# Fundamental Rights and Socio-economic Justice in The Indian Constitution

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To

My respected and noble *Guru*,

PROFESSOR C. H. ALEXANDROWICZ

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## PREFACE

The six chapters of this little volume represent series of attempts made to assess the relative positions of fundamental rights and provisions relating to socio-economic justice incorporated in the Constitution and to analyse further the actual connotation and ambit of the latter. This book endeavours to show, with the help of Constituent Assembly debates and by interpretation of relevant constitutional provisions and by critical analysis of judicial pronouncements, that the Constitution stipulated a position of importance for socio-economic justice provisions without minimising the value of fundamental rights. This means that the idea of freedom, right and liberty must, as pointed out by Julian Huxley in his essay on "Economic Man and Social Man", shed its nineteenth century meaning of individual liberty in the economic sphere and become adjusted to new conceptions of social duties and responsibilities. With such a change from medieval to modern outlook on liberty and right, the yardstick of justice itself changes. In view of this, I have subscribed to the view that legislations intended to give effect to provisions relating to socio-economic justice must be construed as reasonable law, or as reasonable restriction on fundamental rights.

In the first chapter implications of the concept of "popular sovereignty" and meaning of "socio-economic justice" have been analysed in the light of Constituent Assembly debates. The proposition that the fundamental rights are immutable and transcendental in character has been examined in the second chapter. In this connection the Supreme Court's decision in *Golaknath* case has been fully analysed. In the third chapter I have endeavoured to show that the scheme of Part III of the Indian Constitution, which enumerates fundamental rights, is based not only on the Anglo-American constitutional jurispru-

dence but also on the principles of Hindu jurisprudence, for it has given as much importance to the duty of the individual as to his rights. The fourth chapter deals with the fundamental character of the directive principles of state policy. It is pointed out that the view that the directive principles are merely pious aspirations is mainly due to an undue emphasis laid on the unenforceability of the directive principles and failure to take cognisance of their fundamental nature stipulated in Article 37 of the Constitution. An analysis of various judicial decisions attempted in this chapter throws much light on the different phases of development in the judicial attitude towards the directive principles and several doctrines that emerged in the course of the development.

Though the concept of socio-economic justice figured prominently in many works, not much thought seems to have been bestowed on its contents and connotations as understood in the Constitution. Therefore, an attempt has been made in the last two chapters to analyse the contents and connotations of the concept fairly exhaustively. What the economic justice means in the Constitution, what is the actual effect of amendments to Article 31 of the Constitution, what is the meaning of the concept of social justice within the Constitution and to what extent "equality in law" and "equality in fact" have been given effect to in the Constitution are here subjected to searching analysis.

I would like to thank the authorities of the University of Madras for granting me permission to publish the book. I am grateful to Prof. T. S. Rama Rao, Professor and Head of the Department of International and Constitutional Law, University of Madras, for his kind disposition and co-operation and for maintaining a research climate in the Department which has been very conducive to research work of this type. I wish to thank my intelligent students of M.L. class, whose searching questions during seminar hours in the class helped me to a great extent to clarify many of my ideas and shape them in proper form before I put them in this book. My thanks are also due to my esteemed friend Mr. P. Gangadhara Rao, Reader

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K. P. KRISHNA SHETTY.

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## Chapter One

# THE PREAMBLE AND THE CONCEPTS OF POPULAR SOVEREIGNTY AND SOCIO-ECONOMIC JUSTICE

The Preamble of the Indian Constitution contains, *inter alia*, two important concepts, namely, popular sovereignty and socio-economic justice. The former, which implies that "the people" is the ultimate sovereign, is a powerful constitutional tool for directing and shaping the constitutional development. But its usefulness and power depend much on the actual position granted to it in the Constitution by the Constitution-makers. It is, therefore, necessary to ascertain from the debates of the Constituent Assembly whether it was intended to be a mere fiction or a dynamic concept in the constitutional framework. The latter represents the aspirations of the people, who have established the Constitution. Its connotation must also be ascertained fully in order to know its actual ambit and the constitutional course it should take to achieve the much-aspired justice in larger freedom. Since in this Chapter these two concepts will be discussed primarily as preambulary concepts or guidelines, a question may be asked: what practical utility the Preamble or the preambulary concepts will have in interpreting the specific provisions of the Constitution? A proper assessment of the Preamble within the constitutional framework must, therefore, necessarily precede a discussion on the concepts enshrined therein. Therefore, the three topics discussed here are: (i) the position of the Preamble, (ii) the concept of popular sovereignty, and (iii) the concept of socio-economic justice.

## Position of the Preamble

A proposition has been formulated to the effect that although the Preamble indicates the general purposes for which the people ordained and established the Constitution, it has

never been regarded as the source of any substantive power conferred on the Government or any of its departments.[1] Intentions of the framers of the Constitution are to be gathered, it is said, primarily from its specific provisions. It is also stated that the rules of interpretation propounded by the judiciary do not permit the Preamble to qualify specific provisions.[2] This notion is obviously based on a principle that general words should not be allowed to control the specific stipulations (*generalia specialibus non derogant*).

The question, however, is whether this rule of construction, which is often adopted by courts in interpreting statutes, may be taken as a potent rule for discerning the correct meaning of specific provisions in a Constitution. Prof. Willoughby is of the view that the value of the Preamble to the Constitution for purposes of construction is similar to that given to the preamble of an ordinary statute.[3] But the usefulness of the Preamble as an aid of interpretation in cases of equivocation has never been denied. In fact, Prof. Willoughby lays emphasis on this idea when he says that the Preamble "may not be relied upon for giving to the body of the instrument a meaning other than that which its language plainly imports, but may be resorted to in cases of ambiguity, when the intention of the framers does not clearly and definitely appear".[4] But he is not clear as to whether this rule could be applied to both the latent and patent ambiguities.

The provisions in an organic instrument are more often terse and prosaic and not explanatory in contents. Such terse and prosaic provisions lend themselves to diverse interpretations and give scope for deduction of more than one meaning or intention of the framers. Deduction of one meaning or intention will be as good as deduction of another meaning or intention. Is it not, then, reasonable to suppose that, except in cases of self-explanatory provisions, in all other cases aid of the Preamble must be taken in discerning their correct mean-

1. *Jacobson v. Massachusetts*, 197 U.S 11.
2. *Powell v Kempton Parke Company* (1899) A.C 143, 157.
3. Westel W. Willoughby, *Principles of the Constitutional Law of the United States*, 2nd Edn., 1938, p. 43.
4. *Ibid.*

ing and ascertaining the actual intention of the framers of the Constitution? In fact, another eminent writer, Story, asserts that "the preamble of a statute is a key to open the mind of the makers as to the mischiefs which are to be remedied, and the objects which are to be accomplished by the provisions of the statute".[5] If the Preamble is such a potent key, is it not reasonable to hold that it must of necessity be used to know the mind of the framers with respect to every provision of the Constitution, excepting those which are elaborate and self-explanatory, lest the judiciary should presume the intentions of the framers, not by opening the mind of the framers by this powerful key of preamble, but by knocking at the door of framers' mind with the help of the provisions whose assistance often remains in doubt? Needless to say that the presumed intention of the framers can never be a good substitute for their actual intention ascertained through the Preamble of the Constitution. It is, therefore, reasonable to say that an organic instrument and an ordinary statute should not be equated for assessing the value of the Preamble.

The foregoing proposition applies with greater force to the Preamble of the Indian Constitution than to Preambles of many other Constitutions. The fact of the matter is that the Preamble to the Indian Constitution has obtained a unique position in the document. It may be remembered that it was carved out of the 'Objectives Resolution' adopted by the Constituent Assembly in January 1947, on the basis of which the entire Constitution was subsequently drafted. The great importance attached by the framers of the Constitution to the basic document, 'Objectives Resolution', indicates the pre-eminent position given to the Preamble of the Constitution. The Objectives Resolution was variously described by the framers as "something that breathes life in human minds",[6] "a pledge which is enshrined in the heart of every man".[7] "an expression of the surging aspirations of a people",[8] "a sort

5. Story, *Commentaries*, p. 459. Also see *Bhola Prasad v. King Emperor* (1942), 46 C.W.N. (F.B.) 32, p. 37.

6. Speech of Pandit Jawaharlal Nehru, C.A.D., Vol. I, p. 57.

7. Speech of F. R. Anthony, C.A.D., Vol. I, p. 92.

8. Speech of Alladi Krishnaswami Ayyar, C.A.D., Vol. I, p. 138.

of a spiritual preamble which will pervade every section, every clause and every schedule (of the Constitution)",[9] and "a sort of dynamic, a driving power."[10]

Thus, it is clear that the Preamble to the Indian Constitution is not merely a preface to the Constitution, but the very basis of it. Besides, the various descriptions of the preambulary declaration given expression to by the Constitution-makers indicate the importance of, and place of pride given to, the Preamble in the constitutional scheme. Since it "pervades every section, every clause and every schedule of the Constitution", it is, unlike the Preambles in many other Constitutions, a sort of telescope through which, probably only through which, one can perceive clearly the intentions of the framers engraved on various parts of the Constitution. In view of these facts, it is difficult to minimise the value of the Preamble to the Indian Constitution as an aid to construe the provisions of the Constitution. As a matter of fact, the Judiciary in India, although hesitant earlier in taking the help of the Preamble,[11] has been now seeking increasingly the aid of the Preamble in interpreting specific provisions of the Constitution.[12]

## Concept of Popular Sovereignty

The Preamble makes it clear that the Constitution is ordained and established by the people, and the phrase "We, the People of India" indicates the source of power and authority. The Objectives Resolution, from which the Preamble is carved out, states: "all power and authority of the Sovereign Independent India, its constituent parts and organs of Government, are derived from the people." The resolution, in effect, lays emphasis on the concept of popular sovereignty, which seems to be at the basis of the Indian constitutional edifice.

9. Speech of N. V. Gadgil, C.A.D., Vol. II--III. p. 259.
10. *Ibid.*
11. *A. K. Gopalan v. State of Madras* (1950), S C R. 88; (1950) S C J 174. Also see *In re Berubari Union & Exchange of Enclaves,* (1960) S.C.J. 933.
12. *Golaknath v. State of Punjab,* (1967) 2 S.C.J. 486.

It may be recalled here that the concept of popular sovereignty, before it could claim a secure place in the Constitution, had to contend against equally powerful 'privilege' theory or 'divine right' theory of the rulers of the Indian Princely States. The latter was stated succinctly by the Prime Minister of the State of Bikaner, who spoke for the rulers thus: "so far as the States are concerned the power is derived from the sovereign and not from the people".[13]

The arguments of the advocates of the privilege theory were met equally by the members of the Constituent Assembly on several grounds. Advancing a legal argument, Gopalaswamy Ayyangar said that the privilege theory of the rulers was inconsistent with the statement of the Cabinet Mission, which stipulated "cession of sovereignty to the Indian people" on the conclusion of the labours of the Constituent Assembly.[14] The words "people of India" in the statement of the Cabinet Mission, he opined, must be held to include the people of Indian States also. Consequently, the phrase "cession of sovereignty to the people of India" must be construed to mean not only that such sovereignty as His Majesty in fact exercised over British India would stand ceded back to the people of India, but also such other sovereignty as His Majesty exercised over Indian States.[15] Besides this, the feature of relationship between the ruler and the people in the Indian States as visualised by the advocates of the privilege theory was inconsistent with the idea underlying the framing of a constitution by a Constituent Assembly consisting of representatives of the people in whom the constituent power was deemed to vest.[16]

As a matter of fact, the overwhelming view in the Constituent Assembly was against the privilege theory. Many members agreed that the theory, far from being in conformity with the modern values, smacked of all characteristics of much

13. C A D , Vol I, p 83, quoted by Rao Bahadur Syamanandan Sahaya.

14. For the statement of the Cabinet Mission see B N Rau, *India's Constitution in the Making*, Appendix A, pp 465-76

15. C.A.D., Vol. I, p. 124.

16. *Ibid.*

derided feudalism of the medieval age.[17] One member, therefore, with justifiable indignation stated that at this stage of the march of civilisation if the rulers were to assert their privilege to rule, another "revolution had to be gone through to get finally sanctioned the principle that political power belonged to the people".[18] According to this member, it was to assert this basic principle, namely, that political power belonged to the people, that the people in India fought the British Imperialism, several of them sacrificed their life and men in lakhs swarmed the jails.[19] There was, therefore, hardly any scope for brandishing the privilege theory, much less room for its acceptance.

Jawaharlal Nehru, who piloted the Objectives Resolution, echoed the sentiments of the overwhelming majority of the members of the Constituent Assembly when he emphatically declared at the end of the debate that "the final decision should rest with the people of the States".[20] "In the modern age," he asked, "how can a man believe for a moment in the divine and despotic rights of a human being?" Then he said, "I fail to understand how any Indian, whether he belongs to a State or to any other part of the country, could dare utter such things. It is scandalous now to put forward an idea which originated in the world hundred years ago and was buried deep in the earth long before our present age. However, I respectfully tell them (rulers and their supporters) to desist from saying such things. They are putting a wrong thing before the world and by doing so they are lowering their own status and weakening their own position."[21]

The Constituent Assembly, therefore, rejected the privilege theory of rulers and, consequently, refused to concede that power and authority could ever flow from the rulers. Thus, the concept of popular sovereignty was accepted with all its implications. The clause in the Objectives Resolution pertain-

17. See the speech of Shri Krishna Sinha, C.A.D., Vol. I, pp. 84-85.
18. *Ibid.*, p. 85.
19. *Ibid.*
20. C.A.D., Vol. II—III, p. 297.
21. *Ibid*

ing to the concept of popular sovereignty was put finally in the following words: "We, the people of India, do hereby adopt, enact and give to ourselves this Constitution."

Now the question is whether this much deified entity, the people, would have to suffer the same fate which it did through the ages and has been doing in several parts of the world. The fact of the matter is that 'the people' is a much talked about but less respected entity. Political history unfolds the truth that at several stages of history men waxed eloquent on the rights, interests and aspirations of 'the people', only to serve the interests and to vindicate the rights of a selected few. Centuries back in Rome we find the concept of popular sovereignty in *lex regia*, according to which the people conferred on the emperor "an authority defined in very broad terms".[22] The fact that the authority which the people conferred on the emperor was "defined in very broad terms" gives an impression that the entity, the people, had some importance even in the monarchical regime. Even this position was taken away by the Roman Glossators of the sixth century, particularly the authors of Justinian's Institute, when they said that in this *lex regia* the *populus* conceded to the Emperor not a part but the whole of its authority.[23] It is anybody's guess as to what happened to this entity, the people, after it conceded the whole of its authority to a monarch who was responsible to none except, perhaps, to his own conscience. Obviously, for the Roman Glossators the entity the people was no more than a medium, perhaps a mechanical one, through which power was passed on to the Emperor. Years later, in the thirteenth century, paradoxically enough, Archbishop Langton and the British nobility asserted their rights against King John, only in the name of 'the people' and wrested the famous Magna Carta from him for the benefit of the British landed gentries.[24] No doubt, the Magna Carta was wrested from the king for 'the people', but its benefit, in effect, at that time accrued only to the British

22. C H McIlwain, *Constitutionalism and the Changing World*, 1939, p. 248.

23. *Ibid.*

24. For elaborate discussion of this see McIlwain, *op. cit.*, pp 95—103.

nobility, probably due to the fact that the phrase 'the people' meant to include at that time only the British nobility. Then, down the period, in the seventeenth century, Hobbes, a staunch monarchist, made use of the very 'people,' whom he de cribed as selfish, nasty and brutish, and whom he held in unmitigated contempt, for the purpose of his "social contract." 'The people', according to him, in their momentary fit of sobriety made a social contract to arm a ruler with unfettered and absolute power, and having done that they reverted back to their perpetual state of drunkenness. To Hobbes, therefore, 'the people' is a meaningless entity, an automaton, useful only to make a social contract. The people, according to him, have no *locus standi* before a ruler, whom they armed with absolute power a little while ago, and they have to be content with the peace and order which the ruler is expected to establish.

Thus, the people have been used often as a tool in the political game either to perpetuate a regime or to overthrow the existing one or to support one or other form of government. Even in the modern age in several parts of the world everybody, whether he is a democratically elected executive, or a leader of the government who rides on the crest of self-created chaos, or a ruthless despot or an adventurous military dictator, claims to rule in the name of the people and speaks of his power being derived from them. This strange phenomenon perhaps led some political thinkers to comment in despair that "popular sovereignty is the fiction under which all the dictators have sprung up and now thrive. The people is not the sovereign; the government is."[25]

No doubt, popular sovereignty is a fiction in a constitutional framework which is meant to serve as a camouflage for the advancement of the interest of a few individuals. But not in a constitution, like the Indian Constitution, which purports to make the people the active vigilators of, and participants in, the democratic set-up. As a matter of fact, a member of the Constituent Assembly felt that despite unequivocal declaration in the Constitution about the popular sovereignty, it might be misused as had been done in the past in many countries. He,

25. McIlwain, *op cit.*, p 264

therefore, suggested that "it is very essential that, when we say 'all powers and authorities are derived from the people', we must also make it clear that the same shall remain always vested in the people".[26] This clearly shows that the doctrine of popular sovereignty was not intended by the framers of the Constitution to be a mere political fiction, but was conceived by them as one of the cardinal concepts of the constitutional edifice in India. This intention was, in fact, accomplished by them when they framed a comprehensive Constitution defining fundamental rights and their restrictions, enjoining on the State the duty to carry out directives of social policy, delimiting the functions of the various organs of the government, setting up effective safeguards against unconstitutional acts and making the government to function on the sufferance of the people. Within such a constitutional framework it is hardly possible for the State (executive, legislature and the judiciary) to rise like a Leviathan ignoring the popular sentiments and social norms, without disregarding all constitutional proprieties and norms.

Therefore, the popular sovereignty embodied in the Preamble, which is considered the basic concept in the Indian constitutional system, is not a mere fiction but a potent and active constitutional precept. 'The people' is, therefore, the ultimate and real sovereign, and the government, which is the creature of the Constitution, is its agent.

It is now necessary to gather some of the formal implications of the concept of popular sovereignty. First of all, from the point of view of constitutionalism, the fact that the whole Constitution is issued from the will of the people would show that the Indian Constitution is not merely "a selection of rules, legal and non-legal",[27] nor an "assemblage of laws, institutions and customs, derived from certain fixed principles of reason",[28] nor an instrument bestowed upon people by Providence,[29] but

26. Speech of Vishwambhar Dayal Tripathi, C A D., Vol II-III, p. 292.

27. K.C. Wheare, *Modern Constitutions*, H. U. L., 1952, p 2.

28. This is the meaning given to the "constitution" by Bolingbroke, quoted by K C Wheare, *Modern Constitutions*, 1952, p. 3.

29. Podsnap thinks that the British constitution has been bestowed upon Englishmen by Providence; quoted by K C. Wheare, *op. cit.*, p. 18.

it is an organic instrument which embodies the social values and aspirations of the people. What is more, it is a manifesto of the people, which is intended to be the charter of the land. The Indian Constitution cannot be described in any other way, for it contains more of existing social values and aspirations of the people than mere rules of law. The truth of the matter is that an instrument which issues from the will of the people is bound to contain more of their intentions, social values and aspirations than mere rules of law, institutions and customs derived from some fixed abstract principles.

Secondly, the Constitution derives its supremacy and fundamental character from the fact that it is an instrument ordained and established by the ultimate sovereign, the people of India. Supremacy of the Constitution connotes that all statutes enacted by legislative bodies consisting of representatives of the ultimate sovereign, the people, must of necessity conform to the provisions of the Constitution. To state it slightly differently, no law enacted by legislative bodies shall override or contravene the provisions of the supreme or fundamental law, namely, the Constitution; and if there is any contravention, such contravening law must be deemed to have been made without the authority or sanction of the fundamental law, and, therefore, void to the extent of its contravention. Thus, the doctrine of ultra vires is the direct result of the concept of supremacy of the Constitution. Therefore, even if the framers of the Constitution had failed to incorporate Art. 13 (2) spelling out the doctrine of ultra vires, the position would not have been different. Once the supremacy or fundamental nature of the Constitution is established, the doctrine of ultra vires inevitably follows from it. Kania, C. J., therefore, rightly pointed out in *A. K. Gopalan's case*[30] that the inclusion of Art. 13 (1) and (2) in the Constitution appears to be a matter of abundant caution.

Finally, the concept of popular sovereignty indicates a mode of interpretation the courts have to adopt to resolve any semblance of conflict between different provisions in the Constitution. One question which often comes up for consideration

30. (1950) S.C.R. 88, p. 99.

is what view the courts should take when there is semblance of conflict between a fundamental right and a directive principle, that is, between a fundamental right and a law which gives effect to one of the directive principles. One view is that fundamental rights being sacred, they should be preserved at any cost. Therefore, conflict between a fundamental right and a directive principle must of necessity be resolved in favour of the fundamental rights. Consequently, any law which seeks to implement any directive principle must be set aside if it is found in conflict with a fundamental right.[31] As against this view, another school of thought holds that in all such conflicts the interest of the society and the people as a whole must be considered paramount in arriving at a decision. Therefore, in all such cases of conflict the courts should apply the doctrine of harmonious construction and give effect to the law which is enacted to carry into execution a directive principle and is designed to benefit the society as a whole, notwithstanding any aberrations or dents it causes on a fundamental right. This view envisages subordination of social interest in any fundamental right to the larger social interest in the rights of the community.[32] There is a third view expounded by Prof. C. H. Alexandrowicz, according to which the courts, in order to avoid similar conflicts, should give the greatest possible weight to the directive principles for the purpose of interpretation of the provisions relating to fundamental rights. The courts, according to him, must take the aid of directive principles to ascertain whether an impugned law is reasonable restriction on the fundamental rights or not; and a law, which is decidedly designed to carry into effect any of the directive principles, may be upheld on the ground that it is made in the "public interest" or for a "public purpose", or that it is a "reasonable restriction" on the fundamental rights.[33]

The concept of popular sovereignty, however, clinches the argument in favour of the second and third view. It may

31. *State of Madras v. Champakam Dorairajan*, A I.R. 1951 S.C 226.

32. See the dissenting judgment of S.R. Das in *Subodh Gopal's case*, A I R 1954 S.C. 92, p. 113.

33. C H. Alexandrowicz, *Constitutional Developments in India*, 1957, pp. 106-107.

be remembered that "the people" made not a part of the Constitution but the whole Constitution of which Part IV dealing with directive principles is a part. The first view of interpretation based on the sanctity of individual rights may be relevant in a Constitution which contains only a bill of rights as in the case of the Constitution of the United States, and also in a document which has been conceded by the ruler to the ruled by force of circumstances, as in the case of Magna Carta, but it cannot be applied on an analogy of the American constitutional position or the Magna Carta to an instrument like the Indian Constitution which places the aspirations of the people designed in the form of directive principles side by side with the fundamental rights.

Besides, it may be noted that the phrase 'the people' has been used in a compendious or collective sense to denote the importance and preponderance of collectivity and society as a whole as against or in contra-distinction with individuals or part of a society. 'Popular sovereignty' is a collective expression and indivisible in connotation. Though individuals together constitute 'the people', the 'popular sovereignty' is not the sum total of the individual sovereignties Therefore, there cannot be group or individual sovereignties. The use of the collective expression shows that social interest in the rights of the community as a whole has been given preponderance over the social interest in individual rights. A natural corollary of this position is that any legislative measure, which is designed to benefit the society as a whole, and more particularly the law which seeks to carry into effect the directive principles, must be given greater weight by the courts than the fundamental rights which are indirectly and incidentally affected by it. No doubt, individuals and their fundamental rights are important, but they have to function and exercise the rights within the society shaped in accordance with the welfare principles embodied in the Constitution. Advancement or the welfare of the society as a whole is much more necessary to the individuals themselves than the meaningless preservation of individual rights in a static and stultified society. After all, what use certain economic rights have for many people unless they are rendered capable of exercising them by remaking social and economic condi-

tions in accordance with the directive principles? Though the welfare legislations seem to curtail the rights of some individuals at a time, they, in fact, re-cast the economic and social conditions and create a situation wherein the rights, which appear to have been curtailed, could be exercised with greater vigour and by larger number of people. Therefore, any narrow interpretation based on the sanctity of fundamental rights, which throws out of gear socially beneficial legislations, would be against the concept of 'popular sovereignty' which is the ultimate source of the Constitution.

## Concept of Socio-Economic Justice

The Preamble of the Constitution states that the people of India have solemnly resolved "to secure to all its citizens: Justice, social, economic and political.....; Equality of status and of opportunity". The Objectives Resolution from which the above phrase has been carved out states: "The Constituent Assembly declares its firm and solemn resolve ...to draw up for her future governance a Constitution—

"(a) 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 ....and

(b) wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes."

