of economic liberalization.

But in recent times we can observe that the Supreme Court and the High Courts have played an important role to remind the State the Constitutional objectives and have tried to suggest the State to create a balance between development and the constitutional goals by evolving the concept amongst others of sustainable development.

It has been held in many decisions of the Supreme Court had reminded the State of its preambular promise and have stressed that the constitutional provision be interpreted, by taking the Preamble as the guiding star and the Directive Principles of State policy as the book of interpretation. It is very encouraging to observe that in some case the Supreme Court has often reminded the State that the preamble embodies the hopes and aspiration of the people and Directive Principles set out the proximate grounds in the governance of the country. Over adventurerism in cases of enforcing global economic policy can lead to disaster in the country like India.

The Hon'ble Supreme Court of India has in a large number of cases held that a beneficial piece of legislation or welfare statues should receive a liberal and wider interpretation and not a narrow and technical one.

In today's time it seems that some of the policies of government are not in conformity with the obligations of a welfare state. It has been seen that the government at tames have taken a pro-corporate stand, by neglecting the plight of the people, in the guise of the glit and glamour of globalization. It is to be reminded that the state cannot derogate its stand from its constitutional responsibilities of creating an egalitarian society and providing social and economic justice by simply making a competitors market. It has to be remembered that people are not just means to achieve higher economic growth, but they are ends in themselves and that in every policy of government the people should be at the centre of it as beneficiaries.

Enforcement of global economic policy needs to be debated extensively and in some cases some rethinking is necessary in the developing country like India where dispararities exist between different segments of the population and different regions of the country. It is necessary for shortening gaps between rich and the poor and there is an urgency in moving towards a more balanced development of the nation.

We have in our study observed that Constitutionalism recognizes the need for government with powers but at the same time insists that limitation be placed on those powers. The antithesis of constitutionalism is despotism. It envisages checks and balances by restraining the powers of governmental organs by not making them uncontrolled and arbitrary. The study clearly opines that Fundamental Rights of the people, Directive Principles of State Policy, Federalism, de-centralization of powers are some of the principles and norms promotes Constitutionalism in the country. Preamble to the Indian Constitution lays down principles for the promotion of constitutionalism. One can safely declare that socialism is the constitutionalism of the Constitution of India. It has been observed that the doctrine of basic structure propounded by the Supreme Court is one of the most dynamic doctrine that has been propounded in the working of this modern Constitution. It envisages the principle of check and balance which is the constitutionalism of the Constitution. This dynamic doctrine of basic structure of the Constitution has always been applied to whenever there is a threat to the constitutionalism of the Constitution. However from the study we can safely conclude that as of now there is no such threat that demands a change in the Constitution. We feel safe with the dynamic activist approach of the Supreme Court of our country and remain optimist that WE THE PEOPLE will live up to the expectation of our founding fathers and remain to be a social welfare state.

As a research student and based upon the study I would propose to put forward some suggestions to the legislatures and all the law makers.

The state is constitutionally obliged to take care of the needs of society, and to maintain the social, economic and political justice hence it must change its

policies along with the changing needs of people keeping the welfare of the people at the centre.

There needs to be a constructive policy to fill the gap between the rich and poor so that the people at the bottom level of the pyramid is brought into the loop of the developmental process, and we be successful in building an inclusive society.

The bureaucracy still seems to have retained colonial characters and it the mindset in the working of the bureaucracy that needs some refreshment. The bureaucracy has to be well versed with the rights of the people. It is beyond comprehension as to why a citizen will have to approach the Courts for enforcement of their rights.

Judicial reforms should be implemented with immediate effect to clear millions of cases which are pending in various courts all over the country.

There is a need for police reforms and the legislature should participate intelligently to make sure that the welfare state of ours does not turn into a police state.

Social welfare schemes launched by the government need strict monitoring and it is to be seen that the intended beneficiaries get the benefit and the perpetrators of frauds should be severely punished. Avenue of new social welfare schemes benefitting and affecting the mass poor and creating employment opportunity and removing economic backwardness should also be taken up on priority basic.

Criminalization of politics is an evil in a democracy and unless urgent steps are required to be taken to counter it.

Political and administrative corruption is a sad reality of Indian administration and this cancer should be removed from the body politic of Indian democracy on an emergency basis.

The state must focus to eliminate poverty and inequality among the different sects of society. Necessary and urgent steps are needed to be taken to reduce the actual number of persons below poverty line.

The state must ensure that the benefits of globalization are not confined to some particular sections of the society and there must be some law regarding corporate responsibilities.

Since India still largely remains to be dependent on agriculture, there is a need to focus on the development of agriculture. The government must increase the public expenditure in agriculture and more funds must be devoted towards the area of research in agriculture as like in the area of production of better quality seeds.

There has to be some corporate environment responsibility as we in our study have seen that environmental damage has mostly affected poor people because they lack sufficient resources to avoid the impact of pollution. The government must have strict environmental laws and there should be a proper administrative set up to monitor and see that all industries fulfill the requisite environmental clearance norms. Polluters Pays principle should be applied strictly in case of breach and the State should be strict in ensuing proper compensation to the affected.

There is a very urgent need for the enhancement on the spending on healthcare. The problem of malnourished children in India is to be addressed on an urgent basic. Government hospitals need to be well equipped with necessary infrastructure and medicine. Continuous effective steps needs to be taken to lift the child mortality rate.

Female feticide should be declared as a grievous crime. Women empowerment programmes needs to be taken up on priority basic.

There is a very urgent need for the enhancement on the spending on education and increase the enrolment rate in schools and college.

The need of hour is to ensure the proper and balanced implementation of policies so as to make social justice an effective vehicle of social progress.

All the three organs, namely, the Legislative, the Executive and the Judiciary should work collectively to ensure civil, political, social, economic and cultural rights to the citizens and to further ensure to protect and preserve human dignity by assimilating the poor, the depressed and deprived in the national main stream for ultimate equitable society and democratic way of life to create unity, fraternity among ‘WE THE PEOPLE’ in an integrated Bharat.