Thus, the concept of socio-economic justice has been incorporated in the Preamble, but its actual connotations and intentions of the framers of the Constitution incorporating it may be gathered from the opinions expressed by the members of the Constituent Assembly.

On the phrase relating to socio-economic justice in the Objectives Resolution two different opinions were expressed by some members in the Constituent Assembly. According to one opinion, the phrase should have been so framed as to express in clear terms the acceptance of the doctrine of socialism. Putting forward this view, Dr. B R Ambedkar stated that if this resolution "has a reality behind it and a sincerity..., I should have

expected some provision whereby it would have been possible for the State to make economic, social and political justice a reality and I should have from that point of view expected the Resolution to state in most explicit terms that in order that there may be social and economic justice in this country, there would be nationalisation of industry and nationalisation of land. I do not understand how it could be possible for any future Government which believes in doing justice, socially, economically and politically, unless its economy is a socialistic economy."[34]

The above view was not shared by others who opined that the Constituent Assembly had no sufficient mandate to incorporate in the Constitution such an economic policy of doctrinaire character.[35] It was also felt by some that incorporation of a particular economic doctrine might impart rigidity into the constitutional framework which might not be very conducive to the smooth working of the democratic apparatus. Alladi Krishnaswami Ayyar, therefore, pointed out that the Constitution should not be rendered rigid by incorporating explicitly a particular economic doctrine, and that it should "contain the necessary elements of growth and adjustment needed for a progressive society."[36] Speaking in support of the phrase, Jawaharlal Nehru, who was the sole architect of the Objectives Resolution, said: "If, in accordance with my own desire, I had put in that we want a socialist state, we would have put in something which may be agreeable to many and may not be agreeable to some and we wanted this Resolution not to be controversial in regard to such matters. Therefore, we have laid down, not theoretical words and formulae, but rather the content of the thing we desire."[37] In view of the explanatory statement of Jawaharlal Nehru, the phrase dealing with socio-economic justice was accepted without any change.

The various views of the members of the Constituent Assembly and final acceptance of the phrase without any change clearly indicate that the Framers unequivocally laid down socio-economic justice as a goal to be achieved by the future governments in

34. C.A D., Vol. I, pp. 97-98.
35. See the speech of M. R Masani, C.A.D., Vol. I, p. 91.
36. C.A.D., Vol. I, p. 138
37. *Ibid.*, p. 60

India, and rejected the idea of incorporating in the Constitution particular means to achieve it. Thus, every government which purports to function within the constitutional framework is duty-bound to strive to secure socio-economic justice for the citizen, but what means it should adopt to achieve the goal is left to each government to decide in accordance with particular mandate it received from the people in each election. If a particular government is of the opinion that *laissez-faire* economy is the best means to achieve the socio-economic justice and if the opinion of the government is in consonance with the mandate received from the people in the general election, there is nothing in the Constitution to prevent the government from pursuing the chosen path to achieve the goal. But no government can ignore or try to circumvent the constitutional mandate, namely, the socio-economic justice, with impunity.

It is, therefore, necessary to know the meaning of the concept of socio-economic justice. Statements made by certain members in the Constituent Assembly explaining the concept help us to discern its meaning. The phrase in the Objectives Resolution pertaining to socio-economic justice, in M.R. Masani's view, clearly rejects the present social structure and the social *status quo*. "It also means," according to him, "that the people of this country, so far as any Constitution can endow them, will get social security—the right to work or maintenance by the community."[38] Proceeding further he said that the Resolution also "envisages far-reaching social change—social justice in the fullest sense of the term—but it works for those social changes through the mechanism of political democracy and individual liberty."[39]

On the other hand, Seth Govind Das said, "keeping in view the condition of the world and the plight of India, we can say that our Republic will be both democratic and socialist. . . .if true peace is to be realised, it can only be realised through socialism. No other system can give us true peace."[40] As to the economic justice, N. V. Gadgil said that it could only be secured if the

38 C.A.D., Vol. I, p. 90.
39. *Ibid.*, p. 92.
40. *Ibid.*, pp. 105-106

means of production in the country ultimately came to be socially owned. Private enterprises might be there, but in a limited manner.[41]

Referring to socio-economic justice contemplated in the Resolution, Dr. S. Radhakrishnan said that it intended to effect a smooth and rapid transition from a state of serfdom to one of freedom.[42] Then, emphasising the need for such a change, he said, "it is therefore necessary that we must remake the material conditions; but apart from remaking the material conditions, we have to safeguard the liberty of the human spirit."[43]

It is anybody's guess whether socio-economic justice could be achieved only through socialism and socialisation of production as pointed out by Seth Govind Das and N. V. Gadgil respectively. The other statements mentioned above, however, indicate clearly the meaning of the concept of socio-economic justice. According to them, (i) the concept means the rejection of the "present social structure and the social *status quo*", (ii) it contemplates a smooth and rapid "transition from a state of serfdom to one of freedom", and (iii) it envisages remaking of material conditions. This preambulary concept of socio-economic justice has been translated by the Framers into specific provisions in Part III and Part IV of the Constitution. This constitutional goal of socio-economic justice can be achieved only if the courts adopt a pragmatic and sociological approach without making much ado about the rights in interpreting socio-economic legislations, which contemplate change in the social structure, effect a transition from serfdom to freedom or attempt to remake material conditions of the society. The fact that such a goal has been embodied in the Preamble itself testifies its value—signifying predominant position in the Constitution.

41. C.A.D., Vol. II-III, p. 259.
42. *Ibid.*, p. 253.
43. *Ibid.*, p. 257.

## Chapter Two

# THE CONCEPT OF FUNDAMENTAL RIGHTS

### Introduction

Inclusion of a list of fundamental rights in a written constitution was not a new idea to the freedom fighters and constitution-makers of India. The idea of incorporation of a bill of rights had been conceived by the Founding Fathers of the Constitution of the United States, and it gained so much currency after the First World War that the constitutions of many European States invariably included a bill of rights. But the Indian leaders felt the need of a bill of rights not because it was the fashion of the era but because it was necessary to restrain the government from acting arbitrarily.

As a matter of fact, there were two schools of thought in India which subscribed to two divergent views on the inclusion of a list of fundamental rights in a written constitution. One school of thought, which represented the strong protagonists of British constitutional system, spurned the idea of including a list of fundamental rights in the Constitution. This school held the view that the inclusion of a bill of rights in a written constitution was unnecessary, unscientific and more often harmful. This view later reflected in the report of the Simon Commission submitted prior to the formulation of the Government of India Act of 1935. It observed that though bill of rights had been inserted in many European Constitutions after the war, experience had not shown them to be of any great practical value. Abstract declarations, it opined, were useless unless there existed the will and means to make them effective.[1] This statement obviously had reference to the constitutions wherein declaration of fundamental rights remained as a platitudinous statement and pious wish without sufficient means to enforce

1. For quotations from the report of the Simon Commission, see-D D. Basu, *Commentary on the Constitution of India*, Fourth Edition, Vol I p. 114.

them, but not to the constitutions which rendered the declaration of fundamental rights effective by enforcement measures stipulated in the constitution itself.

Another school of thought, which represented the views of the majority of the Indian leaders, strongly favoured the inclusion of a list of fundamental rights in the Constitution. Eminent men, who belonged to this school of thought, had ample experience of arbitrary and ruthless measures taken by the British Executive in India against the national leaders during the freedom struggle and also of the steps taken by the government to suppress with impunity such important rights as freedom of speech, freedom of association, freedom of the press and personal liberty. Naturally, therefore, they strongly felt that only a written guarantee of individual rights could deter any government from acting arbitrarily.

Besides this, there was another factor which influenced these men, and that was the existence of minority communities in India which were nursing a feeling of helplessness against any possible arbitrary rule of the majority community and a fear of insecurity. The protection of cultural, religious and other interests of the minority communities was rightly considered *sine qua non* for a free democracy and just rule, and that could be ensured, they thought, only by written guarantee of individual rights. Many a leader of India, therefore, strongly felt the need of including a list of fundamental rights in the Constitution. Their determination reflected in the Nehru Committee Report of 1928 and later in the Karachi Resolution on Fundamental Rights. Finally, the Cabinet Mission, which was solely manned by Englishmen, unequivocally subcribed to this view and in its statement of 1946 it strongly recommended the formation of an Advisory Committee to go into the question of formulation of a list of fundamental rights.[2] Thus, in 1947 when the leaders of India settled down in the Constituent Assembly to frame a Constitution for India it was decidedly settled that a list of fundamental rights should be included in the Constitution. Accordingly, the Framers

2 For the statement of the Cabinet Mission, see B N. Rau. *India's Constitution in the Making*, Edited by B. Shiva Rao, Appendix A.

addressed themselves, *inter alia,* to the task of formulating a list of fundamental rights, and the result was Part III of the Constitution which guaranteed to persons and citizens several fundamental rights.

The incorporation of fundamental rights is, therefore, intended to serve two purposes, namely, (i) to prevent the executive from acting arbitrarily, and (ii) to ensure some amount of security and protection to the minorities of various types in India. However, a view has been developed by the Supreme Court of India and a few writers that the fundamental rights embodied in Part III of the Constitution are immutable and transcendental in character. In support of this view the fundamental rights have been variously described as "paramount",[3] "sacrosanct",[4] "rights reserved by the people",[5] "inalienable and inviolable"[6] and "transcendental".[7] The immutability or permanence of the fundamental rights is sought to be established first on the reasoning that these rights are rooted in the doctrine of natural law and, therefore, traditionally known as "natural rights", and, secondly, on the ground that they have been given a place of permanence by the Constitution within its scheme. It is, therefore, necessary to dwell on the basis and the nature of fundamental rights as reflected in the scheme of the Constitution to ascertain the concept of fundamental rights.

## Basis of Fundamental Rights

Some scholars hold the view that "the concept of fundamental rights is rooted in the doctrine of natural law",[8] and some

3. *A. K. Gopalan v. State of Madras,* (1950) S.C.J. 174; (1950) S.C.R. 88, p. 198.

4. *State of Madras v. Champakam Dorairajan,* (1951) S.C.J. 313; (1951) S.C R. 825.

5. *Pandit M. S. M. Sharma v. Shri Sri Krishna Sinha,* (1959) S.C.J. 925; (1959) 1 S.C.R. (Supp.) 806.

6. *Ujjam Bai v. State of U. P.,* (1963) 1 S.C.R. 778; A.I.R. 1962 S.C. 1621.

7. *Golak Nath v. State of Punjab,* (1967) 2 S.C.J. 486, pp. 498-99.

8. Justice K. Subba Rao, *Fundamental Rights under the Constitution of India,* (Rt. Hon. V. S. Sastri Memorial Lecture, University of Madras), p. 1.

others go further and say that "human or fundamental rights is the modern name for what have been traditionally known as natural rights."[9] The latter proposition has been affirmed by the Supreme Court in its majority decision in *Golaknath v. State of Punjab.*[10] This proposition inevitably leads to the conclusion that the fundamental rights are unchangeable and, therefore, on their inclusion in the Constitution they remain entrenched in it. In fact, the concept of immutability or transcendental character of fundamental rights is deduced from the notion that the fundamental rights are rooted in the doctrine of natural law. It may, however, be remembered that natural law, on which the scholars try to base the fundamental rights, is an enigmatic concept. Some theorists ascribe divine origin to the concept of natural law and some others speak of right reason as its origin, not to speak of positivists who denounce it. Among the supporters of the first view are the ancient Greeks, scholastic writers and other political thinkers. The classic instance of this theme in Greek literature is the *Antigone* of Sophocles. When Antigone was charged with having broken the law laid down by King Creon, who was her father, she replied to Creon : "Yea, for these laws were not ordained of Zeus; And she who sits enthroned with gods below, Justice, enacted not these human laws. Nor did I deem that thou, a mortal man, could'st by a breach annul and override the immutable unwritten laws of Heaven. They were not born to-day nor yesterday; they die not; and none knoweth whence they sprang."[11] This statement brings out "the conflict between a duty to human law and a duty to the law of God",[12] establishes the superiority of the latter, and identifies law of nature with the law of God.

The question, however, is whether the concept of law of nature or natural law with its divine origin could be employed to explain the concept of fundamental rights enshrined in the

9. Gaius Ezajiofar, *Protection of Human Rights under the Law*, 1964, p. 3.

10. (1969) 2 S.C.J. 486, p. 497.

11. For the quotation see George H. Sabine, *A History of Political Theory*, 3rd Edn., p. 39.

12. Sabine, *ibid*,, p. 39.

Indian Constitution. It may be noted that Art. 27 of the Constitution guarantees right against any compulsion to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion, and Art. 30 (1) guarantees to all minorities the right to establish and administer educational institutions of their choice. If we accept the concept of natural law with its divine origin as a basis of fundamental rights, then inevitably the two rights guaranteed under Arts. 27 and 30 (1) must also be deemed to be rooted in such a doctrine of natural law. But it is hardly possible to say that these rights have any semblance of natural rights, much less they could be said to have originated from natural law and divine will. Therefore, it is difficult to agree with the general statement that the concept of fundamental rights adopted by the Indian Constitution is rooted in the doctrine of natural law.

The great exponent of the second theory of natural law is Hugo Grotius. According to him, "the law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity: and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God."[13] He identifies the law of nature with the "dictate of right reason" and makes God the author of nature. This gives rise to a doubt whether "the dictate of right reason", which he speaks about, is that of human beings or of God. If it is the "right reason" of human beings, it must be remembered that such "right reason" is essentially a product of history, environment and of the age in which the individuals are found. History, environment and age are not static factors, and they keep on changing. "Right reason" of human beings, therefore, changes from age to age and with it changes the concept of rights. Some rights which were once considered sacred have now entered a state of oblivion. A few of them are not rights at all to-day, while others have undergone a tremendous

13. Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*, Tr. by Francis W. Kalsey and others, *The Classics of International Law*, ed. by J B. Scott, Vol. II, 1925, pp. 38-39.

metamorphosis. For example, right to own slaves, which was considered inviolable centuries ago, is not a right at all in the modern age, for the present "right reason" of human beings does not vouchsafe it. Freedom of contract, though still regarded as an important aspect of individual freedom, possesses no longer the absolute value attributed to it a century ago.[14] It has, to a great extent, given way to freedom of labour.[15] This change in the concept of right is obviously due to a change in the "right reason" of the people of the present generation. Thus, it is clear that "right reason" of human beings is a changing concept and, therefore, if it is conceded that the law of nature is a product of "right reason" of human beings, then it must also be a changing doctrine. If law of nature is such a changing doctrine, then the fundamental rights, which are said to have been rooted in the law of nature, can hardly be construed as immutable or transcendental.

Hugo Grotius, however, does not seem to subscribe to the view that the law of nature is a changing doctrine. He specifically imparts a character of immutability to it in these words: "The law of nature, again, is unchangeable—even in the sense that it cannot be changed by God ..... Just as even God, then, cannot cause that two times two should not make four, so He cannot cause that which is intrinsically evil be not evil."[16] From this it is clear that the "right reason" which he speaks of is the "right reason" of God. In that case there is not much difference between his theory of natural law and the theory of natural law which is supposed to spring from the Divine Will, and, therefore, his theory of natural law is as much unacceptable as the other theory and it is difficult to base fundamental rights enshrined in the modern constitutions on such enigmatic and Divine-willed theory of natural law. It is, therefore, not unreasonable to say that in view of the fact that several types of rights are mentioned in the Indian Constitution the fundamental rights can hardly be said to have been rooted in the doctrine of natural law conceived by the ancient philosophers.

14. W. Friedmann, *Legal Theory*, 4th Edn., p. 369.
15. *Ibid.*
16. Hugo Grotius, *op. cit.*, p. 40.

The concept of fundamental rights included in the Indian Constitution must of necessity be ascertained from the types and nature of rights included therein and from the discernible intention of the Framers. Article 17 of the Constitution has abolished "untouchability" and forbidden its practice in any form. It is difficult to say that this is a right in the same sense as a right to life or right to equality is. This provision has been incorporated in the Constitution in order to do away with the practice of untouchability found in the society, which, according to the modern notion, is a social evil. Again, Art. 18 states that no title, not being a military or academic distinction, shall be conferred by the State and Art. 24 prohibits employment of children below the age of fourteen in any factory or mine. These can hardly be called rights. The former is obviously an outcome of the concept of egalitarian society, whereas the latter is intended to protect the health of children and prevent the practice of employing children in factories, which is considered to be a social evil. These provisions, therefore, visualise only the eradication of certain practices found in the Indian society, which are considered by the present generation as social evils.

The foregoing survey will show, unless we abandon ourselves to pure dialectics, that the above mentioned provisions and similar other provisions in Part III of the Constitution do not enshrine rights rooted in the doctrine of natural law, but instead embody the social values of the present generation. A question may, however, be asked whether the same may be said about the right to equality, right to property and the right to personal liberty mentioned in Part III of the Constitution. A correct answer to this question requires a brief analysis of the evolution of these rights through the ages.

Even before the Stoics, Aristotle expounded the concept of equality. He advocated *justitia distributiva*, according to which equal treatment should be accorded to those who were equal before the law.[17] But this equality of treatment was confined to citizens, from which category artisans and slaves were excluded. He excluded artisans and slaves from citizenship

17. W. Friedmann, *op. cit.*, p. 385.

on the ground that "virtue is impossible for men whose time is consumed in manual labour".[18] His concept of equality was, therefore, a limited concept and applied only to a designated section of the population. This lack of universal application of the concept of equality was not due to the fact that by nature slaves and artisans were less human in character, endowments and aspirations than the citizens of the city state, but mainly due to the then prevailing social values which assigned inferior status to them. Aristotle, who imbibed the spirit and social values of the period, could not think in terms of extending the concept of equality to artisans and slaves.

The Roman jurists received the doctrine of equality from the Stoics, but they made a distinction between the law of nature which postulated absolute equality, and the law of nations (*jus gentium*) which recognised slavery.[19] Even though the Christian doctrine was pledged to the fundamental equality of men, in the scholastic and catholic legal system this fundamental equality, as pointed out by Prof. Friedmann, was "subordinated to the acceptance of the existing social order as one ordained and to be borne—subject to certain principles of justice and charity."[20]

It is said, and rightly so, that "the modern postulate of legal equality dates from the era of the French and American Revolutions."[21] But it may be noted that though the concept of equality and equal protection is included in the Constitution of the United States,[22] it has been given different meaning at different times. The "equal protection" clause of the Fourteenth Amendment was intended to guarantee equal treatment to the Negroes and to enforce absolute equality of the two races. But in 1896 the Supreme Court gave a different meaning to the concept of equality in *Plessy v. Ferguson*.[23] A Louisiana statute, which required separate but equal accommodations on railroads, was upheld not only under the police power as a

18. G. H Sabine, *op. cit.*, p. 95.
19. W. Friedmann, *op. cit.*, p. 385.
20. *Ibid.*
21. *Ibid.*
22. See Amendment 14 of the U.S. Constitution.
23. 163 U. S. 537, 1896.

measure designed to preserve public peace, but also on the ground that "separate but equal" provisions did not violate "equal protection" clause of the Constitution. Justice Brown, who spoke for the Court, asserted that "in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or commingling of the two races upon terms unsatisfactory to either."[24] Thus, the *Plessy* decision interpreted the concept of equal protection as "separate but equal protection" doctrine. The public opinion and the social values then were not sufficiently strong enough to compel the Court to give to the concept of equality a meaning different from the one adopted by it. Perhaps it is more correct to say that the social values of the period supported the interpretation given by the court.

Thurgood Marshall, the noted Negro spokesman, later characterized the "separate but equal" doctrine as "a faulty conception of an era dominated by provincialism".[25] True, it is a faulty conception to-day. But the fact remains that it was an accepted conception of that period, and the court simply adopted it as a valid doctrine of the era. It was only in 1954 that the Supreme Court discarded the "separate but equal doctrine" when it ruled in *Brown v. Topeka*[26] that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." This change in judicial attitude was definitely due to the change in the society's conception of equality. The Chief Justice rightly remarked in *Brown's case* that "in approaching this problem we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Fergusson* was written. We must consider public education in the light of its full development and its present place in American life throughout the nation."[27]

24. *Ibid.*

25. For quotation see A. T. Mason and W. M. Beaney, *The Supreme Court in a Free Society*, 1959, p. 261.

26. 347 U. S. 483.

27. Quoted in A. T. Mason and W. M. Beaney, *op. cit.*, p. 262.

Thus, the foregoing survey of the evolution of the concept of equality shows that it has never been conceived as a static and eternal doctrine with an unchangeable meaning, and, on the other hand, it has been given, in consonance with the changing values of the society, different meaning at different times. The modern concept of equality is, therefore, different from the concept expounded by Aristotle, Roman Jurists, Scholastic writers or in *Plessy* decision, and is as much sustained by the social values of the present generation as the equality doctrine of Aristotle, Roman Jurists, Scholastic writers and of the *Plessy* decision was by the social values prevailing in the respective periods.

The same may be said about other rights and particularly about the right to property. In fact, the concept and freedom of property changed from time to time in consonance with the changing values of the society. Speaking in the Constituent Assembly of India on 10th September, 1949, on the changing concept of property, Jawaharlal Nehru said that it had changed from the earlier conception of "property in human beings" as was evidenced in the institution of slavery in olden days to the modern conception of "property in a bundle of papers" which consisted of securities, promissory notes, etc.[28] The changing concept of freedom of property has been clearly analysed by Prof. Friedmann. He says that according to Locke, the makers of the French and American Revolutions, Bentham, Spencer and the leaders of earlier liberal movement, freedom of property or "estate" constituted a cardinal principle and the justification for this theory was the mingling of man's labour with an object. This ideology persisted, he says, despite the increasing dissociation of property and labour.[29] But in modern democracy, says Prof. Friedmann, freedom of property has been tempered with social responsibilities attached to property.[30] "The limitations on property," he states, "are of many different kinds. The State's right of taxation, its police power, and the power of expropriation—subject to fair compensation—are examples of public restrictions on freedom of

28. C.A.D. Vol. IX, pp. 1194-95.
29. W. Friedmann, *op. cit.*, pp. 373-74.
30. *Ibid.*, p. 374.

property which are now universally recognised and used. Another kind of interference touches the freedom of use of property, through the growing number of social obligations attached by law to the use of industrial property, or contracts of employment."[31] Then he concludes that "in most countries statutes and courts have supplemented each other in bringing about this gradual adjustment in the rights of property."[32] It is true that statutes and courts often bring about a gradual adjustment or change in the concept of a particular right. But the compelling force behind such adjustments or changes, which the statutes and courts have been constrained to bring about, is undoubtedly the changing values of the society and the resultant change in the attitude of the society towards a particular right.

Thus the types and nature of rights enumerated in Part III of the Constitution and the tenor of certain provisions included therein hardly support the proposition that the fundamental rights listed in the Indian Constitution are rooted in the enigmatic, abstract and Divine-willed doctrine of law of nature. The fact that more definite rights like right to equality and right to property have borne different connotations at different periods of human history shows that even these rights cannot be described strictly as natural rights issuing from the Divine-willed law of nature. It is, therefore, more appropriate to say that the fundamental rights listed in Part III of the Constitution are not so much rooted in the doctrine of natural law as they are based on the social values of the society.

## Nature of Fundamental Rights as Reflected in the Scheme of the Constitution

Art. 13 (2) of the Constitution states that "the State shall not make any law which takes away or abridges the rights" conferred by Part III and "any law made in contravention of this clause shall, to the extent of the contravention, be void". Then, sub-clause (a) of Art. 13 (3) gives an inclusive definition

31. *Ibid.*
32. *Ibid.*, pp. 374-75.

of the word "law". It says: "In this article, unless the context otherwise requires, 'law' includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law." The provisions are clear enough to show that rights embodied in Part III are protected against erosive acts of the State.[33] This means, in effect, that neither a legislative organ nor an executive body in India may tinker with the fundamental rights beyond the terms of Part III. There are no two opinions on this point.

The crux of the problem, however, is: whether the tenor of the provisions of Art. 13 (2), viewed in the context of the scheme of the Constitution, is such as to insulate the fundamental rights against the constitutional amending power? Art. 368, which is the sole Article in Part XX and which is found under the caption "Amendment of the Constitution", states that "an amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill." This is the main provision of Art. 368. Its proviso provides that if such amendment seeks to make any change in (*a*) Art. 54, 55, 73, 162 or 241, or (*b*) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or (*c*) any of the Lists in the Seventh Schedule, or (d) the representation of States in Parliament, or (*e*) the provisions of this Article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making for such amendment is presented to the President for assent. There is nothing in the provisions of this Article

33. "State is defined in Art. 12 thus: "In this Part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

to show that the fundamental rights are excluded from the ambit of the amending power. The immutability of the fundamental rights may, therefore, be established only if it is proved that they are beyond the reach of the amending power. Naturally, attempts have been made to keep the rights outside the purview of the amending power.

**Judicial Interpretation**

In *Shankar Prasad v. Union of India*,[34] where the validity of the Constitution (First Amendment) Act of 1951, which inserted Arts. 31—A and 31—B in the Constitution, was challenged, it was contended that the Amendment Act in so far as it purported to take away or abridge any of the fundamental rights fell within the prohibition of Art. 13 (2). The rationale of the contention was that 'the State', by virtue of definition in Art. 12, included Parliament and, therefore, 'law' must include a constitutional amendment. Besides, it was contended that the framers of the Constitution, who realised the sanctity of the fundamental rights conferred by Part III, intended to make them immune not only from ordinary laws but also from constitutional amendments.

But Patanjali Sastri, J., who spoke for the Court, rejected the above contention and held that "although 'law' must ordinarily include constitutional law, there is a clear demarcation between the ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power."[35] Proceeding further he said: "No doubt our Constitution-makers, following the American model, have incorporated certain fundamental rights in Part III and made them immune from interference by laws made by the State. We find it, however, difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from constitutional amendment. We are inclined to think that they must have had in mind what is of more frequent occurrence, that is,

34. (1952) S.C.R. 89.
35. *Ibid.*, p. 106.

invasion of the rights of the subjects by the legislative and the executive organs of the State by means of laws and rules made in exercise of their legislative power and not the abridgement or nullification of such rights by alteration of the Constitution itself in exercise of sovereign constituent power."[36] So he came to the conclusion that 'law' in Art. 13 "must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that Art. 13 (2) does not affect amendments made under Art. 368."[37] Thus, in this case the Supreme Court rejected the doctrine of immutability of fundamental rights.

An attempt was made subsequently in *Sajjan Singh v. State of Rajasthan*[38] to reopen the whole issue settled in *Shankari Prasad's case*. A strong plea was made before the Supreme Court to re-consider its earlier view. But the Court rejected the demand and declared categorically that fundamental rights listed in Part III were not eternal and inviolate. Gajendragadkar, C. J., who handed down the opinion of the Court, stated that the fundamental rights contained in relevant provisions of Part III of the Constitution could justly be described as "the very foundation and the corner-stone of the democratic way of life ushered in this country by the Constitution", but it could not be said that the fundamental rights guaranteed to the citizens were eternal and inviolate in the sense that they could never be abridged even by amendment.[39] This proposition was explained further by him with the help of the scheme of Art. 19 of the Constitution. The scheme of this Article itself, he said, indicated that the fundamental rights guaranteed by sub-clauses (a) to (g) of clause (1) could be validly regulated in the light of the provisions contained in clauses (2) to (6) of Art. 19. "It is hardly necessary to emphasize," said the Chief Justice, "that the purposes for which fundamental rights can be regulated which are specified in

36. *Ibid.*
37. *Ibid.*, p. 107.
38. A.I.R. 1965 S.C. 845.
39. *Ibid.*, p. 857.

Cls. (2) to (6), could not have been assumed by the Constitution-makers to be static and incapable of expansion. The Constitution-makers must have anticipated that in dealing with socio-economic problems which the legislatures may have to face from time to time the concept of public interest and other important considerations which are the basis of Clauses (2) to (6) may change and may even expand; and so, it is legitimate to assume that the Constitution-makers knew that Parliament should be competent to make amendments in these rights so as to meet the challenge of the problems which may arise in the course of socio-economic progress and development of the country. That is why we think that even on principle, it would not be reasonable to proceed on the basis that the fundamental rights enshrined in Part III were intended to be finally and immutably settled and determined once for all and were beyond the reach of any future amendment."[40]

The Supreme Court, however, in six to five, sharply divided, decision rendered in *Golaknath v. State of Punjab*[41] has over-ruled the proposition laid down in its two earlier decisions and ruled instead that the fundamental rights are given transcendental position in the Constitution and are kept beyond the reach of the amending power of Parliament. According to the Court, "the incapacity of the Parliament therefore in exercise of its amending power to modify, restrict or impair fundamental freedoms in Part III arises from the scheme of the Constitution and the nature of the freedoms."[42]

In support of the above view Subba Rao, C. J., who delivered the majority judgment of the Court, adduced three important reasons. First, "the people" have embodied in the Preamble their ideals and aspirations of securing justice, liberty, equality and fraternity and worked out in detail in the Constitution the mode of realisation of these objectives.[43] They, in giving themselves the Constitution, "have reserved the fundamental freedoms to themselves—Art. 13 merely incorporates

40. *Ibid.*, p. 858.
41. (1967) 2 S.C.J. 486.
42. *Ibid.*, p. 499.
43. *Ibid.*, p. 496.

ordinary legislative process. Therefore, whether in the field of constitutional law or statutory law amendment can be brought about only by law.[52]

Proceeding further Subba Rao, C J., states that "there is internal evidence in the Constitution itself which indicates that amendment to the Constitution is a 'law' within the meaning of Art. 245. Now, what is 'law' under the Constitution? It is not denied that in its comprehensive sense it includes constitutional law and the law amending the Constitution is constitutional law. But Art. 13 (2) for the purpose of that Article gives an inclusive definition. It does not exclude constitutional law. It prima facie takes in constitutional law. Art. 368 itself gives the necessary clue to the problem. The amendment can be initiated by the introduction of a bill; it shall be passed by the two Houses; it shall receive the assent of the President. These are well known procedural steps in the process of law making."[53] In this connection he refers to observation made by the Supreme Court in *Shankari Prasad's* case,[54] according to which the three-fold procedures, namely, initiation of amendment by the introduction of a bill, the passing of the bill by the two Houses and the President's assent to the bill, mentioned in Art. 368 reflect familiar features of Parliament's procedures laid down in Art. 107 (1),[55] Art. 107 (2)[56] and Art. 111[57]

52. *Ibid.*

53. *Ibid.*

54. (1951) S.C.R. 89.

55. Art. 107 (1) states: "(1) subject to the provisions of Articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament"

56. Art. 107 (2) says: "(2) Subject to the provisions of Articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses."

57. Art. 111 provides: "When a Bill has been passed by the House of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will consider the Bill or any specified provisions thereof and, in particular, will

respectively.[58] It is also pointed out in the same decision that Art. 368 is not a complete code in respect of the procedure, for there are gaps in the procedure as to how and after what notice a bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained. According to the Court, therefore, "having provided for the Constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rule made by each House (Art. 118), the makers of the Constitution must be taken to have intended Parliament to follow that procedure, so far as they may be applicable consistently with the express provision of Art. 368, when they have entrusted to it the power of amending the Constitution."[59] Relying on these observations Subba Rao, C J , states that "if amendment is intended to be something other than law, the constitutional insistence on the said legislative process is unnecessary. In short, amendment cannot be made otherwise than by following the legislative process. The fact that there are other conditions, such as, larger majority and in the case of Articles mentioned in the proviso a ratification by Legislatures is provided, does not make the amendment any the less a law. The imposition of further conditions is only a safeguard against hasty action or a protection to the States but does not change the legislative character of the amendment."[60]

The above conclusion, he says, is reinforced by the other Articles of the Constitution, namely, Art. 4 which enables Parliament by law to amend Schedules I and IV, Art 169 which empowers Parliament by law to abolish or create Legislative Councils in States, and Para 7 of the 5th Schedule and para 21 of the 6th Schedule which enable Parliament by law to amend the said Schedules. Besides, in all these provisions a

consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to President for assent, the President shall not withhold assent therefrom."

58. (1951) S.C.R. 89.

59. *Ibid.*

60. (1967) 2 S.C.J. 486, p. 501.

fiction has been introduced to the effect that such a law made under any one of these provisions shall not be deemed to be an amendment to the Constitution for the purpose of Art. 368. These provisions, according to him, "bring out the two ideas that the amendment is law made by legislative process and that but for the fiction introduced it would attract Art. 368."[61]

He, therefore, finally comes to the conclusion that "amendments either under Article 368 or under other Articles are made only by Parliament by following the legislative process adopted by it in making other law. In the premises, an amendment of the Constitution can be nothing but law".[62] Consequently, Parliament "has no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights."[63]

Thus, the proposition that fundamental rights listed in Part III of the Constitution are immutable and transcendental in character and, therefore, are beyond the amending power of Parliament is based on the following *raison d'etre* :

(1) The fundamental rights being the rights reserved by the people, Parliament, which is a creature of the Constitution created by them, cannot abridge the reserved rights of the people.

(2) Amending law is 'law' within the meaning of Art. 13 (2), because:—

(a) the power to amend is a legislative power located within the residuary field exclusively given to Parliament by Art. 248;

(b) the amendment is law made by legislative process and this is clear from the Constitutional insistence on such legislative process in the provisions of Art 368; and

(c) the word "law" in Art. 13 (2) and the inclusive definition of "law" given in the same Article take in constitutional law, which includes law amending the Constitution.

61. *Ibid.*
62. *Ibid.*, p. 502.
63. *Ibid.*, p. 512.

**Critical Analysis of the raison d'etre of Golaknath Decision**

The first question is whether the people, in giving themselves the Constitution, have "reserved" the fundamental freedoms to themselves? To put it slightly differently, whether the Constitution of India has incorporated the theory of "reserved rights"? In fact, some reference was made by the Supreme Court earlier to the theory of reservation of rights. In *A. K. Gopalan v. State of Madras*,[64] Sastri, J. said: "There can be no doubt that the people of India have, in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality, and in delegating to the legislature, the executive and the judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, so-called, I apprehend, because they have been retained by the people and made paramount to the delegated powers, as in the American model."[65] Again, in *In re The Delhi Laws Act*[66] the same judge stated: "It is true to say that, in a sense, the people delegated to the legislative, executive and the judicial organs of the State their respective powers while reserving to themselves the fundamental rights which they made paramount by providing that the State shall not make any law which takes away or abridges the rights conferred by that Part. To this extent the Indian Constitution may be said to have been based on the American model,..."[67] The theory of "reserved rights" connotes paramountcy of rights "reserved" by the people. The theory has been countenanced by the Supreme Court in these two cases to indicate the limitations of the legislative power of Parliament and State Legislatures to make law affecting fundamental rights, which limitations are, in fact, evident from the concept of a written Constitution and also from the provisions of Part III of the Constitution.• But in *Golaknath case* the theory has been extended and applied even to the amending power of

64. (1950) S.C.R. 88, A.I.R. 1950 S.C. 27
65. (1950) S.C.R. 88, p. 198
66. (1951) S.C.R. 747; A.I.R. 1951 S.C. 332.
67. (1951) S.C.R. 747, p. 883.

Parliament to immunise fundamental rights against amendment laws.

No doubt, the Preamble is a guiding star in interpreting the Constitution, and its importance cannot, therefore, be minimised. But there is nothing in it to suggest that the rights enumerated in Part III of the Constitution are rights reserved by the people. It is also true that incorporation of a list of fundamental rights follows the American model. The preamble of the American Constitution, like the preamble of the Indian Constitution, opens with the phrase "We the people" and indicates clearly that the Constitution is ordained and established by the people. It may be noted that the original Constitution of the United States, of which the preamble was, as it is now, an integral part, did not contain a bill of rights. The ten Amendments, which have been often described as a "bill of rights", were introduced into the Constitution later. It is, therefore, difficult to attribute the theory of "reserved rights" to the Preamble of the original U. S. Constitution, which did not embody any rights. If the theory cannot be attributed to the Preamble of the original U. S. Constitution, it can hardly be attributed to it, in the absence of any change in the language of the Preamble, after the inclusion of the bill of rights in the Constitution. Thus it is clear that, in the absence of specific indication in the Preamble, the fact that the people have ordained the Constitution and the fact that the Preamble mentions rights do not ipso facto convey the idea that the rights enumerated in the Constitution are the rights reserved by the people. The same argument applies to the Preamble of the Indian Constitution which follows the American model. That is to say, the theory of "reserved rights" cannot be deduced, in the absence of any specific provision to that effect, from the Preamble of the Indian Constitution simply because it speaks of the people being the ordainers of the Constitution.

Secondly, in the U. S. Constitution the 9th Amendment says that rights enumerated in the Constitution shall not be construed to "deny or disparage others retained by the people". Then, the 10th Amendment states that the powers not delegated to the United States by the Constitution are reserved to the

people. The former, therefore, speaks of the rights "retained" by the people, and the latter says about the powers "reserved" by the people. These two provisions may lend support to the theory of "reserved" rights in the American Constitution. But in the Indian Constitution there is no similar provision. On the other hand, Art. 13 (2) of the Indian Constitution states that "the State shall not make any law which takes away or abridges the rights conferred by this Part." The phrase "this part" here means Part III of the Constitution, which in the ultimate analysis means "the Constitution by this Part III." The expression "the rights conferred by this Part" in Art. 13 (2) is important in that it positively states that the rights embodied in Part III are rights "conferred" by the Constitution. In view of this positive statement it is hardly possible to come to the conclusion that these rights are "reserved" by the people. Rights "conferred" by the Constitution, unlike the rights "reserved" by the people, can be modified by a modification in the Con titution itse'l, which can be brought about by amendment laws.

Thirdly, in Part III of the Constitution, though some rights are guaranteed against the State, certain rights are assured against individuals also.[68] The theory of "reserved rights" connotes that the rights are re erved by the people against the State. It is a misnomer to call the rights guaranteed to citizens against certain individuals as "reserved rights" of the people as a whole. Therefore, rights can be pre umed to have been "reserved" by the people only in a Constitution wherein all the enumerated rights are guaranteed against the State, but not in an organic instrument, like the Indian Constitution, wherein some rights are secured against State action and some others are guaranteed against individuals. So there is hardly any scope in Part III of the Con titution to deduce or imply the theory of "reserved rights".

It may, therefore, be stated that in the absence of any specific stipulation in the Preamble as to the reservation of rights by the people, the mere fact that rights have been mentioned in the Preamble cannot give rise to the presumption that the rights enumerated in Part III are rights reserved by the people, the

68. See, for example, Arts. 15 (2), 17, 23 (1) and 24.

ordainers of the Constitution. Besides, the expression "rights conferred by this Part" in Art. 13 (2) and the novel method of enumerating rights (some rights guaranteed against the State and others against the State and individuals) adopted in the Constitution clearly establish that the rights listed in Part III are not in the nature of reserved rights but in the nature of conferred rights, that is, rights conferred by the Constitution. Consequently, the conferred rights are amenable to change if the instrument which has conferred them could be amended by the body empowered by the same instrument to amend it.

The second problem is related to the location of the power to amend the Constitution. The majority view in *Golaknath case,* as stated earlier, is that the power to amend the Constitution is not to be found in Art. 368 but is contained in Art. 248 read with Entry 97 of List I. It may, however, be noted that in the Constitution, while delimiting the legislative fields of the Union and States, three elaborate legislative lists have been drawn up which cover almost all conceivable legislative heads. It is common knowledge that these broadly phrased legislative heads are capable of taking in several more allied and incidental subjects. Thus the three lists are almost practically exhaustive. In such a context insertion of a residuary clause may be understood as intended only to net subject matters that have escaped the notice of the makers of the Constitution. Since the amendment of the Constitution was uppermost in the minds of the Founding Fathers, as is evident from the fact that the entire Part XX is devoted to the subject, it is hardly possible to think that it was relegated by them to the uncertain residuary field. Had they intended to transform the amending power into an ordinary legislative power, they would have definitely enumerated it as one of the items in the Union List.[69]

It may also be noted that Art. 248, which confers residuary powers on Parliament, states that "Parliament has exclusive power to make any law" with respect to any residuary subject. Exclusive power of Parliament means that the State Legislatures have no scope whatsoever to share it. Any power shared by the

69. For same view see S. Mohan Kumaramangalam, "The power of Parliament to amend the Constitution," *Supreme Court Journal,* 1967. Also see H. M. Seervai, *Constitutional Law of India,* 1967, pp. 1093-94.

Parliament and State Legislatures can hardly be called the exclusive power of Parliament. At best it may be termed as a concurrent power. In Art. 368 the proviso requires participation of State Legislatures also in the amendment of any one of the Constitutional provisions specified therein. If the power to amend is ordinary legislative power located in the residuary field and exclusively vested in Parliament, participation of State Legislatures in the amendment of certain provisions of the Constitution is inexplicable.[70] The fact that State participation is permitted in affecting amendments to certain provisions of the Constitution specified in the proviso provision of Art. 368 shows that it is well nigh impossible to locate the amending power in the residuary field without contradicting the theory of exclusiveness of legislative power postulated in Art. 248.

The third reasoning, which requires a close scrutiny, is that inasmuch as Art. 368 specifies only procedures of amendment and not the power to amend, and the procedures are nothing but the procedural steps in the process of law making, amendment law is, like any other legislative enactment, a law within the meaning of Art. 13 (2) of the Constitution. This conclusion is inevitable if we accept the hypothesis that Art 368 contains only procedures for amendment, but power to amend is located in the residuary legislative field of Parliament. Wanchoo, J., who gave the dissenting opinion, rejects the hypothesis. According to him "the very fact that a separate Part has been devoted in the Constitution for amendment thereof and there is only one Article in that Part shows that both the power to amend and the procedure for amendment are to be found in Art. 368. Besides, the words 'the Constitution shall stand amended in accordance with the terms of the Bill' in Art. 368 clearly in our opinion provide for the power to amend after the procedure has been followed."[71] The question, therefore, is whether Art. 368 contains only procedures and is devoid of power content.

It may be noted that Art. 122 (1) of the Constitution states that "the validity of any proceedings in Parliament shall not

70 For a more or less similar view see H.M. Seervai, *op cit.*, p. 1094.
71. (1967) 2 S.C.J. 486, 520.

be called in question on the ground of any alleged irregularity of procedure". Marginal title of this Article says, "Courts not to inquire into proceedings of Parliament". This Article is one in a group of Articles which deal with the legislative procedure in the Constitution. The language of the clause is clear enough to show that the courts cannot invalidate an Act on the ground that it was passed by Parliament without strictly complying with all the procedures laid down therein. If amendment law is assimilated to ordinary legislation and the provisions of Art. 368 to legislative procedure, then the provisions of Art. 122 (1) will apply to the enactment of amendment law also. Consequently, even the validity of an amendment Bill cannot be questioned in any Court of law on the ground of alleged "irregularity of procedure", that is, non-compliance with the procedure laid down in Art. 368.

Besides, the provisions of Art. 100 relate to "conduct of business" in both Houses of Parliament. Clause (2) of the Article provides, inter alia, that "any proceedings in Parliament shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings." In other words, even if decision of, or an Act passed by, either House of Parliament is influenced by vote or votes cast by disqualified or non-qualified person or persons, which fact is known only subsequent to the passing of an Act or taking a decision, it shall be deemed to be valid, for any proceedings in Parliament shall be valid notwithstanding the fact that without the knowledge of the House disqualified or non-qualified person or persons took active part in the decision-taking process of the House. When this provision is read with the provision of Art. 122 (1), it is clear that despite the discovery of such irregularity of procedure, it cannot be made an issue before the courts to question the validity of the proceedings in Parliament. In the light of these provisions if the provisions of Art. 368 are examined, the incongruity of assimilating the amendment procedure and amendment process into legislative procedures and legislative process respectively will be more apparent.

According to Art. 368, an amendment Bill must be passed in each House by a majority of the total membership of that

House and by a majority of not less than two-thirds of the members of that House present and voting. Suppose the total number of members of the Lower House of Parliament is 600, and out of them only 452 members participate in the debate and voting on an amendment Bill. Then 301 votes constitute both the majority of the total membership of that House and two-thirds majority of the members of that House present and voting. Now, suppose an amendment Bill is passed by 301 votes out of 452 members present and voting and subsequently it is discovered that one or two persons among tho e who cast votes in its favour, were not person or persons entitled to do so, would the validity of such amendment law be questioned before competent courts on the ground of irregularity of proceedings in Parliament? If Art. 368 is treated as a complete code by itself and if the sum total of procedures stipulated therein are construed to constitute a capacity of Parliament to amend the Constitution, the validity of an amendment law can undoubtedly be questioned on the ground of irregularity of procedure in Parliament, for in such a case the provisions of Arts. 100 (2) and 122 (1) will not apply to the amendment proceedings. But, on the other hand, if the amendment process is assimilated to legislative process, the validity of amendment law can hardly be questioned before the courts on the ground of irregularity of procedure or on the ground that the required majority, which the law obtained in the House, contained one or two votes of disqualified or non-qualified persons. If that had been the intention of the Constitution-makers, nothing would have prevented them from placing the provisions of Art. 368 in Chapter II of Part V of the Constitution and especially among the Articles which deal with the legislative procedures of Parliament. It cannot be argued that difference in procedures necessitated the allotment of a separate Part for Art. 368, for Art. 109 which stipulates different procedure in respect of money bills had been placed in Chapter II of Part V of the Constitution. If difference in procedure is the sole reason for allotting a separate Part for Art. 368, then Art. 109 ought to have been similarly placed under a separate and independent Part in the Constitution.

In view of the above analysis it may be said that amend-

ment process or procedures stipulated in Art. 368 cannot be assimilated into legislative process without immunising procedural irregularities of amendment laws against Court proceedings. Therefore, it seems more reasonable to say that Art. 368 is a complete code by itself and the totality of the amendment procedures contemplated in the Article constitutes a capacity or power of Parliament to amend the Constitution. The expression "the Constitution shall stand amended in accordance with the terms of the Bill" in the Article amply supports and strengthens the above construction.

Besides, the proposition that the power to amend is located in the residuary legislative field will lead to two grave implications in the Constitutional jurisprudence of India. An equation between amendment law and ordinary legislation, which the above proposition gives rise to, may not only enable the President to amend the Constitution by ordinance but also insulate or immunise the entire Constitution against amendment.

Art. 123 (1) of the Constitution empowers the President to legislate by Ordinance during recess of the Union Parliament.[72] Clause (2) of the Article declares that "an Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament." Then, clause (3) of the Article states that "if and so far an Ordinance under this Article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void". The provisions of clauses (2) and (3) together, therefore, make clear that the power of the President to legislate by ordinance during recess of the Union Parliament is co-extensive with the power of Parliament to make law. That is to say, by virtue of this Article the President has power to legislate by ordinance with respect to all subject matters which fall within the Union List, Concurrent List and residuary field. So, if the power to amend is legislative power and is located in the residuary field reserved to the Union Parliament, the President can also amend the

72. Art 123 (1) states: "If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take action, he may promulgate such Ordinances as the circumstances appear to him to require."

Constitution by Ordinance during the recess of Parliament, which is unheard of in any Constitutional instrument.[73]

Secondly, any attempt to equate amendment law with ordinary legislation will result in immunising the entire Constitution against amendment. In fact, this point has been clearly stated by Wanchoo, J., thus : "If the fundamental law (i.e., the Constitution) cannot be changed by any law passed under the legislative powers contained therein, for legislation so passed must conform to the fundamental law, we fail to see how a law passed under the residuary power, which is nothing more than legislative power conferred on Parliament under the Constitution, can change the Constitution (namely, the fundamental law) itself."[74] But, according to Subba Rao, C. J., the argument that since Art. 245 is subject to the provisions of the Constitution, every law of amendment will necessarily be inconsistent with the Articles sought to be amended, "is an argument in a circle."[75] "Can it be said reasonably," he asks, "that a law amending an Article is inconsistent with the Article amended?"[75] Answering this self posed question he says that "if an Article of the Constitution expressly says that it cannot be amended, a law cannot be made amending it, as the power of Parliament to make a law is subject to the said Article. It may well be that in a given case such a limitation may also necessarily be implied. The limitation in Article 245 is in respect of the power to make law and not of the content of the law made within the scope of its power."[76]

The above argument appears to side track the central issue involved in the decision. The question is: if amending power is treated as ordinary legislative power located in the residuary field, how a legislation made in pursuance of such power could alter, modify or do away with any provision of the fundamental law, viz., the Constitution? It is an accepted principle in Constitutional jurisprudence that every legislation made by

73. This point has been discussed in the decision by Subba Rao C. J. in connection with Art. 392. See (1967) 2 S.C.J. 486, 500.

74. (1967) 2 S.C.J. 486, p. 521.

75. *Ibid.*, p. 500.

76. *Ibid.*

legislature in exercise of its legislative power, which is repugnant to the provisions of the Constitution, is void. This principle is applicable to all written constitutions whether they specifically mention the ultra vires doctrine or not. That is because Constitution is endowed with fundamental character. Therefore, unless the fundamentality of the Constitution is discarded it is difficult to advance the proposition that a legislation made in exercise of legislative power can validly amend the Constitution. This principle cannot be circumvented by treating amendment law as ordinary legislation for the purposes of certain parts of the Constitution and then as amendment pure and simple for purposes of other parts of the Constitution. What is more, Art. 245 clearly states that any law made by Parliament in exercise of its legislative power shall be "subject to the provisions of this Constitution". If, therefore, the residuary legislative power of Parliament takes in the power to amend, then amendment law must necessarily be subject to the provisions of the Constitution. Consequently, every amendment law, which seeks to modify, alter or eliminate any provision of the Constitution, will be unconstitutional, and the entire Constitution, in such an event, will remain immune from amendment. This result cannot be avoided by strenuously contrived argument that "the limitation in Art. 245 is in respect of the power to make a law and not of the content of the law made within the scope of its power," for the content of a law can hardly be different or divorced from the power of Parliament to make it, much less it can over-reach the power itself.

The next important problem hinges on the meaning of the word "law" in Art. 13 (2) of the Constitution. If the equation between amendment law and ordinary statute is accepted, then the former undoubtedly comes within the meaning of "law" in Art. 13 (2). The fallacy and inadmissibility of such an equation is amply demonstrated above. The question, however, is: whether the amendment law, despite the rejection of its equation with ordinary statute, can be said to come within the meaning of "law" in Art. 13 (2) ? This question arises because of a statement in the majority opinion that since "law" is given in Art. 13 an inclusive definition "it does not exclude

constitutional law. It prima facie takes in constitutional law."[77] Consequently, inasmuch as the amendment of the Constitution is constitutional law, the amendment law is "law" within the meaning of Art. 13 (2).

The above view is rejected by Wanchoo J. in his dissenting opinion. According to him, Art. 13 is in three parts. The first part, namely, clause (1) of Art. 13, lays down that all "laws in force" before the commencement of this Constitution, which are inconsistent with the provisions of the Constitution, shall be void. Further, all previous constitutional provisions have been repealed by Art. 395 which provides that "the Indian Independence Act, 1947, and the Government of India Act, 1935" and all the amendments to the latter are hereby repealed. Thus it is clear that the word "law" in Art. 13 (1) does not include any law in the nature of a constitutional provision, for no such law remained after the repeal in Art. 395.[78] The second part of Art. 13 is covered by clause (2). The third part, namely, clause (3) of the Article, gives an inclusive definition to the word "law" for the purpose of Art. 13. "Now we see no reason," says Wanchoo J., "why if the word 'law' in Art. 13 (1) relating to past laws does not include any constitutional provision the word 'law' in clause (2) would take in an amendment of the Constitution, for it would be reasonable to read the word 'law' in the same sense in the first two clauses of Art. 13."[79]

It may also be noted that when Art. 13 (2) says that "state" shall not make "law" abridging or taking away rights, it actually means that the "state" as defined in Art. 12 shall not make "law" infringing the rights. That is to say, neither the legislative body shall exercise its normal legislative functions so as to infringe the rights, nor the executive authority shall exercise its normal executive functions in derogation of the conferred rights. Inasmuch as the power to amend the Constitution does not follow per se from the constitution of a legislature, it can hardly be considered as a normal function of a legislature. The power to amend the Constitution is a special and constitutive power, and for the exercise of this exceptional power a Con-

77. *Ibid.*
78. *Ibid.*, p. 528.
79. *Ibid.*, pp. 528-29.

stitution may choose one body or more than one body as an entity depending upon the degree of rigidity it intends to inject into the organic instrument. If a legislative body alone is chosen for the purpose, it is purely because of the deliberate choice of the Framers dictated by their own idea of rendering the Constitution more flexible and not because of any compulsive force of constitutional doctrine. Even in the Indian Constitution the choice has not fallen completely on the Union Parliament; and, while the Union Parliament with special majority is selected for the amendment of certain provisions, the combination of the Union Parliament and State legislatures is chosen for the purpose of amending certain other Articles of the Constitution.

No doubt, the definition of 'law' in Art. 13 (3) is inclusive and not exhaustive; and so is the definition of 'State' in Art. 12.[80] When the Supreme Court was called upon to interpret Art. 12, it balked at giving wider interpretation to the inclusive definition of 'State' and refused to include within the definition judicial and quasi-judicial authorities.[81] In *Ramamurthy Reddiar v. Chief Commissioner, Pondicherry*,[82] the Supreme Court went a step further and held that the Chief Commissioner, Pondicherry, was an authority under the control of Government of India within the meaning of Art. 12 only when he functioned as an executive or legislative authority and not while he discharged duties of a quasi-judicial authority. Therefore, according to the Supreme Court, while the Chief Commissioner of Pondicherry functioned as a quasi-judicial authority "he could not be the State within that Article."[83] But in *Golaknath case* the Supreme Court abandoned its rule

80. Art. 12 states: "In this Part, unless the context otherwise requires, the 'State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

81. See *Ujjam Bai v. Uttar Pradesh*, A.I.R. 1962, S.C. 1621 and *Naresh Sridhar Mirajkar v. Maharashtra*. Misc. Petition 5 of 1965. Judgment delivered on March 3, 1966. Referred by H. M. Seervai, *op. cit.*, 7, 11, p. 154.

82. A.I.R. 1963 S.C. 1464.

83. *Ibid.*, p. 1469.

of strict interpretation, which it consistently followed while giving meaning to the inclusive definition of 'State' in Art. 12, and adopted the rule of wider interpretation with respect to inclusive definition of 'law' in Art. 13 (3). It is, therefore, difficult to comprehend why two divergent rules should be applied to two definitions, both of which are inclusive and not exhaustive in character. This divergence in approach alone would suggest that the word 'law' in Art. 13 (2) requires a fresh look and that its scope and ambit should not be determined by reference to its inclusive definition alone. It must be understood as referring to legislative enactments that may be made by the legislative bodies, included within the definition of 'State', in pursuance of their normal legislative functions.

Another important point we have to consider is that if the Constitution cannot be amended so as to take away or abridge fundamental rights, can it be amended in order to add a few more rights into the list? An oblique suggestion of an answer to this question seems to have been made in the following statement of Subba Rao, C. J.: "we have not said that the provisions of the Constitution cannot be amended but what we have said is that they cannot be amended so as to take away or abridge fundamental rights."[84]

A suggestion implicit in the above statement is that the provisions of the Constitution can be amended so as to incorporate new rights in Part III of the Constitution. If that is the correct implication of the statement, one may naturally wonder as to what status such an amendment and the rights so included in Part III might assume. If amendment law is no more than an ordinary legislation, any new right added by such amendment law can hardly rise above the status of a statutory right. On incorporation of new rights in Part III by amendment do they remain as ordinary statutory rights or do they assume the same sanctity as other fundamental rights? If they remain still as statutory rights there is no purpose in incorporating them in Part III, for the same purpose may be achieved statutorily. Such newly created rights cannot be said to assume the sanctity of fundamental rights without conceding constitutive power and character to the amendment law which

84. (1967) 2 S.C.J. 486, p. 513.

created them. If constitutive character could be attributed to amendment law which creates new rights, it would not be reasonable to deny it to amendment law which abridges the existing rights. Therefore, if it is conceded that the provisions of the Constitution can be amended so as to add new rights to the list in Part III, the acceptance of the proposition that the Constitution can be amended so as to abridge rights is implicit in it. So viewed, the statement seems to concede indirectly and implicitly what the decision in its entirety laboured to deny.

Finally, with regard to the argument that if the power of amendment is not all comprehensive there will be no way to change the structure of the Constitution or abridge the fundamental rights even if the whole nation demands for such a change, Subba Rao, C. J. says that this argument "visualizes an extremely unforceable and extravagant demand; but even if such a contingency arises, the residuary power of the Parliament may be relied upon to call for a Constituent Assembly for making a new Constitution or radically changing it."[85] But he refused to express a final view on this question. However, Hidayatullah, J. who concurred with him, has expressed a final view on it and suggested that "Parliament must amend Article 368 to convoke another Constituent Assembly, pass a law under item 97 of the First List of Schedule 7 to call a Constituent Assembly, and then that Assembly may be able to abridge or take away the fundamental rights if desired."[86] The grave results that may follow the implementation of these suggestions have been clearly analysed by S. Mohan Kumaramangalam. According to him, the above suggestions, in effect, make the destruction of fundamental rights by Parliament a task more easy of achievement than if the procedure under Art. 368 is to be followed. For, this new Constituent Assembly will be brought into existence by a simple majority of the existing Parliament; and the Constituent Assembly, so given birth to, by this same simple majority do anything it wishes to the Constitution.[87]

85. *Ibid.*

86. *Ibid.*, p. 553

87. S. Mohan Kumaramangalam, "The power of Parliament to amend the Constitution", *Supreme Court Journal*, 1967, p. 58.

However, one important point that may be noted in the statements of Subba Rao, C. J., and Hidayatullah, J. is that they concede ultimately that fundamental rights enumerated in Part III can be amended. But they suggest that that can be done only by a Constituent Assembly convoked or convened by Parliament in exercise of its residuary power. This concession is something contrary to the earlier proposition that fundamental rights are immutable and transcendental in character, for rights, which are amenable to amendment made either by Parliament under Art. 368 or by Constituent Assembly convened by Parliament under Arts. 245 and 248 read with Entry 97 of the Union List of the Seventh Schedule, can hardly be called immutable rights.

## Conclusion

The inclusion of fundamental rights in the Constitution of India seems to have been intended to serve two purposes. The first purpose is to secure the life and liberty of the people against arbitrary acts of the Government and not to keep the rights beyond State regulations and reasonable restrictions. Reasonableness of restriction is often determined with reference to social thinking on a particular matter. Stipulation of restrictions in Part III, which can be imposed on the rights by the State, bears out this purpose that lies behind the inclusion of fundamental rights. Even the Supreme Court admitted in *A. K. Gopalan v. State of Madras*[88] that the most striking feature of the provisions of Part III of the Constitution is that they expressly seek to strike a balance between a written guarantee of individual rights and the collective interests of the community.[89] If the Constitution-makers had intended to render the rights sacrosanct such a balance would not have been struck by them. The second purpose is to remove suspicion from the minds of members of minority communities and offer them sufficient safeguards.

Secondly, the rights enumerated in Part III of the Constitution of India are based on social values of the present genera-

88. (1950) S.C.R. 74.
89. *Ibid.*, pp. 85 and 108.

tion and not on the doctrine of natural law. Since the social values are not static and likely to change with the progress of time, the rights are liable to change or modifications to square with the changing values. No right can remain sacred in an organic instrument if it is not supported and sustained by the active opinion and social values of the society in which it is intended to be exercised. When such is the case it is difficult to say that rights should remain in the same form as they were introduced by the framers of the Constitution without any alteration even if there is change in social thinking and values. Attribution of immutability to these rights on the ground that they are rooted in the doctrine of natural law would not only put these rights in constitutional strait-jacket, but stultify future progress as well. That that might not be the intention of the Fathers of the Constitution is evident from the fact that they explicitly envisaged in the Constitution creation of a welfare State through gradual economic reconstruction and social reforms, which can be achieved by re-adjusting the rights if need be.

Thirdly, it is difficult to derive support from the scheme and provisions of the Constitution to the concept of immutable and transcendental fundamental rights. The theory of "reserved rights", which connotes paramountcy of rights, cannot be attributed to the mere fact that "the people" are the ordainers of the Constitution. The fact that in Part III certain rights are guaranteed against the State and certain other rights against individuals, and also the fact that Art. 13 (2) uses the expression "the rights conferred by this Part" make it clear that the Constitution gives no quarters to the theory of "reserved rights". Therefore, the immutability of fundamental rights cannot be established on the non-existing theory of "reserved rights". Besides, the un-amendability of fundamental rights cannot be established under the Constitution except by strenuous and far-fetched construction of the provisions of the Constitution, which construction, if accepted, would lead, as shown earlier, to dangerous implications and absurd conclusions. The truth of the matter is that there is nothing in the Constitution to support the concept of immutable fundamental rights. In fact, even the majority view in *Golaknath case* admits that the fundamental

rights can be amended by Constituent Assembly which may be summoned by Parliament acting under its residuary power. This very admission of amendability of fundamental rights disproves the earlier assertion that they are transcendental in character.

It seems, therefore, reasonable to think that the fundamental rights have been based on the values, which the society considers very dear. That being the position, it is difficult to subscribe to the view that the fundamental rights are unalterable, and they remain in the same form in which they were adopted and radiate the same meaning which they did at the time of their inclusion in the Constitution, for all time to come.

## Chapter Three

# FUNDAMENTAL RIGHTS AND THE DUTY-ORIENTED JURISPRUDENCE

One important feature in Part III of the Constitution, which distinguishes it from the American Bill of Rights, is the emphasis it lays on the duty of the citizens. A close scrutiny of Part III would disclose that the Constitution has given as much importance to the duty of the individual as to his rights. This would mean that fundamental rights Part in the Indian Constitution has not been carved out solely in conformity with Western juridical thought, but on the other hand, it is done in consonance with both Western and Hindu juridical concepts. Consequently, any value-assessment of fundamental rights in the Constitution of India made solely in terms of Western jurisprudence would hardly be in conformity with the spirit of the Constitution. Before attempting to analyse the relevant provisions in Part III of the Constitution, an analysis of the duty-oriented concept in the Hindu jurisprudence and the position of the doctrine of "individual invasion of individual right" in the American Constitution is quite essential.

### Order and Duty-Oriented Concept in Hindu Jurisprudence[1]

One foremost principle in Hindu jurisprudence is the concept of *Rita* which means eternal order or harmony found in nature. The ancient *Rishis* in India turned to nature with an inquisitive mind to enquire what was that which helped to sustain grand harmony found in the celestial sphere. They deeply contemplated on this problem and also on the origin or creation of the universe, and came to the conclusion that *Rita* (Order) existed in nature and the strict observance of this *Rita* by the celestial bodies and by various phenomena in nature

1. K P Krishna Shetty, "The Constitution of India and Hindu Jurisprudence, *Bulletin of the Institute of Traditional Cultures*, Madras, 1964, Part II, p. 197 at pp. 210–13.

were the two factors which perpetuated harmony in nature. Their next task was to turn to the world inhabited by human beings and tell them that similar harmony would not be difficult to achieve or establish permanently if the people scrupulously respected order (*Rita*) in human life, performing such of duties as they are capable of and as are enjoined by law. Thus, life on earth was conceived as an integrated whole, which could be lived properly only in peace and harmony. Peace and harmony could be maintained only by respecting *Rita*. And people could be said to respect *Rita* only when they act in accordance with *Dharma*, that is, when they do their duties which nature and the fundamental law enjoined on them. Thus, the ancient *Rishis* evolved a "duty-oriented" jurisprudence which was based on two concepts, namely, *Rita* and *Dharma*.[2]

In this connection it may be noted that the thinkers and seers of ancient India did not seriously concern themselves with the rights of individuals. They laid stress very often on the duties of individual and on the necessity to adhere to and preserve *Dharma*, presumably because they felt, and rightly so, that in a society of duty-conscious or *Dharma* conscious people rights of the individual could be exercised fully and without hindrance from any quarter. It is, therefore, no wonder that they harped much on the concept of *Rita* and *Dharma*.

The concept of *Rita* has been expounded by several ancient *rishis*. Aghamarsana, the great vedic *rishi*, says:

> "From Fervour kindled to its highest, *Rita* (eternal law) and *Satya* (Truth) were born; thence was the right produced, and thence the billowy flood of sea arose."
>
> "From that same billowy flood of sea the year was afterwards produced, Ordainer of the days and nights, Lord over all who close the eye."
>
> "*Dhata*, the great Creator, then formed in due order, Sun and Moon. He formed in order Heaven and Earth, the regions of the air, and light."[3]

2. *Ibid.*, p. 210.

3. *Rigveda*, X, 190, 1–3, quoted by R. Pal, *The History of Law in the Vedic Age and in Post-Vedic Times down to the Institutes of Manu*, p. 113.

From the foregoing verses it is clear that *Rita* (eternal order) has been conceived before the creation of other phenomena of the universe. Aghamarsana elevates *Rita* to the highest position in the scheme of the universe. In fact, it has been conceived by him as the first and primal phenomenon in the natural scheme of the universe. The natural implication of the prime position accorded to *Rita,* therefore, is that the other natural phenomena, which were created subsequently, are bound to respect it. This seems to be the view of Aghamarsana and of others too. According to Aghamarsana's father, Madhuchanda, even gods, Mitra and Varuna, achieved their might by respecting and cherishing this *Rita*.[4] A similar statement is found in the Samaveda also, which says, "Mitra and Varuna, through law, lovers and cherishers of law (*rita*), have obtained their mighty power."[5]

Vamadeva, another great vedic *rishi*, speaks about "eternal order" and "eternal law". He says:

> "Eternal law hath varied food that strengthens; thought of eternal law removes transgression. The praise-hymn of eternal law, arousing, glowing, hath opened the deaf ears of the living."
>
> "Firm seated are eternal law's foundations; in its fair form are many splendid beauties. By holy law long lasting food they bring us; by holy law have cows come to our worship."
>
> "Fixing eternal law he, too, upholds it; swift moves the might of law and wins the booty."
>
> "To law belong the vast deep earth and Heaven; Milch-kine supreme, to law their milk they render."[6]

As is evident from these verses, Vamadeva not only glorifies eternal law, but also lays emphasis on the necessity of observing that "holy law" which would bring to the upholder of it "long lasting food" and coveted "booty". He lays stress on the "eternal law", for such "thought of eternal law removes transgression". What is more, he even indirectly tells us

4. *Rigveda,* I, 2, 8, quoted by R. Pal, *op. cit.,* p. 114.
5. *Samaveda,* IV, 2, 2, quoted by R. Pal, *op. cit.,* p. 175.
6. *Rigveda,* IV, 23, 8–10, quoted by R. Pal, *op. cit.,* pp 143 and 144.

through the expression "Milch-kine supreme, to law their milk they render", how one could uphold this "eternal law" or act in conformity with it by performing one's duty ordained by nature.[7] Here much stress has been laid on the duty of every sentient being to act in accordance with the "eternal law" or what may be called the "fundamental law" to preserve the much needed *Rita* (order).

Further, Gautama, another *rishi*, describes the benefits an individual may get by observing law in these words: "The winds waft sweet, the rivers pour sweet for the man who keeps the law; so may the plants be sweet for us."[8] Again we find in the *Atharvaveda* the law being described thus:

"Truth, high and potent law, the consecrating rite,
Fervour, Brahma, and 'sacrifice' uphold the earth."[9]

Proceeding further it states: "Truth is the base that bears the earth: by Surya are the heavens upheld. By law Adityas stand secure and Soma holds his place in heaven."[10]

The ancient *rishis* thus conceived "eternal law" as an "ordinary principle" in nature. The natural phenomena strictly observed this law and respected *Rita* by performing dutifully functions allotted to them by nature; that is to say, they did not swerve from the path of duty. Consequently, perfect peace has been maintained in the universe. In other words, peace and harmony in the universe is the result of perfect discharging of duties by the phenomena in nature. Naturally, therefore, the ancient *rishis* thought that similarly much desired peace could be established in human society if people respected law, maintained *Rita* and acted without any dereliction of duty.

The duty concept has been stressed again in another important principle of the Hindu jurisprudence, namely, *Dharma*. The word *Dharma*, in fact, bears many connotations. As many as eleven implications and meanings have been listed by

7. Shetty, "The Constitution of India and Hindu Jurisprudence", *op. cit.*, pp. 211 and 212.
8. *Rigveda*, I, 90, 6, quoted by R. Pal, *op. cit.*, p. 154.
9. *Atharvaveda*, XII, 1, 1, quoted by R. Pal, *op. cit.*, p. 177.
10. *Ibid.*, XIV, 1, 1, quoted by R. Pal, *op. cit.*, p. 177.

Dr. V. P. Varma.[11] But some of the important meanings listed therein are *Rita,* duty, universal law, justice, international or inter-tribal law and truth. Besides, the word *Dharma,* as explained by Dr. Varma, is derived from the word *Dhri,* which means "to sustain or uphold."[12] If this etymological meaning of the word *Dharma* is read with the meanings ascribed to it in Vedic texts, the word *Dharma* in its totality would mean "sustain or uphold" duty, *Rita,* universal law, justice etc. It may also be noted that the word *Dharma* is nowhere used to mean or denote a "right", and this lends support to the idea that the ancients never used the word to ask the people to "sustain or uphold" their right, or, to put it in a more prosaic modern language, to assert their rights. Thus it is clear that the ancient Indian juris consults used the word *Dharma* to denote individual's duty to "uphold or sustain" *Rita,* duty, law, justice and truth, but not to indicate or stipulate assertable individual rights.

A clear idea of this emphasis may be seen in the following two verses of the Manu code :

> "For the sake of preserving this universe, the being supremely glorious allotted separate duties to those, who sprang respectively from his mouth, his arm, his thigh and his foot."[13]
>
> "Through the fear of that genius all sentient beings, whether fixed or locomotive, are fitted for natural enjoyment and swerve not from duty."[14]

These two verses have been the subject-matter of much controversy for some believed that they served as a basis for the edifice of caste system. However, it is difficult to think that

11. V. P Varma, *Studies in Hindu Political Thought and its Metaphysical Foundations,* 1959, p. 106, footnote 1. The eleven meanings are: something like the old *Rita;* the morallly proper, the ethical duty, virtue; good works; religious duty, religious virtue; the ideal; identical with god and absolute truth, a universal law or principle; divine justice; a compromise between the ideal and actual conditions; convention, a code of customs and traditions; common law or laws; and international or inter-tribal law.

12. *Ibid.,* p. 107.

13. *Manu* (tr. by W. Jones), Ch. I, Verse 87.

14. *Ibid.,* Ch. VII, verse 15.

the expression "to those who sprang respectively from his mouth, his arm, his thigh and his foot" lends itself to such interpretation, for the words "mouth", "arm", "thigh" and "foot" in the expression seem to have been used not so much in symbolic sense to symbolize or denote castes as metaphors to indicate functional differences (difference in functions). The second verse, mentioned above, clearly states that "all sentient beings" are fit for "natural enjoyments". The word "all" in the expression "all sentient beings" makes unmistakably clear that in the matter of "natural enjoyment" no difference of artificial nature among the sentient beings is postulated in the verse. The expression "natural enjoyment" may either mean enjoyment of things in the universe in accordance with nature, that is, capacity of each sentient being, or may mean enjoyment of what is natural to each sentient being. Enjoyment of what is natural to trees or beasts may not be equally enjoyment natural to human beings. But enjoyment natural to one human being is equally natural to another human being. Differences in degree of enjoyment may arise due to differences in capacity among the human beings, but that would not make them less human beings for the purpose of enjoyment of all that are natural to human beings. So viewed, it is clear that the second verse, when it says that "all sentient beings" are fit for or entitled to "natural enjoyment", abjures all differences among the sentient beings that may be contrived upon artificial basis or lines. Therefore, any interpretation of the expression "to those, who sprang respectively from his mouth, his arm, his thigh and his foot" in the first verse that it means a basis for the edifice of caste system would be apparently untenable and contrary to the provisions of the second verse and to the intention of the giver of the Manu Code.

The fact of the matter, however, seems to be that these verses were incorporated in the code to lay emphasis on the duties of "all sentient beings". Accordingly, the first verse says that for the sake of preserving the universe, "the being supremely glorious allotted separate duties" to all, that is, effected a division of functions among all in accordance with their capacity. These functions they are expected to perform without any dereliction. This duty is again stressed in the second verse,

*which says that through the fear of the "genius" all sentient* beings "swerve not from duty". "Genius" referred in this verse is evidently "the genius of punishment" or what is called *danda*. What the verse seems to mean is this: the sentient beings, especially the human beings, are enjoined by the code to perform their duties scrupulously, lest they be compelled to do so by "the genius of punishment".

From the foregoing discussion it is clear that the ancient jurists conceived a duty-oriented jurisprudence. It is, therefore, natural that the entire emphasis in this duty-oriented jurisprudence has been on the duty or obligation of the individuals and not on their rights.

## Doctrine of "Individual invasion of individual right" in the American Constitution

The American Constitution guarantees to all persons equality of treatment. The first section of the Fourteenth Amendment states, *inter alia,* that no State shall "deny to any person within its jurisdiction the equal protection of the laws". Though the ambit of this clause is wide enough to extend the protection stipulated therein to all persons, including aliens, the genesis of the amendment shows that it was adopted with the avowed purpose of removing all discriminatory treatment meted out to the negroes in the United States. The fifth section of the same amendment authorises the Congress "to enforce, by appropriate legislation, the provisions of this article".

In pursuance of the provisions of the fifth section of the Fourteenth Amendment Congress enacted in 1875 a Civil Rights Act making it a misdemeanour to deny any person, on the ground of race, colour or any previous condition of servitude, equal rights of enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement. This law, as the language itself suggests, was directed against the private discriminatory acts. The question before the Supreme Court brought before it in 1883 in a batch of

cases, popularly known as *Civil Rights cases*,[15] was whether Congress had constitutional power to make such a law.

The Court, speaking through Justice Bradley, ruled in the above case that the first section of the Fourteenth Amendment prohibited only State action of a particular character. "Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind", which denies to persons, the equal protection of the laws.[16] Then, referring to the fifth section of the amendment, the Court stated that "legislation which Congress is authorised to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking."[17]

Having thus ruled, the court gave expression to an important principle, which guided the Court since then, in the following words: "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true,....affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under the State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress."[18] The decision, in effect, laid down a doctrine that individual

15. 109 U.S. 3; 27 L. Ed. 835 (1883); L.B. Evans, *Cases on American Constitutional Law*, 6th Edn., 1952, p. 487.

16. Evans, *op. cit.*, p. 488.

17. *Ibid.*, pp. 489-90.

18. *Ibid.*, pp. 490-91.

invasion of individual right, unsupported by State authority, is not an unconstitutional act under the Fourteenth Amendment. This doctrine seems to have influenced the subsequent decisions of the Supreme Court in cases brought before it under the "equal protection of the laws" clause.

But it is doubtful whether "individual invasion of individual right" could ever take place without the support, either overt or covert, of State authority. If a State enacts a law authorising private individuals to discriminate against coloured race in regard to entry to public places like inns and theatres, it would amount to giving the private acts of discrimination overt and active support of State authority. In such a case State law under which private acts of discrimination take shelter would undoubtedly amount to violation of the Constitution. On the other hand, if the State fails or refuses to make law either authorising private discriminatory acts or prohibiting them in the matter of enjoyment of public inns, theatres, etc., there is no legal bar, except the constitutional prohibition which by construction is said to apply to State acts only, against the private acts of discrimination. So if an owner of a theatre or an inn makes discrimination in regard to entry into it against persons on the ground of their colour or race, his act would not be unlawful because there is no legal bar to it; and in such an event if the person against whom discrimination is practised forces his entry into the inn by force, defying the order of the proprietor, his action would amount to trespass, against which there is legal remedy for the proprietor. Through such legal remedies the State lends covert or indirect support to such private acts of discrimination. Therefore, it may not be wrong to say that no private act of discrimination can be made in public places without the indirect support of the State. In other words, no individual can invade the right to equal treatment of another individual without direct or indirect support of State authority. The Court could have given a liberal construction to the Fourteenth Amendment to cover not only State discriminatory acts but also all private discriminatory acts in public places made under the tolerant eyes of the State. Such an interpretation would have saved the beneficial Civil Rights Act, but the

Court balked at giving the Amendment such a wider construction. The doctrine it enunciated, therefore, influenced the subsequent decisions on similar points.

In 1926, the Supreme Court was called upon in *Corrigan* v. *Buckley*[19] to pronounce its opinion on the constitutionality of restrictive covenants attached by White men to the property sale agreement imposing restrictions against the use of real property by Negroes. The Court ruled that the constitutional prohibitions "have reference to State action exclusively, and not to any action of private individuals... It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment. It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property."[20]

Again in 1948 a similar problem in a slight different form came before the Supreme Court in *Shelley* v. *Kraemer*.[21] There was an agreement among the owners of property in a particular municipal locality in Missouri State restricting the use and occupancy of property situated in the locality to White men and forbidding the occupancy as owners or tenants of any portion of the said property for residence or other purpose by the people of the Negro or Mongolian race. The petitioners, who were Negroes, and who were not aware of the restrictive covenant, purchased a piece of land in the said locality from the respondents. Subsequently, the respondents brought a suit for restraining the petitioners from taking possession of the property and for divesting title out of petitioners and re-vesting title in the immediate grantor. The Supreme Court of Missouri held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to the petitioners by the Federal Constitution. Accordingly, it directed the trial court, which had earlier dismissed the suit, to grant the relief for which the respondents had prayed.

19. 271 U.S. 323 (1926).
20. *Ibid.*, p. 330.
21. 334 U.S. I. (1948); Evans, *op. cit.*, p. 904.

Therefore the question posed before the Supreme Court of the United States in the above case was : whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by State courts of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or colour from the ownership or occupancy of real property?

The Court said that since the decision in the *Civil Rights cases* in 1883 "the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[22] Affirming this principle the Court ruled that "the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."[23]

The Court, however, noted that "here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined."[24] So the next question was whether enforcement of private agreements by State Courts would amount to State action. The Supreme Court had in earlier decisions established a proposition that the action of State Courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment.[25] Relying on this proposition the Court held that in

22. Evans, *op. cit.*, p. 906.
23. *Ibid.*, p. 906.
24. *Ibid.*
25. *Virginia v. Rives*, 100 U.S. 313, p. 318 (1880); *Ex. Parte Virginia*, 100 U.S. 339 p. 347 (1880). Evans, *op. cit.*, p. 907.

granting judicial enforcement of the restrictive agreement in the above case, the State had denied the petitioners equal protection of the laws, for "the difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing."[26] The decision, in effect, gave fresh lease of life to the earlier doctrine that individual invasion of individual rights, unsupported by State authority, is outside the operation of the prohibitory provisions of the Fourteenth Amendment.

## Fundamental Rights and Duty Stipulations in the Indian Constitution

Part III of the Constitution of India, which contains fundamental rights, may be described as the Indian Bill of Rights. But this Indian Bill of Rights, unlike the American Bill of Rights, contains several duty stipulations. The duties of individuals have been stipulated in two forms, namely, (*i*) in the form of restrictions imposed on the guaranteed rights, which may be called "indirect duty stipulations," (*ii*) in the form of direct and mandatory order to the people to refrain from doing certain things prohibited by the Constitution, and this may be called "direct duty stipulations".

The indirect duty stipulations may be found in certain Articles wherein rights are expressly hedged in with restrictions. While clause (1) (a) of Art. 19 guarantees to all citizens freedom of speech and expression, clause (2) states that this guaranteed right shall not affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the said right in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, defamation, etc. This clause (2) is, in effect, an indirect reminder to the citizens that while exercising freedom of speech they are duty-bound not to utter anything, which would affect

26. Evans, *op. cit.*, p. 908.

the security of the State, public order or friendly relations with foreign States, or which would amount to defamation, obscenity, etc. Similarly, clauses (3) to (6) of Art. 19, which stipulate restrictions that may be imposed on the rights guaranteed in sub-clauses (b) to (g) of clause (1) of Art. 19, stipulate indirectly duties of citizens, which they have to fulfil by exercising the guaranteed rights within the reasonable limit.

However, it is said that clauses (2) to (6) of Art. 19 do not support the duty concept, for no duties are cast on individuals under those clauses. According to this view, the clauses only enable the State to impose restrictions on the exercise of the rights conferred by clause (1) of Art. 19 for the purposes set out therein. As long as the State has not imposed any such restrictions, individuals are absolutely free to exercise their rights in any way they like. Clauses (2) to (6) of Art. 19 as such do not impose any restrictions on the exercise of the rights.[27]

But it may be pointed out that in a civilized society no right is considered absolute. In a constitutional set-up where fundamental rights are guaranteed, even if the State is not expressly empowered to impose restrictions on the guaranteed fundamental rights in the interest of general public, it is common knowledge that the State could legitimately impose reasonable restrictions on the rights in exercise of its inherent police power. The idea behind this concept is that the individuals are expected to exercise such guaranteed rights within bounds realizing, at the same time, their duties not to offend the rights of others. For example, when an individual exercises his right to freedom of speech he should realize that he is, at the same time, duty-bound not to utter words amounting to blasphemy, sedition, obscenity, contempt of court, etc. When he violates this rule and thereby refuses to perform his duties, the State steps in and prevents him from exceeding the bounds of his qualified right. The State could do so either under an enabling constitutional provision, if there is

27. This view is expressed by T. Venkatavaradan in a seminar. See *Bulletin of the Institute of Traditional Cultures*, Madras, Part II, 1964, p. 225.

any, or under its inherent police power. The State, therefore, does not require enabling provisions to impose reasonable restrictions on the rights. If that is the only purpose of the clauses they need not have been incorporated in the Constitution. The obvious conclusion, therefore, is that when a constitutional instrument spells out expressly the restrictions, which the State could impose on the guaranteed rights, it also means that duties of the individuals have been expressly stipulated thereon, indicating impliedly thereby the necessity of performing such duties by the individuals voluntarily, lest they be compelled to do so by force of law. For example, clause (2) of Art. 19 is a sufficient warning to the citizens that while they exercise their freedom of speech they are under obligation not to commit libel, slander, defamation, etc., which duty they should perform voluntarily if they wish to avoid the State compulsion, or, to use the expression of Hindu jurisprudence, "the genius of punishment". Viewed from this point of view, it is obvious that clauses (2) to (6) indicate, with sufficient clarity, the duties of the citizens which they should bear in mind while they exercise the rights mentioned in clause (1) of the same Article. It is, therefore, reasonable to think that clauses (2) to (6) of Art. 19 embody the duty concept.

Further, Art. 25 guarantees to all persons freedom of religion "subject to public order, morality and health". Then, Art. 26 says that "subject to public order, morality and health" every religious denomination shall have right to establish and maintain religious and charitable institutions, to manage its own affairs in matters of religion, to own and acquire property, etc. These restrictive provisions also impose indirectly a duty on all persons not to exercise the rights guaranteed therein in such a way as to affect the public order, morality or health of the society. This method of stipulation of restrictions along with rights connotes that the Constitution purports to give as much importance to the duty of the individual as to his right. And the stipulation of duties of individuals is fully in conformity with the Hindu jurisprudence.

Direct stipulation of duties is to be found in Arts. 15 (2) (a), 17, 18 (2), 23 and 24 of the Constitution. Art. 15 (2) (a) states that no citizen shall, on grounds of religion, race, caste,

sex, place of birth or any of them, be subject to any disability, liability, and restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment. Evidently, this is mainly an exhortation to the people who are owners of shops, hotels, etc., to refrain from taking any discriminatory act against the fellow citizens on any one of the grounds specified therein. Next, Art. 17 says that "untouchability is abolished and its practice in any form is forbidden. It also makes the enforcement of any disability arising out of "untouchability" an offence punishable in accordance with law. Though the latter part of the Article is a sort of direction to the State to punish the practice of "untouchability", the former part, which is a self-contained provision, forbids the practice of "untouchability" in unequivocal terms. This means that any practice of "untouchability" by an individual, irrespective of whether it is punished or not under a statute, is an unconstitutional act. The same argument applies *mutatis mutandis* to Arts. 23 (1) and 24. The former states that traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. The latter states that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Similarly, Art. 18 imposes a duty on the citizens not to accept any title from any foreign State. Needless to say that any dereliction of the duty stipulated in these Articles by any person would be contrary to the provisions of the Articles and, therefore, would be unconstitutional.

Further, Art. 32 guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III. Then, clause (2) of that Article states that the Supreme Court shall have power 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. There is nothing in this Article to suggest that the rights conferred by Part III of the Constitution could be enforced only against the State, or

the directions, orders or writs could be issued by the Supreme Court only to the State. In the absence of any positive indication in Art. 32 to the effect that the rights guaranteed in Part III could be enforced only against the State, one may reasonably infer that the provisions of Arts. 15 (2) (a), 17, 23 and 24 and even of Art. 18 (2) read with Art. 32 guarantee certain enforceable rights to individuals as against some other individuals. In other words, if an individual violates any of the provisions of the above-mentioned Articles his act would be unconstitutional, and the aggrieved persons could approach the Supreme Court under Art. 32 of the Constitution for a direction or order directing the concerned person to refrain from acting in unconstitutional way.[28]

However, a counter argument has been raised. It is said: Part III of the Constitution is designed in such a way as to guarantee the fundamental rights only against the State. There is in Part III definition of "State" but not of "individual", "person" or "citizen". Art. 13 specifically prohibits the State from taking away or abridging any of the fundamental rights conferred by the Part. There is no such specific injunction against an individual. There are provisions enabling the State to impose, under certain circumstances, restrictions on the exercise of the rights. No such concession is available to an individual. It is, therefore, clear that the individual is deliberately excluded from the category of entities against whom fundamental rights could be enforced. Though the terms of Art. 32 are wide enough to take in individuals, the point to be noted is that under the Article the Supreme Court will not have jurisdiction to issue order, direction or writ to individuals for the enforcement of fundamental rights if it is already established that the rights are guaranteed only against the State and not against individuals.[29]

If the definition of "State" and the presence of Art. 13 in Part III could be taken as sufficient reasons to come to the con-

28. Shetty, "The Constitution of India and Hindu Jurisprudence," *op. cit.*, p. 215.

29. This is the view expressed by T. Venkatavaradan in a seminar, See *Bulletin of the Institute of Traditional Cultures*, Madras, 1964, Part II, pp. 224-25.

clusion that the fundamental rights could be enforced by the Supreme Court, on appropriate proceedings, only against the State, what would be the position of Arts. 15 (2), 17, 18 (2), 23 (1) and 24, which are addressed mainly to individuals? Art. 15 (2) states that no citizen shall, on grounds of religion, race, caste, etc., be subject to any disability or restriction with regard to access to shops, hotels, places of public entertainment etc. Since clause (1) of Art. 15 specifically prohibits the State from discriminating against any citizen on grounds of religion, race, caste, etc., clause (2) of the same Article is evidently directed against individuals who are owners of shops, hotels, theatres, etc. This seems to be the correct interpretation for any attempt to consider clause (2) also as a provision solely addressed to State would render one of the two clauses otiose. So, what will be the position if any discrimination, in violation of Art. 15 (2), takes place in privately owned hotels, shops or theatres? Enforcement of rights under Art. 32 means, on the one hand, vindication or enforcement of rights of individuals who claim them, and on the other hand, enforcement of corelative duty vested in or imposed on the State or some other individuals as the case may be. If the view that individual invasion of individual rights cannot be a subject matter of a writ petition before the Supreme Court under Art. 32 of the Constitution is correct, then it would mean that Art. 15 (2) is a non-self-executing and unenforceable provision which has been left in Part III of the Constitution. What is true of Art. 15 (2) is also true of Arts. 17, 18 (2), 23 and 24. But it may be remembered that the Constitution-makers deliberately created Part IV (Directive Principles of State Policy) and placed in it all provisions which are unenforceable. If they had really intended the provisions of Arts. 15 (2), 17, 18 (2), 23 (1) and 24 to be unenforceable they would have conveniently placed them in Part IV. The very fact that they have been placed in Part III without even a word about their unenforceability shows that they are meant to be as much enforceable as any other Article in Part III. If they are enforceable provisions, they must be deemed to be capable of being enforced against concerned individuals who indulge in acts prohibited by the very provisions of the Constitution.

Further, if the proposition that these provisions are unenforceable is correct then the legislature must have to pass laws in order to give effect to these unenforceable Articles. But, what is the legal position of such laws passed in aid of consti tutional provisions? As the law stands to-day, the position of such statutes or laws is governed by the proposition that in as much as laws enacted in aid of constitutional provisions are also laws within the meaning of the word "law" given in Art. 13, they must conform to the provisions of Part III. This proposition has been laid down by the Supreme Court in *M. S. M. Sharma v. Sri Krishna*[30] when it accepted the view that any law made by the legislature in pursuance of the provisions of Art. 194 (3) defining its powers and privileges would be subject to the fundamental rights. The proposition is given further impetus by a recent historic decision of the Supreme Court delivered on 27th February, 1967, which states that constitutional "amendment" is also a "law" within the meaning of Art. 13, and, therefore, it must conform to the provisions of Part III.[31] If the constitutional amendment, like any other ordinary legislative enactment, is "law" within the meaning of Art. 13, then there is much force in treating statutes passed in aid of constitutional provisions which, by constitutional standards, are less weightier than constitutional amendments, as "law" within the meaning of Art. 13. From this it is evident that any law passed by a legislature giving effect to, say, provisions of Art. 15 (2) must conform to all fundamental rights. If it contravenes any of them, it would be void. So the position of supplemental legislation, that is, law passed in aid of unenforceable provisions, such as Arts. 15 (2), 17, 18 (2), 23 (1) and 24, is inferior and subordinate to other provisions in Part III of the Constitution. In the ultimate analysis it means, therefore, that Arts. 15 (2), 17, 18 (2), etc., which require supplemental legislation for their effective operation, are not only relatively ineffective but their position *vis-a-vis* other Articles in Part III is inferior as well. This position is neither warranted by the

30. A.I.R. 1959 S.C. 395.

31. *The Hindu*, Feb. 28, 1967; *Golaknath v. State of Punjab*, (1967), 2 S.C.J. 486.

language of the Articles, nor it conforms to constitutional tenets, according to which all constitutional provisions have equal validity and force unless expressly provided otherwise. Viewed from this angle also the proposition that individual invasion of individual right cannot be a subject matter of writ petition before the Supreme Court under Art. 32 appears untenable. The omission of any reference to State and the use of flexible language in Art. 32 seem to be deliberate so as to afford sufficient scope to the Supreme Court to enforce the provisions of Arts. 15 (2), 17, 18 (2), etc., against individuals who violate them. If the Constitution-makers had intended to guarantee rights only against the State and consequently to enforce only the duties of the State, they would have created a definite axis between Arts. 13 and 32 by expressly stipulating in the latter that the provisions of Part III can be enforced only against the State. In the absence of such axis between Arts. 13 and 32, it is reasonable to think that rights embodied in Arts. 15 (2), 17, etc., can be enforced against individuals by appropriate order or direction by the Supreme Court under Art. 32 of the Constitution.

But, then arises a question whether a Constitution may guarantee rights to individuals as against other individuals. A simple answer, however, is that if a basic law so chooses there is nothing improper in making an "individual invasion of individual right" an unconstitutional act and protect it from such invasion. Students of Western, especially American, constitutional jurisprudence may, no doubt, find it difficult to subscribe to this view, for they may think that there can hardly be any fundamental right except as against the State. But Western or American constitutional jurisprudence is not the only jurisprudence by which the Indian Constitution must be adjudged.

In fact, the Anglo-American constitutional jurisprudence seems to have influenced earlier decisions of the Supreme Court of India, for in *A. K. Gopalan v. State of Madras*[32] and in *Shamdasani v. Central Bank of India*[33] it held that fundamental

32. (1950) S.C.R. 88.
33. A.I.R. 1952 S.C. 59.

rights are guaranteed only against the State and not against individuals. The Court, however, changed its view subsequently in *State of West Bengal v. Union of India*,[34] wherein it stated that "fundamental rights are primarily for the protection of rights of individuals and corporations enforceable against executive or legislative action of a governmental agency..... Some of these rights are declared in form positive, but subject to restrictions authorising the State to make laws derogating from the fullness of the protection....there are certain Articles which merely declare rights....and there are others merely prohibitory without reference to the right of any person, body or agency to enforce them....prima facie, these declarations involve an obligation imposed not merely upon the 'State', but upon all persons to respect the rights so declared, and the rights are enforceable unless the context indicates otherwise against every person or agency seeking to infringe them. The rights declared in the form of prohibition must have a positive content; without such positive content they could be worthless. Relief may be claimed from the High Court or from this Court against infringement of the prohibition by any agency unless the protection is expressly restricted to State action."[35]

## Conclusion

The foregoing analysis of the relevant provisions of Part III of the Constitution shows that Part III contains, besides a list of fundamental rights, an array of duties of individuals. Stipulation of duties of individuals, as shown earlier, is the distinctive feature of the Hindu jurisprudence which made it essentially duty-oriented in character. Therefore, listing of rights and duties of the individuals shows that Fundamental Rights Part of the Constitution is based not only on Western constitutional principles but on duty-oriented Hindu jurisprudence as well.

Besides, the position in the Indian Constitution with regard to the doctrine of "individual invasion of individual

34. A.I.R. 1963 S C. 1241.
35. *Ibid.*, p. 1264.

right" is far more in advance than the position in the American Constitution, in that individual invasion of individual right is unconstitutional and any such invasion could be a subject matter of a writ petition before the Supreme Court under Art. 32 of the Constitution.

Finally, the fact that the principles of Hindu jurisprudence had also influenced the formulation of the Fundamental Rights Part of the Constitution indicates that any value assessment of rights mentioned therein solely in terms of Western constitutional doctrines or Western political thought would be totally against the basic principles of Part III. In other words, undue attribution of sanctity to individual rights without reckoning the duties of individuals to other individuals or to the society would be negation of the basic principles on which Fundamental Rights Part is based.

## Chapter Four

# FUNDAMENTALITY OF DIRECTIVE PRINCIPLES OF STATE POLICY

### Introduction

Part IV of the Constitution embodies several directive principles of State policy, and the Parliament of India and State Legislatures are duty-bound to carry them into execution by proper legislations. A few Articles in this Part contain provisions dealing with socio-economic justice. Art. 38 states: "The State shall strive to promote the welfare of the people by securing and protecting effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life." The imperative need, as envisaged by this Article, is the creation of a social order which would ensure socio-economic justice to all. The State, as defined in Art. 12, has been given a peremptory mandate to secure and protect such a social order. A glance at the wording of the provisions of this Article would convince any one that it signifies a clear translation of the goal of socio-economic justice, which the people set before them in the Preamble, into a specific provision in the Constitution.

Then, the following Article, namely Art. 39, lays down certain specific policies to achieve the much coveted goal. It states :

"The State shall, in particular, direct its policy towards securing—

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

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

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

(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."

The phrase "in particular" found at the beginning of the Article denotes particularization of socio-economic policies. The Article does not lay down an exhaustive list of such policies. It only prescribes the minimum programmes which are considered necessary to create the social order visualised in Art. 38 of the Constitution.

The third important Article, which stipulates socio-economic policies, is Art. 46. It says: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

These three Articles stipulate ways and means to secure a social order, which guarantees socio-economic justice to all. The language of these Articles would reveal that the directives issued to the State by the people are mandatory in nature. Therefore, any failure, deliberate or otherwise, on the part of the State to implement them would be tantamount to dereliction of duty.

However, Art. 37 seems to have created a position of uncertainty as to the status of the directive principles *vis-a-vis* the fundamental rights. Consequently, the effectiveness of legislation enacted in furtherance of the directive principles has been doubted very much. This Article states that the provisions contained in Part IV "shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." Very often undue emphasis has been laid on unenforceability of the

directive principles without taking cognisance of fundamental nature of the directive principles stipulated in, and the constitutional duty cast on the State to implement them by the latter part of the Article, which inevitably led to the conclusion that directive principles are merely pious aspirations of little legal force. If this is a correct view, then the preambulary provisions which postulate socio-economic justice as an end, and the provisions of Part IV which stipulate specific policies to realise the end, would be redundant. Besides, socio-economic legislations would run the risk of being set aside by the judiciary, not only because the judiciary has nostalgic antipathy towards radical changes in the existing social order which is fortified by undue respect for fundamental rights, but also because every socio-economic legislation carries with it a semblance of conflict with the existing social order and vested interest, which is often characterised as fundamental right. In order to know, therefore, to what extent the socio-economic programmes stipulated in Part IV could be carried out, it is necessary to ascertain the actual position accorded by the Framers to the directive principles in the Constitution. It is, therefore, necessary to look into the Constituent Assembly debates.

## Fundamentality of Directive Principles as Postulated by the Framers

An Advisory Committee was constituted by the Constituent Assembly for the purpose of formulating a list of fundamental rights. Its Supplementary Report[1] submitted to the Constituent Assembly in August 1947, contained a chapter on directive principles. The first clause of the report stated: "The principles of policy set forth in this chapter are intended for the guidance of the State. While these principles shall not be 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."[2] In a letter to the President of the Constituent Assembly on 25th August,

1. C.A.D., Vol. V, Appendix A, p. 406.
2. *Ibid.*

1947, the Chairman of the Advisory Committee stated that the Committee came to the conclusion that, in addition to justiciable rights, the Constitution should include certain directives of State policy which, though not cognizable in any court of law, should be regarded as fundamental in the governance of the country.[3]

But the letter neither gives reasons for making the directives of State policy, which are considered fundamental in the governance of the country, non-cognizable, nor it explains why such important directives were not included in the Chapter dealing with fundamental rights. However, a formidable reason for it is found in the advice tendered to the Members of the Constituent Assembly by B. N. Rau, the Constitutional Adviser to the Constituent Assembly. Since many rights were sought to be included by the members in the Chapter on Fundamental Rights and immediate enforcement of some of them was found to be well nigh impossible without encountering serious economic and administrative dislocation, B. N. Rau suggested that such of those rights as were normally enforceable should be listed as justiciable fundamental rights and those which required administrative action should be incorporated in the Constitution as non-justiciable directives to the State. Such a distinction between justiciable fundamental rights and non-justiciable directives, he pointed out, was followed in the Irish Constitution, and, therefore, the Indian Constitution might profitably follow the Irish plan in this matter.[4] From this it is evident that distinction was made between the fundamental rights and directives of State policy for the purpose of obviating administrative and other practical difficulties that might arise if the directives were to be enforced at the behest of citizens. There is a provision, for example, which speaks of the citizens' right to adequate means of livelihood. If this right were to be enforced on a successful petition for a writ of mandamus, the Government might find itself in a great quandary without finding adequate economic resources to implement it. The only solution left

3. C.A.D., Vol. V, p 404.

4. See B. N. Rau, *India's Constitution in the Making*, edited by B. Shiva Rao, pp. 248–50.

open to the Framers of the Constitution to obviate such administrative and practical difficulties was to make the directive principles unenforceable, non-cognizable, or non-justiciable. Therefore, the provisions in the first part of Art. 37, which make the directive principles unenforceable, are solely intended to obviate such administrative and other practical difficulties as are attendant on the immediate enforcement of the directives in Part IV, but not to render the directive principles into pious aspirations. Much light has been shed on this point in the course of the debate on directive principles in the Constituent Assembly.

The Supplementary Report of the Advisory Committee was placed before the Constituent Assembly on 30th August, 1947. Then, Sardar Patel, the Chairman of the Advisory Committee, laid much stress on the fundamental nature of the directives and the need to include them in the Constitution.[5] Inspite of that, three members expressed their doubt regarding the necessity of including a list of ineffective directive principles. R. K. Sidhwa was of the opinion that unless the directive pinciples were made justiciable, they would not give any satisfaction to the common man in India.[6]

Another member, B. Das, said that the fundamental principles of governance meant *dharma* or the path of duty of the government. Such basic principles of government hardly needed any mention in the Constitution. At any rate, he said, they ought not have been rendered ineffective by making them non-cognisable or unenforceable. According to him, therefore, the non-imperative obligations listed in the Supplementary Report were fit only to be included in the Appendix to the Constitution.[7] P. S. Deshmukh held the view that the directive principles mentioned in the list were of such great importance that no modern State would dare to disown them. They were the absolute minimum that every modern State must avow and, therefore, it would not be good, he opined, to make a hollow avowal of that minimum as the

5. C.A.D., Vol. V, p. 362.
6. C.A.D., Vol. V, pp. 362–64.
7. C.A.D., Vol. V, pp. 366–68.

first clause of the Supplementary Report purported to do. All these views were expressed evidently on the assumption that non-cognisability of the directive principles rendered them ineffective and meaningless superfluities in the Constitution, which was neither the intention of the Advisory Committee nor the actual purport of the first clause of the Supplementary report. The Constituent Assembly, therefore, adopted the report without any change.

Subsequently, the Drafting Committee, which was entrusted with the task of drafting the Constitution in the light of the discussion that had taken place in the Constituent Assembly, drafted the crucial provisions of Part IV as follows : "The provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." The only significant change made by the Drafting Committee in the provisions contained in the Supplementary Report was the substitution of the phrase "shall not be enforceable" for the words "shall not be cognisable". The ambit and scope of the provisions, therefore, remained almost the same.

This provision came up for discussion in the Constituent Assembly on 4th November, 1948. Dr. B. R. Ambedkar, the Chairman of the Drafting Committee, said that though he was prepared to admit that the Directive Principles had no legal force behind them, he was neither prepared to admit that they had no sort of binding force at all, nor was he ready to concede that they were useless simply because they were unenforceable. The Directive Principles were, he said, like the Instruments of Instructions which had been issued to the Governor-General of India and to the Governors of the Provinces by the British Government under the 1935 Act. What were called Directive Principles was merely another name for the Instrument of Instructions. The only difference, according to him, was that the directives were instructions to the Executive as well as to the Legislature.[8] Then, explaining the point further, Dr. Ambedkar stated : "The inclusion of such

8. C.A.D., Vol. VII, p. 41.

instructions in a Constitution such as is proposed in the Draft becomes justiciable (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."[9]

The same point was further elaborated by B. N. Rau subsequently as follows: "It will be remembered that under previous enactments relating to the Government of India, there used to be Instrument of Instructions from the Sovereign to the Governor-General and the Governors and these Instruments used to contain injunctions which, though unenforceable in the courts, served a useful purpose. For example, one of them specially charged and required the Governor 'to take care that due provision shall be made for the advancement and social welfare of those classes who on account of the smallness of their number or of their educational or material advantages or from any other cause specially rely on our protection.' This may be compared with the Article in the Draft of the New Constitution which requires that the State shall promote with special care the educational and economic interests of the weaker sections of the people. The former was an instruction from the legal sovereign to the Governors appointed by him; the latter may be looked upon as a similar instruction from the ultimate sovereign, namely, the people of India, speaking through their representatives in the Constituent Assembly, to the authorities set up by or under the Constitu-

9. *Ibid.*

tion."[10] Thus, the directive principles were treated by the framers of the Constitution as instructions from the ultimate sovereign, the people of India, to the authorities set up by or under the Constitution.

The Part dealing with the directive principles came up once again for discussion before the Constituent Assembly on 19th November, 1948. Then an amendment was moved by a member for deletion of the word "Directive" from the title "Directive Principles of State Policy" of Part IV, and for the substitution of the word "Fundamental" in its place so that the title, as amended, might read "Fundamental Principles of State Policy." The reason adduced in support of the amendment was that it was necessary to emphasise the fundamental nature or fundamentality of the rights included in Part IV.[11] But Dr. B. R. Ambedkar pointed out that the objective of the proposed amendment, namely, that the emphasis should be laid on the fundamental nature of the directive principles, was already achieved by the wording of the Article which stated in unmistakable terms that the principles laid down in Part IV "are nevertheless fundamental in the governance of the country." He said that the word "Directive" should be retained in the title, for it was to be understood that in enacting this part of the Constitution the Constituent Assembly was giving certain directives to the future legislatures and executives to indicate in what manner they have to exercise their respective powers. If the word "Directive" was omitted, he opined, the intention of the members of the Constituent Assembly in enacting this Part would fail in its purpose, for it was not the intention of the members to introduce mere pious declarations. The directive principles were, according to him, intended to be fundamental principles and as such were intended to be made the basis of all executive and legislative actions that might be taken in future in the governance of the country.[12] In view of this explanatory statement the Consti-

10. The *Hindu*.

11. See the speech of H.V. Kamath, C.A.D., Vol. VII, pp. 471-72, Also see the speeches of Kazi Syed Karimuddin and Naziruddin Ahmed, C.A.D. Vol. VII, pp. 473, 475 and 476.

12. C.A.D., Vol. VII, p. 476.

tuent Assembly did not find it necessary to accept the amendment.

However, K. T. Shah, who was not satisfied with the provisions of the Article, moved an amendment to replace the entire Article by the following provisions: "The provisions contained in this Part shall be treated as the obligations of the State towards the citizens and shall be enforceable in such manner and by such authority as may be deemed appropriate in or under the respective law relating to each such obligation. It shall be the duty of the State to apply these principles in making the necessary and appropriate laws." Speaking in support of the amendment, K. T. Shah said that Part IV, which contained the hopes and aspirations of many people in this country, was one of the most important and creative parts of the Constitution. Such an important part of the Constitution, therefore, should not be rendered ineffective by making the provisions unenforceable simply because some of the principles enunciated therein looked impracticable from the point of immediate implementation. He therefore felt that unless the duties or obligations of the State were made mandatory, the State might not attend to them at all.[13]

No doubt, many a member agreed with K. T. Shah that Part IV embodied hopes and aspirations of the people of India and, therefore, it was one of the most important creative parts of the Constitution. But they did not subscribe to his view that provisions relating to unenforceability of the directive principles rendered the directives ineffective, for those provisions were introduced only to obviate administrative and economic difficulties that might arise if the State was compelled to implement the directives immediately, regardless of economic situation, at the behest of an individual, but not to make the directive principles less important or ineffective. One member, therefore, reiterated emphatically the earlier view that the directive principles would not remain mere pious wishes. He said that the very fact that Part IV formed part of the Constitution was a sufficient indication that the directive principles would

13. C.A.D., Vol. VII, pp. 478-79.

not remain as mere ineffective obligations, and even though a citizen would not be able to go to a court of law for their enforcement, it would surely be open to the Presiding Officer of every Legislative Assembly to turn down or disallow a Bill if it was in conflict with the Directive Principles.[14] Consequently, K. T. Shah's amendment was not favoured by the members of the Constituent Assembly.

From the foregoing analysis of the views of the framers of the Constitution a few conclusions may be drawn. First, the phrase "shall not be enforceable" has been used in Art. 37 only to save the State from the embarrassment of being called upon by the citizens to implement the directive principles immediately or at a time when their implementation would not be feasible economically, administratively or otherwise, but not to make the directive principles ineffective. Therefore, any grant of undue importance to, or emphasis on, the phrase which will have the effect of reducing the directive principles to the position of pious and ineffective obligations would be clearly against the much avowed intention of the framers of the Constitution. Secondly, Part IV embodies the hopes and aspirations of the people and, therefore, it is the most important Part of the Constitution. Thirdly, the directive principles are fundamental principles as far as the governance of the country is concerned. Finally, the directive principles are the instructions of the ultimate sovereign, the people of India, to the future legislatures and executives in India that may be established by or under the Constitution. The directives in that sense are imperative and mandatory obligations imposed on the State.

State, as defined in Art. 12, includes only the legislature and executive. Since these are obligations of the State, a question may arise whether the judiciary is bound by the directives or instructions issued to the legislative and executive wings of the State by the people. It is still controversial whether the definition of State in Art. 12 comprehends the judiciary also. It is, however, reasonable to bring the judiciary within the definition

14. See the speech of Shibban Lal Saksena, C.A.D., Vol. VII, pp. 481–82.

if the context otherwise so requires. At any rate, it is difficult to say that the judiciary could ignore with impunity the directives of the ultimate sovereign. Judiciary is as much a creature of the Constitution as the other two organs of the State. When the Constitution is known to have been explicitly established by the ultimate sovereign, the people, there is hardly any scope to think that while the legislative and executive wings of the State are bound to respect them, the interpretative organ of the State could ignore them. Inasmuch as these directive principles are fundamental in the governance of the country and are instructions of the ultimate sovereign, the judiciary is obliged to make use of them in interpreting legislations.

### Directive Principles and the Judicial Attitude

It is now interesting to examine the attitude of the judiciary towards the Directive Principles. The first opportunity arose in *State of Madras v. Champakam Dorairajan*,[15] wherein the validity of the Madras Communal Government Order, which fixed seats for different communities and caste groups in the medical and engineering colleges of the State, was questioned on the ground that it violated the provisions of Art. 29 (2) of the Constitution. According to this Article, a citizen could not be denied admission to educational institutions maintained by the State on grounds only of religion, race, caste, language or any of them.[16] The Supreme Court held that if a candidate for a particular course had the academic qualifications but was refused admission only on grounds of religion, race, caste, language or any of them, then there was a clear breach of his fundamental right.[17] Inasmuch as the impugned Communal G.O. stipulated community and caste as the basis for fixing seats for different communities and caste-groups in the State maintained medical and engineering colleges, the Court ruled, it was inconsistent with

15. (1951) S.C.R. 525; A.I.R. 1951 S.C. 226.

16. Art. 29 (2) states: "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."

17. (1951) S.C.R. 525, p. 530.

the provisions of Art. 29 (2), and, therefore, was void under Art. 13 of the Constitution.[18]

But the State sought to justify and maintain the validity of the communal G. O. on the ground that it was meant to promote with special care the educational and economic interests of the weaker sections of the people and of the Scheduled Castes and the Scheduled Tribes and to protect them from social injustice and all forms of exploitation, which was the duty enjoined on the State explicitly by Art. 46 of the Constitution. It was argued that the communal G. O. was valid in law and not a violation of the Constitution, in that it purported to implement one of the directive principles which, despite their unenforceability, were made by Art. 37 not only fundamental in the governance of the country but also obligatory on the State to apply those principles in making laws. What is more, the State maintained further that the provisions of Art. 46 must be deemed to override the provisions of Art. 29 (2). The Supreme Court rejected the above mentioned contention and held: "The directive principles of 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 on which the provisions found in Part III and Part 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

18. Art. 13 states: "(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of such inconsistency, be void.

"(3) In this Article, unless the context otherwise requires—

(a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."

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.[19]

It is difficult to disagree with the decision, for the argument of the State that the communal G.O. was meant to promote the educational and economic interests of the weaker sections of the people is hardly convincing. The communal G. O. which classifies people into non-Brahmin Hindus, Backward Hindus, Brahmins, Harijans, Anglo-Indians and Christians, and Muslims for the purpose of distributing seats in professional colleges, can hardly be construed to have been intended to promote educational and economic interests of the weaker sections of the people. Besides, it does not seem to be reasonable to identify "weaker sections of the people" with a particular community or a caste-group. For example, non-Brahmin Hindus, to whom six out of every fourteen seats were reserved by the communal G.O., cannot be described assertively or decisively as "weaker sections of the people".

But it is difficult to subscribe to Supreme Court's view on the directive principles. It states that the directive principles of State policy "have to conform to and run as subsidiary to the Chapter of Fundamental Rights". This view is based on the idea that the fundamental rights have been expressly made enforceable by the Court, whereas the directive principles have been explicitly made unenforceable by any Court. This view of the Supreme Court ignores the fact that the framers of the Constitution made the directive principles unenforceable only to prevent the State from being compelled to implement them immediately, but not to reduce their importance, nor to allot to them inferior place in the Constitution *vis-a-vis* the fundamental rights.

Secondly, while the Court lays stress on the unenforceability of the directive principles, it overlooks the fundamental nature of the directive principles emphasised explicitly in Art. 37. It may be noted that unlike Art. 37 in Part IV, nowhere in Part III the fundamental nature of the rights embodied therein has been expressly emphasised or asserted. This difference between

19. (1951) S.C.R. 525 at p. 531.

Part III and Part IV has been ignored often in an enthusiasm to emphasise the sanctity of fundamental rights. So, even if the directive principles are construed to have lost force because of their unenforceability, the loss has been completely offset by the due emphasis laid in the Constitution on their fundamental nature. The directive principles, therefore, ought to have been treated on par with, if not more than, the fundamental rights.

Finally, it is worth pondering over the problem whether the Courts could give more weight to Part III (which embodies the existing social values) than to Part IV (which enshrines aspirations of the people). Social values are not static. They reflect socio-economic conditions and thinking of the people on socio-economic matters, and, therefore, they are bound to change with the change in the socio-economic conditions and structure of the society. Aspirations of the people not only represent a goal to be reached but also signify the intention of the people to march from "is" to "ought", from the "real" to the "ideal". One of the aspirations is to bring into existence a new social order wherein socio-economic justice is assured to all. This goal of new social order evidently envisages remaking of material conditions and re-casting of socio-economic structure on the lines suggested in Art. 39 of the Constitution. In the new social order the present social values are bound to change, lest they should be out of tune with the changed socio-economic structure. Such a change in social values can be thwarted, and an attempt to achieve the set goal of new social order can be stifled only by freezing, and attaching sanctity to, the present values, and by giving lesser importance and weight to the aspirations of the people embodied in Part IV. This seems to be exactly the result of the Supreme Court's view in *Champakam Dorairajan's case* that the directive principles "have to conform to and run as subsidiary to the Chapter of Fundamental Rights." And the statement of the Supreme Court that "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" hardly gives any consolation, for such self-evident truth hardly needs a reiteration in a judicial

pronouncement. The view of the Supreme Court seems to go against the avowed intention of the framers of the Constitution who visualised, as pointed out earlier, a march, a change from "state of serfdom to one of freedom", which can be accomplished only if the Court accords equal, if not more, importance and weight to directive principles.

A change in the attitude of the Supreme Court can, however be discerned in two subsequent cases. The first case was *State of Bihar v. Kameshwar Singh*[20] in which the validity of several Zamindari Abolition Acts was questioned on the ground that they violated the guaranteed fundamental right to property. As against this, the validity of the legislations was asserted on the ground that they were enacted in pursuance of Art. 39 which provided for de-concentration of wealth and distribution of the material resources for the common good.

The main question before the Court was, therefore, whether the implementation of the directive principles, which the impugned legislations purported to have done, could be construed valid as intended for "public purpose", mentioned in Art. 31 (2), under which the State could acquire private property for public purpose if compensation was provided for. It was argued that the expression "public purpose" should not be construed in the light of the directive principles laid down in Part IV, because they were mere glittering generalities with no justification behind them. Besides, it was contended that the expression "public purpose" was an old concept with a settled meaning and it must be presumed that the Constitution used the expression in the same meaning; if the intention was otherwise, it would have stated clearly that "public purpose" included purposes which aim at implementing the directive principles. Mahajan J., who spoke for the Court, rejected the contention and upheld the validity of the laws on the reasoning that the implementation of the directive principles set out in Art. 39 was such a public purpose. He observed: "Now it is obvious that concentration of big blocks of land in the hands of a few individuals is contrary to the principle on which the Constitution of India is based. The purpose of the acquisition contemplated by the impugned

20. A.I.R. 1952 S C. 252.

Act therefore is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to so distribute the ownership and control of the material resources which come in the hands of the State as to subserve the common good as best as possible."[21]

In this case Das J. expressed a similar view when he said: "In the light of this new outlook what, I ask, is the purpose of the State in adopting measures for the acquisition of Zamindaris and the interests of intermediaries? Surely, it is to subserve the common good by bringing the land, which feeds and sustains the community and also produces wealth by its forest, mineral and other resources, under State ownership or control. This State ownership or control over land is a necessary preliminary step towards the implementation of the directive principles of State policy and it cannot but be a public purpose."[22] Finally, Mahajan J. concluded saying: "In my opinion, legislation which aims at elevating the status of tenants by conferring upon them the bhumidari rights to which status the big Zamindars have also been levelled down cannot be said as wanting in public purposes in a democratic State. It aims at destroying the inferiority complex in a large number of citizens of the State and giving them a status of equality with their former lords and prevents the accumulation of big tracts of land in the hands of a few individuals which is contrary to the expressed intentions of the Constitution."[23]

In the foregoing decision Mahajan J. laid down two propositions of considerable importance. The first proposition is that "the concentration of big blocks of land in the hands of a few individuals is contrary to the principles on which the Constitution of India is based." The same proposition has been stated slightly differently by him when he said that the accumulation of big tracts of land in the hands of a few individuals "is contrary to the expressed intentions of the Constitution." Averment of the basic principles of the Constitution in the proposition is highly significant. One of the basic principles, referred to here, is evidently the concept of socio-economic justice embodied in

21. *Ibid.*, p. 274.
22. *Ibid.*, p. 290.
23. *Ibid.*, p. 311.

the preamble of the Constitution. According to the expressed views of the makers of the Constitution, as shown earlier, the concept meant rejection of the present social structure and the status quo and a change from the status of serfdom to one of freedom.[24] This intention has been given a definite and practical content in certain Articles in Part IV of the Constitution, which expressly enjoin on the State a duty to implement certain socio-economic policies laid down therein and to secure a new social order in which socio-economic justice is assured to all. So statement of Mahajan J. that "the concentration of big blocks of land in the hands of a few individuals is contrary to the principles on which the Constitution of India is based" seems to mean that such concentration of large tracts of land in the hands of a few people is contrary to the basic concept of socio-economic justice writ large on the face of the Constitution and to the policy of de-concentration of wealth and means of production in a few hands stipulated in Part IV of the Constitution. If concentration of lands or wealth in the hands of a few individuals is contrary to the basic principles of the Constitution, any right claimed in respect of it is, therefore, logically against the basic principles of the Constitution and against the directive principles designed to give effect to such basic principles, and hence unconstitutional. In effect, therefore, any assertion of right against the directive principles, implementation of which is necessary for the realisation of the basic principles of the Constitution, is inadmissible. That is to say, whenever a right is asserted against a legislation, which has been enacted decidedly for the implementation of such of those directive principles as are necessary for the realisation of the basic principles of the Constitution, then the right claimed must be deemed to be against the basic principles of the Constitution and must not be enforced as against the basic principles of the Constitution. In other words, whenever there is a conflict between an individual right and a legislation purporting to carry into effect socio-economic policies laid down in Part IV, greater weight should be accorded to the latter, for fundamental rights have

24. See *supra*.

to be exercised by the individuals not only in consonance with the basic principles but also in conformity with the aspirations of the people.

The second proposition is that the "legislation which aims at elevating the status of tenants by conferring upon them bhumidari rights to which status the big Zamindars have also been levelled down cannot be said as wanting in public purposes in a democratic State." If this proposition is considered against the background of the argument advanced before the Court that the expression "public purpose" should not be construed in the light of the directive principles, it is clear that the proposition rejects the suggested mode of construction and asserts instead that the Zamindari abolition law, which intended to do away with the concentration of large tracts of land in the hands of a few individuals and to benefit large number of tenants, must be deemed to be for "public purpose" in a democratic state. A principle that may be deduced from this is that a legislation, which purports to implement socio-economic policies laid down in Part IV, must of necessity be construed as one designed for "public purpose", or as one intended to promote the "public interest", or as "reasonable restriction" on the fundamental rights. This is actually the mode of construction suggested by Prof. Alexandrowicz.[25]

Another important case was *Bijay Cotton Mills Ltd.* v. *The State of Ajmer*[26] wherein the validity of the Minimum Wages Act and the minimum rates of wages fixed thereunder were challenged on the ground that they were *ultra vires* by reason of their conflict with the fundamental rights of the employers and the employees guaranteed under Art. 19 (1) (g) of the Constitution and that they were not protected by clause (6) of that Article. In fact, earlier there was an industrial dispute between the company and its labourers regarding enhancement of wages, and the dispute was referred by the Government of Ajmer to an Industrial Tribunal. The latter held that the present earning capacity of the Mill precluded the award of

25. Prof. C. H. Alexandrowicz, *Constitutional Developments in India*, 1957, pp. 106-07.

26. (1955) 1 S.C.R. 752.

higher rates of wages, whereupon the labourers took an appeal against the award to the Appellate Tribunal. While the appeal was pending, the Government of Ajmer, acting under the Minimum Wages Act, fixed the minimum rates of wages of labourers in the textile industry within the State. Consequently, the Appellate Tribunal sent the case back to the Industrial Tribunal for further investigation and the latter made its final award by which it rejected the basis upon which minimum wages were fixed by the government and fixed the minimum wages at considerably lesser rate. The company, which felt that it could not carry on its business on payment of wages fixed by the government, closed its mills. Subsequently, the labourers approached the managing authorities of the company and requested them to open the Mills expressing their willingness to work at lesser wages as fixed by the Industrial Tribunal. Though the majority of workers were agreeable to work on the wages fixed by the Industrial Tribunal, the company was unable to open the Mills by reason of the fact that the Minimum Wages Act made any refusal to pay the wages fixed under the Act a criminal offence. This being the position, both the employers and the employees filed writ petitions challenging the validity of the Minimum Wages Act and the minimum wage fixed thereunder.

It was contended that the Minimum Wages Act not only restricted unreasonably the rights of the employer in the sense that he was prevented from carrying on trade or business unless he was prepared to pay minimum wages, but also curtailed the rights of employees inasmuch as they were disabled from working in any trade or industry on the terms agreed upon between them and their employers. The Supreme Court in its unanimous judgment refused to subscribe to this view. Mukherjee J., who spoke for the court, said: "It can scarcely be disputed that securing of living wages to labourers, which ensure not only bare physical subsistence but also the maintenance of health and decency, is conducive to the general interest of the public. This is one of the Directive Principles of State Policy embodied in Art. 43 of our Constitution. . . If the labourers are to be secured in the enjoyment of minimum wages and they are to be protected against exploitation by their employers, it is absolute-

ly necessary that restraints should be imposed upon their freedom of contract and such restrictions cannot in any sense be said to be unreasonable. On the other hand, 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."[27]

This decision upholds the validity of the Minimum Wages Act on the reasoning that in so far as the law strives to secure living wage for labourers, which is one of the directive principles, it is conducive to the general interest of the public and, therefore, a reasonable restriction on the labourers' freedom of contract and on the employers' right to carry on business. Consequently, it lays down a principle that legislation purporting to implement one of the directive principles must be considered to be conducive to the general interest of the public, and any restraint it imposes on the rights of the individuals must, therefore, be construed as a reasonable restriction. Thus, in effect, the decision reiterates the rule of construction laid down in *Kameshwar Singh's case*.

Subsequently, in two other cases, the Supreme Court's approach became a little uncertain and complicated in that while adopting the pragmatic approach laid down in *Kameshwar Singh* and *Bijay Cotton Mill* cases to the problem at hand, it has affirmed expressly the ruling in *Champakam Dorairajan* case. It is, however, interesting to analyse them to sift the essence of the rulings.

In *M.H. Quarashi* v. *State of Bihar*[28] the Supreme Court was called upon to pronounce its decision on the validity of Bihar, Uttar Pradesh and Madhya Pradesh legislations which banned the slaughter of certain animals including cows. To wit, the Bihar Preservation and Improvement of Animals Act, 1955, put a total ban on the slaughter of all categories of animals of the species of bovine cattle; the U.P. Prevention of

27. *Ibid.*, at p. 755. For detailed discussion of "minimum wage", "fair wage" and "living wage", see *R. B. Employees v. Reserve Bank*, A.I.R. 1966 S.C 305.

28. (1959) S C.R 629.

Cow Slaughter Act, 1955, put a total ban on the slaughter of cows and its progeny which included bulls, bullocks, heifers and calves; and the C.P. and Berar Animal Preservation Act, 1949, placed a total ban on the slaughter of cows, male or female calves of cow, bulls, bullocks and heifers, and the slaughter of buffaloes (male or female, adults or calves) was permitted only under a certificate granted by the proper authorities. It was urged before the court that inasmuch as the above mentioned legislations imposed total ban on the slaughter of certain animals including cows, they prevented the petitioners from carrying on their butcher's trade and its subsidiary undertakings and, therefore, infringed their fundamental rights, among others, guaranteed under Art. 19(1) (g) of the Constitution. As against this it was maintained that the legislations were enacted in pursuance of the directive principles contained in Art. 48 which envisaged, *inter alia*, prohibition of slaughter of cows and calves and other milch and draught cattle,[29] and since they were made in consonance with the directive principles they were perfectly valid.

It was also urged before the Court that the laws having thus been made in discharge of the fundamental obligation imposed on the State, the fundamental rights conferred on the citizens and others by Part III of the Constitution must be regarded as subordinate to those laws. The directive principles, it was contended, were equally, if not more, fundamental and must prevail. But the Supreme Court found difficult to accept this view. S. R. Das C. J., who delivered the opinion of the Court, said : "We are unable to accept this argument as sound. Article 13 (2) expressly says that the State shall not make any law which takes away or abridges the rights conferred by Chapter III of our Constitution which enshrines the fundamental rights The directive principles cannot override this categorical restriction imposed on the legislative power of the State. A harmonious interpretation has to be placed upon the Constitu-

29. Art. 48 states: "The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle."

tion and so interpreted it means that the State should certainly implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise the protecting provisions of Chapter III will be 'a mere rope of sand'."[30]

Having laid down the foregoing proposition, S. R. Das C. J. proceeded to examine the reasonableness of the impugned legislations and reached the conclusion "(*i*) that a total ban on the slaughter of cows of all ages and calves of cows and calves of she-buffaloes, male and female, is quite reasonable and valid and is in consonance with the directive principles laid down in Art. 48, (*ii*) that a total ban on the slaughter of the buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are as milch or draught cattle is also reasonable and valid, and (*iii*) that a total ban on the slaughter of she buffaloes, bulls and bullocks (cattle or buffalo) after they cease to be capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable in the interests of the general public."[31]

It may be noted that this decision states categorically, in a language almost reminiscent of the language used in *Champakam Dorairajan* case, that the directive principles cannot over-ride the categorical restriction imposed by Art. 13 (2) on the legislative power of the State. If the directive principles cannot over-ride this categorical restriction, a logical conclusion would be that they must then remain subservient to fundamental rights as envisaged by the Supreme Court in *Champakam Dorairajan* case.

The Court, however, introduced the doctrine of harmonious interpretation or construction as a new technique of interpretation in this field. But it has defined the doctrine in such a way as to mean that the State must implement the directive principles in such a way that its laws do not take away or abridge fundamental rights. This definition seems to lead nowhere, for there can hardly be any scope for complaint or for the Court to apply the doctrine of harmonious construction

30. (1959) S.C.R. 629, p. 648.
31. *Ibid.*, p. 688.

if the laws made by the State in pursuance of the directive principles do not conflict with fundamental rights. In fact, every legislation, which does not take away or abridge fundamental rights, is valid not because it is in consonance with a directive principle but in spite of it. Therefore, so long as a legislation, whether made in pursuance of a directive principle or not, is not in conflict with fundamental rights, or so long as the individuals affected by such legislation in some way or other do not choose to challenge its validity, the problem of interpretation does not arise at all. But the question is what will be the role of the doctrine harmonious construction in a situation wherein a legislation made in pursuance of a directive principle is found in conflict with a fundamental right or at least alleged to have infringed the fundamental rights of an individual ? The doctrine as enunciated herein does not seem to be of any help in solving the problem.

It may be noted further that in the first part of the final decision of the Court it is stated that "a total ban on the slaughter of cows of all ages . . . . is quite reasonable and valid and is in consonance with the directive principles laid down in Art. 48". One may try in vain to detect the application of the doctrine of harmonious construction here. It is not clear from the statement whether the law banning the slaughter of milch cows is reasonable and valid because it is in consonance with a directive principle or it is reasonable and valid on its own, that is, despite its conformity with a directive principle. From the decision it is difficult to discern the actual view of the Court. The fact, however, remains that the Court when faced with the problem of adjudging the validity of a law made in pursuance of a directive principle enunciated the doctrine of harmonious construction, which presupposes the existence of conflict between two provisions of equal force. In the instant case, since the conflict is between the legislation enacted in pursuance of a directive principle and the fundamental rights, the court indirectly treated them as two provisions of equal force. Once it is admitted that they are provisions of equal force, it is immaterial how the court would resolve the conflict applying the doctrine of harmonious construction. It may resolve the conflict either by according a greater weight to the

legislation as one intended to benefit the society as a whole or by treating every such legislation as a reasonable restriction on the fundamental rights.

Then, in *In re The Kerala Education Bill*,[32] the Supreme Court was called upon to give its opinion, *inter alia*, on the relationship between the fundamental rights and the directive principles. One of the issue before the Court related to the validity of clause 20 of the Kerala Education Bill, which prohibited the government and private schools from collecting any tuition fee from pupils studying in primary classes.[33] In other words, clause 20 of the Bill sought to make education free up to the primary classes within the State. Then, clause 3 (5) of the Bill extended the provisions of the Bill including clause 20 to new schools that may be established after the commencement of the Act and provided that any such new school established otherwise than in accordance with the provisions of the Act shall not be entitled to be recognised by the Government.[34]

Argument before the Supreme Court was that clause 20 of the Bill violated the right of the minorities to establish and administer educational institutions of their choice so solemnly guaranteed to them by Art. 30 of the Constitution.[35] The State, on the other hand, maintained, in effect, that the Bill was brought forth to implement the directive principle embodied in Art. 45, which enjoined on the State to provide for free and

32. (1959) S C.R. 995

33. Clause 20 of the Bill states: "No fee shall be payable by any pupil for any tuition in the primary classes in any government or private school."

34. Clause 3 (5) of the Bill states: "After the commencement of this Act, the establishment of a new school or the opening of a higher class in any private school shall be subject to the provisions of this Act and the rules made thereunder and any school or higher class established or opened otherwise than in accordance with such provisions shall not be entitled to be recognised by the Government."

35. Art. 30 states: "(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. (2) The State shall not in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

compulsory education for all children below the age of fourteen years.[36] Thus, the Supreme Court was faced with the problem of resolving the alleged conflict between the impugned provision of the Bill made in pursuance of a directive principle and the fundamental right of the minorities guaranteed under Art. 30 (1) of the Constitution.

But the Supreme Court, speaking once again through S. R. Das, C. J., said that "although this legislation may have been undertaken by the State of Kerala in discharge of the obligation imposed on it by the directive principles enshrined in Part IV of the Constitution, it must, nevertheless, subserve and not over-ride the fundamental rights conferred by the provisions of the Articles contained in Part III of the Constitution and referred to above . . . . . Nevertheless, in determining the scope and ambit of the fundamental rights relied on by or on behalf of any person or body the Court may not entirely ignore these directive principles of State policy laid down in Part IV of the Constitution but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible. Keeping in view the principles of construction above referred to we now proceed to examine the provisions of the said Bill in order to get a clear conspectus of it."[37]

Having thus laid down the principle of construction the Chief Justice then set out to examine the ambit of the impugned provisions of the Bill and their impact on the right of the minorities guaranteed under Art. 30 (1) of the Constitution. After analysing the scope of the impugned provisions, he came to the view that if the Bill became law, all the schools would have to forego the fruitful source of income, namely, the fees collected from students attending primary classes. There was, however, no provision for counterbalancing the loss of fees which would be brought about by clause 20 when it

36. Art 45 states: "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

37. (1959) S C.R. 995 at 1022.

came into force. Therefore, he was of the opinion that "the imposition of such restriction against the collection of fees from any pupil in the primary classes as a condition for recognition will in effect make it impossible for an educational institution established by a minority community being carried."[38]

Then adverting to the argument of the State that the impugned provisions were valid because they were made in pursuance of the directive principle embodied in Art. 45, he said that "Article 45, no doubt, requires the States to provide for free and compulsory education for all children, but there is nothing to prevent the State from discharging that solemn obligation through government and aided schools, and Art. 45 does not require that obligation to be discharged at the expense of the minority communities. So long as the Constitution stands as it is and is not altered, it is, we conceive, the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority communities who are our own."[39] So, the inevitable conclusion of the Court was that clause 20 in so far as it affected educational institutions established and administered by minority communities was violative of Art. 30 (1) of the Constitution.[40]

The above mentioned pronouncement of the Supreme Court does not strike any new ground. It reiterates the view expressed in *Champakam Dorairajan* case when it says that the directive principles must "subserve and not over-ride the fundamental rights." No innovation either is introduced in the application of the doctrine of harmonious construction. The decision says that in adopting the principle of harmonious construction attempt should be made to give effect to both directive principles and fundamental rights as much as possible. This is not different from the rule of construction adopted in *M. H. Quarashi* case wherein the doctrine of harmonious construction has been construed to permit the State to implement directive principles in such a way that its laws do not take away or abridge the fundamental rights. This fact is evident in the

38. *Ibid.*, p. 1069.
39. *Ibid.*, p. 1070.
40. *Ibid.*, p 1071.

final conclusion in *In re the Kerala Education Bill,* according to which the impugned clause 20, which secures free education to all upto primary class, is void because it infringed the rights of minority communities guaranteed by Art. 30(1). Thus, though the doctrine of harmonious construction has been put forward in these two cases, it has been rendered innocuous by the way it is applied. In fact, the same result could have been reached, without bringing in the name of the doctrine, by following the rigid and narrow construction rule adopted in *Dorairajan* case. The similarity of views in all the three cases, namely, *Dorairajan* case, *M. H. Quarashi* case and *Kerala Education Bill* case is understandable, because Mr. Justice S. R. Das spoke for the Court in all the three cases.

But his statement in *In re Kerala Education Bill* that there is nothing to prevent the State from discharging the solemn obligation imposed on it by Art. 45 through government and aided schools and that "Art. 45 does not require that obligation to be discharged at the expense of the minority communities", if read with the final pronouncement made in the case, seems to contain a dangerous implication. First of all, it means, in effect, that education can never be free for all, because those who attend educational institutions established and maintained by the minority communities will have to pay the fees charged by them. In other words, the directive principles embodied in Art. 45 can never be implemented in full.

Secondly, it means that the directive principles shall not be implemented if the implementation of them affects the fundamental rights of a few individuals. If this is the correct reasoning it is well nigh impossible to carry into effect socio-economic policies laid down in Part IV of the Constitution. For example, there is a directive to the effect that the State shall direct its policy towards securing distribution of ownership and control of the material resources of the community in such a way as to subserve the common good[41] and securing an economic system, operation of which does not result in the concentration of wealth and means of production to the common

41 Art. 39(b).

detriment.[42] Any attempt on the part of the State to carry into effect these obligations must necessarily affect the fundamental right to property of a few individuals in whose hands material resources of the community, wealth and means of production are concentrated. As the Court suggests, if the directive principles are to be implemented without affecting the fundamental rights, or for that matter without affecting the existing property rights, it virtually amounts to laying down a rule which not only makes the implementation of the socio-economic policies impossible as against the property rights of a few individuals but also perpetuates the property rights of a few individuals in whose hands wealth of the community and means of production have already concentrated. Thus, the *raison d'etre* in this case prevents change in the socio-economic structure of the society on the lines suggested in Part IV of the Constitution and consequently stifles any attempt to bring into existence a new social order wherein greater number of persons than hitherto could exercise the fundamental rights.

Recently judicial thinking on this point seems to have undergone a change. First indication of it may be noticed in the statement of Mudholkar J. in *Sajjan Singh* v. *State of Rajasthan*.[43] In this case he was confronted by an argument that if the Fundamental Rights Chapter was not made subject to the amending process of the Constitution there was a danger that the much needed dynamic change or development in the Indian society would be hampered. Though he did not dismiss the argument as of no consequence, he opined that even if the fundamental rights were taken as unchangeable, the much required dynamism may be achieved by properly interpreting the fundamental rights in the light of the directive principles of State policy in Part IV of the Constitution. In this connection he observed that these directive principles "are also fundamental in the governance of the country and the provisions of Part III of the Constitution must be interpreted harmoniously with these principles."[44]

42. Art. 39 (c).
43. A.I.R. 1965 S.C. 845.
44. *Ibid.*, at 864.

No doubt, the statement of Mudholkar, J. also envisages the application of the doctrine of harmonious construction. But it goes further not only to take cognizance of the fundamental nature of the directive principles, but also to resolve the conflict, if any, between the fundamental rights and the directive principles by interpreting the former in the light of the latter. This method of interpretation is advocated by him in order to ensure dynamism in the socio-economic structure in the Indian society. To interpret the fundamental rights in the light of the directive principles is definitely to give new meaning, new content and new dimension to the former so that not only the latter could be implemented fully and effectively but the former could find themselves in tune with the changed conditions and the new social order brought about by implementation of the directive principles. Viewed thus, the observation of Mudholkar, J. definitely marks a leap forward from the position held in *M. H. Quarnishi* and *Kerala Education Bill* cases.

There is yet another view expressed by K. Subba Rao, C. J., in a recent historic decision delivered while disposing of a batch of writ petitions from Mysore and Punjab challenging the validity of Seventeenth, Fourth and First Amendments to the Constitution. In this case an argument was placed before the Court that if the provisions (relating to fundamental rights) of the Constitution could not be amended, it would lead to revolution.[45] But the Chief Justice said that what was meant was that fundamental rights could not be taken away or abridged by means of amendment.[46] Proceeding further he said, "Nor can we appreciate the argument that all the agrarian reforms which Parliament in power wants to effectuate cannot be brought about without amending the fundamental rights."[47] It was in this context that the Chief Justice observed: "The fundamental rights and the Directive Principles of State Policy enshrined in the Constitution formed an 'integrated scheme'

45. See *The Hindu*, Feb. 28, 1967, *Golaknath v. State of Punjab*, (1967), 2 S.C.J. 486.
46. *Ibid.*
47. *Ibid.*

and was elastic enough to respond to the changing needs of the society."[48]

Thus, in the above mentioned pronouncement the Supreme Court enunciated what may be called the doctrine of "integrated scheme" to characterize the relationship between the fundamental rights and the directive principles. If it is admitted that Part III and Part IV form an "integrated scheme", an inevitable conclusion that flows from it is that the Court treated both the Parts equally. In other words, the doctrine of "integrated scheme" pursupposes the equality of the Parts which constitute the "integrated scheme". Thus, in effect, the doctrine of "integrated scheme" repudiates the theory of subordination enunciated by the Supreme Court in *Champakam Dorairajan* case and reiterated later in *M. H. Quareishi* and *Kerala Education Bill* cases.

Besides, the language of the latest pronouncement of the Supreme Court reveals that the doctrine of "integrated scheme" has been conceived to indicate the elasticity of the fundamental rights, which elasticity would enable them to respond to the changing needs of the society. It is now certain that such change in the society and social order can be brought about in consonance with the aspirations of the people only through the implementation of the socio-economic policies laid down in Part IV of the Constitution by legislative measures. Attribution of static meaning to fundamental rights, or perpetuation of a particular meaning they assumed under the old social order, would undoubtedly stifle legislative measures designed to bring about the much aspired changes in the society. Therefore, the elasticity of fundamental rights postulated in the doctrine of "integrated scheme" is the capacity with which the fundamental rights respond to the changing needs of the society and adopt themselves to the changing situations by assuming new meanings and contents. Thus, implicit in the theory of elasticity of fundamental rights and the doctrine of "integrated scheme" is a rule of construction that the fundamental rights must be interpreted in the light of the directive principles, that is to say, the fundamental rights must be construed in

48 *Ibid.*

such a way as to enable the State to carry out its socio-economic obligations imposed on it by Part IV of the Constitution. This implicit rule of construction gains support from the statement of the Supreme Court which preceded the enunciation of the doctrine of "integrated scheme". According to the statement, the Supreme Court could not appreciate the argument that "all agrarian reforms which Parliament in power wants to effectuate cannot be brought about without amending the fundamental rights." A reasonable inference we may draw from this statement is that agrarian reforms could be brought about not by amending the fundamental rights but by some other methods, which will not physically remove the fundamental rights. When this statement is read with the doctrine of "integrated scheme" and the theory of elastic fundamental rights, it is clear that the method postulated is nothing but the method of interpreting the fundamental rights in the light of the directive principles. This rule of construction is in consonance with the intention of the framers of the Constitution.

## Conclusion

The provisions contained in Part III and Part IV of the Constitution reveal two differences. First, while Art. 37 makes the provisions contained in Part IV unenforceable, Art. 32 makes the provisions of Part III enforceable in a court of law. Secondly, while Art. 37 asserts positively the fundamental nature of the directive principles, no Article in Part III lays emphasis on the fundamental nature of the provisions contained therein. Therefore, if the mentioning of enforceability of the provisions of Part III and unenforceability of the provisions of Part IV could be construed to accord a position of subordination to the latter *vis-a-vis* the former, on the parity of reasoning the positive assertion of fundamental nature of the provisions of Part IV and the inexplicable silence in Part III about the fundamental nature of its provisions must be interpreted to give superior position to Part IV *vis-a-vis* Part III of the Constitution. At any rate, the positive assertion of the fundamental nature of the directive principles retrieved completely the position they supposed to have lost by being unenforceable provisions. This fact and also the fact that Part IV is an in-

*legal part of the Constitution* make it unreasonable to consider Part IV as an inferior or subordinate *part* to any other Part *in the Constitution.*

*The Constituent Assembly debate on the Directive Principles of State Policy unfolds a few important facts.* First, the directive principles have been made unenforceable not to render them ineffective, but only to forestall an attempt by citizens to compel the State to implement them immediately or at a time when it is not financially and administratively ready for it.

Secondly, positive emphasis has been laid on the fundamental nature of the directive principles not only to indicate the importance attached to them by the framers of the Constitution, but also to lay stress on the duty of the State to use them in making laws. In fact, Part IV has been described by the framers of the Constitution as a most important and creative part of the Constitution, and is said to contain, according to them, hopes and aspirations of the people.

Finally, according to the framers of the Constitution, Part IV is an Instrument of Instruction from the ultimate sovereign, the people of India, to the State, which is a creature of the Constitution established by them. Consequently, if the legislative and executive wings of the State are duty bound to carry them into effect it is doubtful whether the judicial wing of the State could ignore them with impunity.

The judicial attitude towards the directive principles shows varied phases of development. The Supreme Court has put forward in *Champakam Dorairajan* case the theory of subordination under which Part IV has been accorded a position subordinate to Part III of the Constitution. The theory of subordination is based on the assumption that unenforceable directive principles are inferior to enforceable fundamental rights, which assumption is neither justified by the actual provisions of Part III and Part IV of the Constitution nor is in conformity with the intention of the makers of the Constitution. Consequently, the theory of subordination is against the spirit of the provisions of Art. 37 of the Constitution and against the intention of the framers of the Constitution as well.

The decisions in *M. H. Quarashi* and *Kerala Education Bill* cases reiterate the theory of subordination. However, in these

decisions the Court introduced the doctrine of harmonious construction with an avowed purpose of resolving the conflict between the fundamental rights and the legislation intended to implement directive principles. Though the application of the doctrine of harmonious construction implies equality between the conflicting provisions, the way the doctrine is applied in these cases permitting the implementation of the directive principles without offending or restricting in any way the fundamental rights shows that embers of the theory of subordination of *Dorairajan* case is still active beneath the surface.

However, the decisions in *Kameshwar Singh* and *Bijay Cotton Mills* cases have adopted a pragmatic and sociological approach to the problem. *Kameshwar Singh* decision or what may be termed as "Kameshwar Singh doctrine" has laid down two rules of construction. They are: (*i*) that whenever there is a conflict between right of an individual and a legislation purporting to implement socio-economic policies laid down in Part IV of the Constitution, greater weight should be given to the latter; and (*ii*) that every socio-economic legislation made in pursuance of the directive principles must of necessity be construed as one designed for "public purpose", or as one intended to promote the "public interest", or as a reasonable restriction" on the fundamental rights. More or less similar principle can be discerned in the approach of Mudholkar, J. in *Sajjan Singh* case wherein he speaks of applying the doctrine of harmonious construction to resolve the conflict between fundamental rights and directive principles by reading the former in the light of the latter. The same principle or rule of construction has got an implicit approval in the doctrine of "integrated scheme" under which the fundamental rights and the directive principles form one integrated whole, and in the theory of elastic fundamental rights according to which the fundamental rights are considered flexible enough to respond to the changing needs of the society and to adjust themselves to the changing environments in the new social order, enunciated by K. Subba Rao, C. J. in the *Golaknath* case. It may, therefore, be said that the "Kameshwar Singh doctrine", the doctrine of harmonious construction as applied by Mudholkar J. in *Sajjan Singh* case and the doctrine of "integrated scheme" and the

theory of elastic fundamental rights adumberated by Subba Rao C. J. are not only in consonance with the provisions of Art. 37 of the Constitution but in conformity with the intention of the Founding Fathers of the Constitution as well.

No doubt, Part III of the Constitution contains the fundamental rights of the people. These fundamental rights, as explained earlier, are in a way the social values of the existing society. The society, as existed at the time of the making of the Constitution, threw up certain values which were nothing but the reflection of its own structural pattern. Part III of the Constitution only constitutionalises those social values.

But certain social values, especially those related to economic rights embodied in Part III of the Constitution, have no meaning absolutely to large sections of the people in India who live in poverty and suffer inexplicable economic distress. The only solution to render these rights meaningful to many a people in India, therefore, lay in re-making the material conditions and ushering in a new social order wherein socio-economic justice would inform all the institutions This is the only peaceful and evolutionary method, the alternative being a revolution. The framers of the Constitution, therefore, rightly took the role of a constitutional reformer and attired the aspirations of the people with a constitutional cloak. The result was the establishment of the goal of socio-economic justice in the Preamble of the Constitution and enumeration of socio-economic policies in Part IV of the Constitution, which are to be implemented by the State to achieve the goal.

Thus, when the State implements the socio-economic policies by legislation, it evidently tries to remake the material conditions and to usher in a new social order in accordance with the directives of the people. Besides, such an effort on the part of the State is not intended to wipe out the fundamental rights but to render them meaningful to larger sections of the people. A legislation intended to bring about agrarian reforms or aimed at the deconcentration of wealth and means of production in the hands of a few people, no doubt, curtails the property right of a few individuals, but it enables more people than hitherto to exercise the right in the society. Such a legislation, which courtails but does not wipe off the property

rights of a few individuals, and which renders the right meaningful to larger sections of people, can hardly be said to infringe the fundamental rights unless Part III is deemed to have perpetuated the rights of a few individuals.

## Chapter Five

# THE CONCEPT OF ECONOMIC JUSTICE AND FUNDAMENTAL RIGHTS

The concept of economic justice, which is one of the two aspects of the concept of socio-economic justice postulated in the Preamble, has been incorporated in two Articles of Part III of the Constitution, namely, Art. 23 which speaks about right against exploitation,[1] and Art. 31 which embodies trust theory, or community-interest-oriented theory of property.[2] The avowed purpose of these two provisions seems to facilitate implementation of progressive economic measures to achieve the goal mentioned in the Preamble of the Constitution. It is, therefore, necessary to examine all the facets of these important provisions found in the Part of fundamental rights

### Right Against Exploitation

Art. 23 (1) of the Constitution states unequivocally that "Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law." Then, clause (2) of the same Article enables the State to impose without discrimination "compulsory service for public purpose".[3] The entire provision has been described in the sub-title as the "Right against exploitation". The importance attached to this provision by the framers of the Constitution is evident from the fact that it has been described by them as a charter of liberty of the down-trodden people of India."[4]

1. See Art. 23.
2. See Art. 31.
3. Art. 23 (2) states. "Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them"
4. See the Constituent Assembly Debates of 3rd December, 1948, Vol. VII.

In the provision of Art. 23 (1) the word *begar* is an indigenous word denoting involuntary servitude. It is said that under the zamindari system, tenants, particularly of the lower classes, are sometimes compelled to render free service to their landlord.[5] While the expression "traffic in human beings" is wide enough to include slavery and traffic in women for immoral purposes, the expression *begar* and other similar forms of forced labour" is comprehensive enough to include any form of involuntary servitude.[6] The two well known forms of involuntary servitude are (*a*) peonage and (*b*) serfdom.

**(a) The Peonage**

The peonage has been defined as "a condition of enforced servitude by which the servitor is compelled to labour in liquidation of some debt or obligation, either real or pretended, against his will."[7] In the United States the peonage is comprehended within the "slavery and involuntary servitude" prescribed by the Thirteenth Amendment.[8] Besides, the same Amendment authorises Congress to enforce its provisions.[9] Pursuant to its enforcement powers, Congress, on March 2, 1867 adopted a statute, by the terms of which peonage was prohibited, and persons returning any one to a condition of peonage were subjected to criminal punishment.[10] This statute was upheld in *Clyatt* v. *U. S.*[11] where Justice Brewer said that the basal fact of peonage was indebtedness. "Peonage is sometimes

5 See D. D. Basu, *Commentary on the Constitution of India*, 4th edn., p. 140.

6. See K. P. Krishna Shetty, "Some aspects of the Constitutions of India, Burma and Ceylon : A comparative study," *The Indian Year Book of International Affairs*, Vol. IX-X, p. 86 at 107.

7. E. S. Corwin (editor), *The Constitution of the United States of America*, 1953, p. 950.

8. Section 1 of Amendment 13 states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

9. Section 2 of Amendment 13 states: "Congress shall have power to enforce this article by appropriate legislation."

10 See E.S Corwin (ed.), *op cit*, p 951, foot note 1. Also see 8 U.S.C A. Section 56 and 18 U.S C.A Section 1581.

11. 197 U.S. 207 (1905).

classified," he said, "as voluntary or involuntary; but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude."[11a] The 13th Amendment, he pointed out, denounced and prohibited a status or condition of servitude, irrespective of the manner or authority by which it was created, and granted to Congress power to enforce this prohibition by appropriate legislation. In exercise of that power, he said, Congress had enacted the impugned law denouncing peonage, and punishing one who held another in that condition of involuntary servitude. "This legislation," he opined, "is not limited to the territories or other parts of the strictly national domain, but is operative in the States wherever the sovereignty of the United States extends. We entertain no doubt of the validity of this legislation, or its applicability to the case of any person holding another in a state of peonage, and this whether there be a municipal ordinance or State law sanctioning such holding. It operates directly on every citizen of the Republic, wherever his residence may be."[11b]

As a matter of fact, in several cases from the States, the Supreme Court of the United States consistently refused to uphold the validity of State laws, which sanctioned peonage. In *Peonage cases*[12] an Alabama Statute, directed against defaulting share croppers, was found to have unconstitutionally sanctioned peonage in that it imposed a criminal liability and subjected to imprisonment farm workers or tenants who abandoned their employment, breached contracts, and exercised their legal right to enter into employment of a similar nature with another person. The clear purpose of such a statute was declared to be the coercion of payment, by means of criminal proceedings, of a purely civil liability arising from breach of contract.[13]

11 (a). *Ibid*, p. 215. 11 (b). *Ibid*, p. 218.
12. 123 F. 691 (1903).
13. E. S. Corwin (ed.), *op. cit*, p. 950.

A few years later, in *Bailey v. Alabama*,[14] the Court voided another Alabama statute which made the refusal without just cause to perform the labour called for in a written contract of employment, or to refund the money or pay for the property advanced thereunder punishable as a criminal offence. According to the statute, the refusal to perform the labour as per the contract, or to refund the money advanced thereunder was *prima facie* evidence of an intent to defraud. Besides, the statute was enforced subject to the local rule of evidence, which prevented the accused, for the purpose of rebutting statutory presumption, from testifying as to his "uncommunicated motives, purpose, or intention". The Court, therefore, ruled that "the act of Congress, nullifying all State laws by which it should be attempted to enforce the 'service of labour of any persons as peons in liquidation of any debt or obligation, or otherwise', necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it. Such laws would furnish the readiest means of compulsion. The 13th Amendment prohibits involuntary servitude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt."[14a]

In 1914, in *U. S. v. Reynolds*[15] a third Alabama enactment was condemned as conducive to peonage. In this case one Rivers, having been convicted in a Court of Alabama of the offence of petit larceny, was fined with costs. The defendant Reynolds appeared as surety for Rivers, and a judgment by confession was entered up against him for the amount of the fine

14 219 U.S. 219 (1911).
14 (a) *Ibid.*, pp 243-44.
15. 235 U S 133 (1914).

and costs, which Reynolds afterwards paid to the State. Subsequently, Rivers entered into a written contract with Reynolds to work for him as a farm hand for a specified period to pay the amount of fine and costs. He worked for some time in liquidation of his debt and refused to labour further. Thereupon he was arrested upon a warrant issued at the instance of Reynolds from the county Court of Alabama, on the charge of violating the contract of service. He was convicted and fined. Whereupon it came before the Supreme Court on an appeal. The question for decision was whether the labour of the convict, thus contracted for, amounted to involuntary servitude for the liquidation of a debt to the surety, which character of service it was the intention of the acts of Congress to prevent and punish.

Justice Day, who spoke for the court, said, "when the convict goes to work under this agreement, he is under the direction and control of the surety, and is in fact working for him. If he keeps his agreement with the surety, he is discharged from its obligations without any further action by the State. This labour is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labour contract which he has made with the surety, and this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict. Compulsion of such service by the constant fear of imprisonment under the criminal laws renders the work compulsory, as much as authority to arrest and hold his person would be if the law authorized that to be done."[15a] Then he pointed out that under the State statute "the surety may cause the arrest of the convict for the violation of his labour contract. He may be sentenced and punished for this new offence, and undertake to liquidate the penalty by a new contract of a similar nature, and, if again broken may be again prosecuted, and the convict is thus kept chained to an ever-turning wheel of servitude to discharge the obligation which he has incurred to his surety, who has entered into an undertaking with the state, or paid money in his behalf."[15b] Justice Day, therefore, came to the conclusion that

15 (a) *Ibid*, p 146
15 (b). *Ibid*, pp 146-147

inasmuch as the convict might be kept at labour to satisfy the demands of his employer, under pain of recurring prosecutions, the system of law was in violation of rights intended to be secured by the 13th Amendment, as well as in violation of the statutes which the Congress had enacted for the purpose of making that Amendment effective.[15] Later, in the forties, the decision in *Bailey v. Alabama* was followed in *Taylor v. Georgia*[16] and *Pollock v. Williams*.[17]

In India the system of peonage, which thrives under different names in different states, is almost rampant. For example, the system of *sagri* or *hali* found in Rajasthan corresponds to peonage. Under the system of *sagri*, it is said, a creditor gives a loan to a debtor on the condition that until the loan is repaid with interest the debtor or any other member of his family shall render labour or personal service to the creditor or any other person nominated by him.[18] The Government of Rajasthan introduced a bill for the abolition of this system.[19] Though there has not yet been a determined and concerted effort by the States in India to wipe out this evil, some States have enacted debt relief and debt regulation laws which have gone a long way to eradicate the system of peonage. Needless to say that all such measures by the States, besides being in conformity with the provisions of Art. 23, are designed to ensure economic justice to a great extent to the people who have been groaning under the system of peonage.

**(b) Serfdom**

Serfdom arises out of adherence to land. In Asian countries, as pointed out by Bruno Lasker, there is in existence two social strata, a ruling group with unlimited rights and a subject class with a restricted right in the matter of choice of residence and occupation and the latter pays often with tribute and services for

15 cf. *Ibid*., p. 150.
16 315 U.S. 25 (1942).
17 322 U.S. 4 (1944).
18 See D.D. Basu, *op. cit.*, 4th edn., Vol. II, p. 140.
19 *Ibid.*

its right to exist.[20] Serfdom in Asia is often marked by the existence of obligations to render non-agricultural or unspecified services and sometimes it is even reinforced by claims to repayment with labour services of obligations incurred by the serf's ancestors.[21] This social evil is clearly discernible in India as in other Asian countries. While speaking in support of Art. 23, in the Constituent Assembly, T. T. Krishnamachari, a prominent member of the Drafting Committee, testified to this fact when he said, "some form of forced labour does exist practically in all parts of India, call it a *begar* or anything like that and in my part of the country the tenant often times is more or less a helot attached to the land and he has certain rights and those are contingent on his continuing to be a slave."[22] For example, the Pulayas of Travancore are virtually in the shackles of economic and social servitude; the *varam* system of land tenure, a share-cropping arrangement in Madras, and the *batai* system, a similar arrangement in the Punjab, have many features of a service tenure.[23] Therefore, if Art. 23 has any meaning for serfs in India it must be of help to rescue them from their existing service status. This can only be achieved by appropriate land legislation. Herein exactly lies the point of conflict between the right against exploitation and the right to property.[24]

The point is that whenever land legislation is enacted, pertaining to regulations of land tenure or to land reforms, it is often challenged on the basis of Art. 19 (1) (f) or Art. 31 of the Constitution. And the question how far such legislation gives effect to the provisions of Art. 23 is hardly examined in any case.[25] It may be suggested that the land reform legislation could well be sustained on the basis of Art. 23 alone.[26] In fact,

20. See Bruno Lasker, "Freedom of Person in Asia and the Pacific", *Pacific Affairs*, Vol 24, 1951, p. 154.

21. *Ibid.*, p. 155.

22. C A.D. 3rd December 1948, Vol VII.

23. Bruno Laskar, *op cit.*, p 159.

24. K. P. Krishna Shetty, *op. cit.*, p. 108.

25. *Ibid.*, p. 109

26. *Ibid.*, Indian Courts, however, sustained Tenancy Reform Laws as being reasonable restrictions on property right though the relevancy of Art. 23 was not considered.

the State has as much a duty to respect the "right against exploitation" as the duty to respect the "right to property". Besides, both the Articles, namely, Arts. 23 and 31, are found within Part III of the Constitution. Therefore, if a conflict arises (due to land reform legislation) between the State's duty to respect the provisions of Art. 23 and its duty to respect the right to property, obviously it has to be resolved by the application of the rule of harmonious construction. Apart from the duty to respect these rights the State has another positive duty to promote the welfare of the people, to disribute the ownership and control of the material resources of the community and to avoid concentration of wealth in a few hands (Arts. 38 and 39). This consideration would undoubtedly tilt the balance against the property right and in favour of the right against exploitation, and, therefore, any land reform legislation could be upheld on the basis of Art. 23 if it purports to abolish serfdom.[27] Thus, Art. 23 is one important Article in Part III designed to pave the way for achieving the economic justice stipulated by the framers of the Constitution.

## Trust Theory or Community-interest-oriented Theory of Property

The right of the citizens "to acquire, hold and dispose of property" has been guaranteed in Art. 19(1) (f) of the Constitution. The State has, however, been given power to impose "reasonable restrictions" on the exercise of this right "either in the interests of the general public or for the protection of the interests of any Scheduled Tribe".[28] But the eminent domain power of the State, that is, power to take property for public purpose, is incorporated in Art 31(2) of the Constitution.[29]

27. *Ibid.*

28 Art. 19(5)

29. The entire provision of Art 31 as was found at the commencement of the Constitution was worded as follows:

"(1) No person shall be deprived of his property save by authority of law

"(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public

Art. 31 (2) authorised the State to "take possession of" or to "acquire" by law any property for "public purposes" on payment of "compensation". Two important points in the provisions of the Article are: (i) that the private property may be taken by the State by law for the "public purpose"; and (ii) that the law of acquisition should provide for "compensation". Consequently, two questions that emerge from these two points are: (i) what is the ambit of the phrase "public purpose"? and (ii) whether the word "compensation" means "just" or "adequate" compensation, or it connotes merely a feature that should accompany the acquisition or requisition of property without any emphasis on its adequacy.

As a matter of fact, the phrase "public purposes" is ambiguous and wide enough to take in its stride any purpose for which the state may seek to acquire private property. However, "public purposes" may be divided broadly into two categories, namely, the "governmental purposes", and the "social purposes". Construction of secretariat building or residential quarters for government servants, establishment of an industrial estate, building a township, and similar other government undertakings, for which private property may be acquired, may be grouped under the former category; and distribution of lands to tillers of the soil, agrarian reforms, regulation of tenancy and similar other economic reforms, for which private property is acquired or taken possession of or right thereon is curtailed, may be grouped under the latter head. In other words, all socio-economic measures pertaining to property taken by the legislature in pursuance of the relevant directive principles to usher in a new social order wherein social and economic justice is assured to all must be construed to be for the "social purpose" distinguished from "governmental purpose". The question, therefore, is, whether in both cases, that is, property taken for "social purpose" and property taken for "governmental purposes", the word

> purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

"compensation" should mean the same, or whether the omission of the word "just" prior to the word "compensation" admits any flexibility in the connotation of the word "compensation" so as to enable it to comport with the two different purposes for which property may be acquired or the right therein may be affected. A brief analysis of the views of the framers of the Constitution will be of great help to come to a correct conclusion.

**Views of the Founding Fathers: the Concept of Property Right and Economic Justice**

The clause, which enabled the State to acquire or take by law private property for "public purposes" with "compensation" to the person from whom the property is acquired or taken, was moved by Sardar Patel in the Constituent Assembly on 2nd May, 1947. In the clause the word "compensation" was not qualified by the word "just". Therefore, during the discussion there was an attempt by a member to introduce the qualifying word "just" before the word "compensation". But the member withdrew his amendment later when he found there was no sufficient support to it. Besides, the discussion revealed a consensus of opinion on the necessity of drawing a distinction between acquisition of property for a specific governmental purpose and acquisition of property for social use.[30] But one member did not find in the clause much scope for social justice. According to him, fundamental rights were embodied in the Constitution with a view to protect the weak and the helpless and the present clause would have just contrary effect in that it would protect the microscopic minority of propertied class and deny social justice to the masses. Therefore, he suggested that the clause should be referred back to the Advisory Committee for reconsideration.[31] The Constituent Assembly, however, did not heed to this suggestion. It accepted the clause as presented by Sardar Patel.

The Drafting Committee did not make any substantial change in the clause while incorporating it in the Draft Constitution.[32] The clause, as found in the Draft Constitution,

30. C. A. D. (debates on 2nd May 1947)
31. See the speech of Ajit Prasad Jain C. A. D. (2nd May 1947).
32. See Art. 24 of the Draft Constitution of 21st February, 1948.

received much attention from the members of the Constituent Assembly and the public as well. From the various suggestions made by them two schools of thought emerged on the subject, one ranging against the other. One school of thought adhered tenaciously to the view that the word "compensation" should be qualified by the word "just", "fair", "equitable" or "reasonable" to ensure to the owner of the property just equivalent of what he would be forced to part with by the acquisition of property for public purposes. The other school stuck steadfastly to the idea that private property and economic enterprises, as well as their inheritance, must be regulated, limited, acquired, requisitioned, expropriated or socialised by the State with or without compensation. With the two diametrically opposite views poised against each other, the clause created so much stir in the minds of the members that when it came up for consideration before the Constituent Assembly on 9th December, 1948, the House thought best to postpone the consideration of the clause for a later date when it could be discussed in a calmer situation.

On the 10th of September, 1949, Jawaharlal Nehru opened the debate in the Constituent Assembly on the provisions of Art. 31 of the Constitution, which he introduced for incorporation in Part III of the Constitution. The Article he moved in the form of an amendment was, according to him, a compromise solution.[33] His characterisation or description of Art. 31 as a compromise solution must be understood in the context of two conflicting viwes on the subject mentioned earlier. Then explaining the significance of the Article, he said there were two approaches to the property right embodied therein. One approach was from the point of view of individual right to property and the other was from the point of view of community's interest in that property or the community's right, and the Article, according to him, not only tried to remove or avoid any possible conflict between them but also tried to take into consideration fully both the rights.[34]

Evidently, in the above statement emphasis has been laid on both the rights, namely, the individual right to property and the community's interest or right in the property. An obvious

33. C A D. Vol. IX, p 1193.
34. C A D , Vol. IX, p. 1192.

implication of the emphasis seems to be to forestall any attempt to inflate unduly the individual right to property at the cost of the community's interest in it. Individuals being part of the community, individual right to property must of necessity be exercised consistent with the community's interest or right. The compromise between the two rights, which the Article supposed to effect, therefore, connotes that what has been contemplated in the Article is not obliteration of individual right to property as such but its effective restriction or control so that de-concentration of property and wealth in the hands of a few individuals could be effected and limitation on the holding of property and wealth could be imposed to enable greater number of people to exercise the right to property and thus further the interest of the community as a whole. A natural corollary to this connotation is that if a legislation intends to bring about socio-economic and agrarian reforms and puts a ceiling on the holding of property and wealth by an individual and takes away the surplus of property and wealth concentrated in a few hands for distribution among the members of the community, there is no obliteration of the property right as such but only a compulsion that property and wealth should be shared and right therein should be exercised by as greater number of people as possible to subserve the common good. In other words, socialisation of property is not obliteration of the right to property as such but only the diffusion of the right within, and extension of the right to greater number of persons in the community. Legislation for such social purposes can hardly be expected to stipulate adequate compensation for those who have to part with the excess property or wealth. On the other hand, if the State acting under its eminent domain power acquires for governmental purposes property of an individual, whose holding is within the ceiling imposed by agrarian reform laws, the acquisition amounts to obliteration of the property right conceded by the community. In such cases of obliteration of property right for governmental purposes adequate compensation must be paid to the person who is deprived of the property.

This idea has been made clear by Jawaharlal Nehru in the course of his speech in the Constituent Assembly. He said that there was no question of any expropriation without compensation

so far as this Constitution was concerned and the law was clear enough regarding acquisition of property for public purpose, compensation to be paid in such cases and the method of judging that compensation. Normally speaking, he said, this principle applied only to, what might be called, petty acquisition or acquisition of small bits of property or even relatively large bits for the improvement of a town, etc. But to-day the community had to deal with large schemes of social reform and social engineering which could hardly be considered from the point of view of the individual acquisition of a small bit of land or structure. If the chosen representatives of the people sitting in the legislature passed such a social reform legislation which affected millions of people, it would not be possible to leave such a piece of legislation open to widespread and continuous litigation in the courts of law without damaging the future of millions of people and the foundation of the State itself.[35] "If we have to take the property, if the State so wills" he said "we have to see that fair and equitable compensation is given, because we proceed on the basis of fair and equitable compensation But when we consider the equity of it we have always to remember that equity does not apply only to the individual but to the community No individual can override ultimately the rights of the community at large. No community should injure and invade the rights of the individual unless it be for the most urgent and important reasons."[36]

The above statement of Jawaharlal Nehru strikes clearly a dichotomy between acquisition of property for "governmental purposes", such as improvement of a town, etc , and acquisition of property for "social purposes", that is, for implementing large schemes of "social reform and social engineering". It is also clear from the statement that the question of fair compensation applies only to the former case and not to the latter, for the latter cannot be considered from the point of the individual acquisition of a small bit of land or structure Again, his words "no individual can override ultimately the rights of the community" emphasise the fact that the right to hold property guar-

35 C.A D , Vol. IX, p. 1192.
36. *Ibid.*

anteed in the Constitution is not an absolute or undiluted right to hold all the wealth and assets of the community by a few individuals for all time to come to the detriment of the community as a whole. Nor does it mean that the community could be prevented from readjusting the socio-economic structure of the society to ensure economic justice to all. Then, his words "No community should injure and invade the rights of the individual unless it be for the most urgent and important reasons" are intended to send home the fact that once the right to property is determined in accordance with the interests of the community, the minimal right cannot be invaded or obliterated by the community unless it be for the important and urgent reasons necessitated by the governmental schemes and functions.

It was in this context that Jawaharlal Nehru dealt with the payment and determination of compensation. He said that it was left to Parliament to determine various aspects of it and "there is no reference in this to any judiciary coming into the picture. Much thought has been given to it and there has been much debate as to where the judiciary comes in. Eminent lawyers have told us that on a proper construction of this clause, normally speaking, the judiciary should not and does not come in. Parliament fixes either the compensation itself or the principles governing that compensation and they should not be challenged except for one reason where it is thought that there has been a gross abuse of the law, where in fact there has been a fraud on the Constitution. Naturally the judiciary comes in to see if there has been a fraud on the Constitution or not. But normally speaking, one presumes that any Parliament representing the entire community of the nation will certainly not commit a fraud on its own Constitution and will be very much concerned with doing justice to the individual as well as the community."[37]

Digressing a little Jawaharlal Nehru spoke on the changing concept of property and attendant problems. He said that it changed from the earlier conception of "property in human beings", which reflected in the institution of slavery in olden days, to the modern conception of "property in a bundle of papers"

37. *Ibid.*, p. 1193.

which consisted of securities, promissory notes, etc. In addition to this, there was another change in modern times and that was, according to him, the "property in shares" in a joint stock company. This, in an industrialised country, led to concentration of wealth more and more in a limited number of hands. The result was that a few persons with a monopoly over capital could crush small shop-keepers out of existence by their method of business and, in fact, they could do so without giving the slightest compensation. In such a state of affairs to-day the question of protecting individual right to property, he said, was by no means simple and no legal argument of extreme subtlety would solve it unless the solution took into consideration the human aspect of the problem and also the changes that were taking place in the world.[38] Obviously, what has been contemplated in the Article is the protection of limited individual right to property consistent with interest of the community and not the absolute right which leads to concentration of assets of the community in a limited number of hands to the detriment of the exercise of the same right by others.

Finally, in conclusion he stated that the National Congress had laid down years ago that the Zamindari institution and big estate system in India must be abolished, which pledge would undoubtedly be honoured. No judiciary could stand in judgment over the sovereign will of Parliament representing the will of the entire community. The duty of the judiciary was only to see "in such matters that the representatives of the people did not go wrong."[39] In a detached atmosphere of the courts, he said, "they should see to it that nothing is done that may be against the Constitution, that may be against the good of the country, that may be against community in the larger sense of the term. Therefore, if such a thing occurs, they should draw attention to that fact, but it is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of third House of correction. So, it is important that with this limitation the judiciary should function."[40] It

38. *Ibid*, pp. 1194-95.
39. *Ibid.*, p. 1195.
40 *Ibid.*, pp. 1195-96.

may be noted that Nehru, while defining the role of the judiciary with respect to Art. 31, said that the duty of the court was to see that "nothing is done that may be against the Constitution". In this expression the use of the word "Constitution" instead of the phrase "right to property" is significant in that the court is not expected to view the right to property in a narrow perspective or from the point of view of the interest of a few individuals but to view it in a broader perspective of the Constitution and of the good of the country and community as a whole. So the duty of the court, as visualised by Nehru, is to see whether a particular measure taken by the State under Art. 31 is "against the Constitution" or against the good of the country and the community, but not merely against the property right. That is to say, a legislative measure taken under Art. 31 effecting the right to property is not tantamount to unconstitutional act if the measure is intended to implement paramount socio-economic policies laid down in the Constitution. Therefore, the constitutionality or unconstitutionality of the State act must be judged not from the extent of dents it makes on the right to property alone, but from over-all consideration of the Constitution and the extent to which it succeeds or fails to implement the socio-economic policies and ideals embodied in the Constitution.

The Article and its objectives expounded by Nehru received wide support from the members of the Constituent Assembly. Among them the ardent advocates of socialisation of property and industry pleaded for explicit rejection of the theory that man has a natural right in property and the theory that property is a projection of personality. One of them, Damodar Swarup Seth, requested the House not to confuse personality with property, nor to ignore the social and functional character of property.[41] He said that property was a social institution and like all other institutions it must be subject to regulations and claim of common interest.[42]

As to the compensation, he said that the doctrine of compensation as a condition of expropriation could not be accept-

41. *Ibid.*, p. 1200.
42. *Ibid.*

ed as a Gospel truth, for according to him, when the institution of slavery was abolished in America compensation was not paid to the slave-owners even though they had paid hard cash when they purchased them. It was impossible, he opined, for the State to pay owners of property in all cases and at market value for the property requisitioned or acquired. One such case he mentioned was the acquisition of property for the purpose of socialisation of the industries and properties with a view to eliminating exploitation and promoting general economic welfare. In such cases of general transformation of economic structure to ensure economic justice to all, even the partial payment of compensation, according to him, has no justification. What he could concede in such circumstances to owners of large property was a claim of an opportunity and a share on par with all other citizens of the State.[43]

A more detailed and clear explanation of Art. 31 was given by Alladi Krishnaswami Ayyar, who supported it without any reservation. Dealing with the word "compensation" he said the wording of the Article gave rise to two arguments. On the one side it had been urged that the word "compensation" by itself carried with it the significance that it must be equivalent in money value of the property on the date of the acquisition; on the other side it had been urged that the mere word "compensation" and other phrases in the Article gave a latitude to the legislature in the matter of formulating the principles on which and the manner in which the compensation was to be determined. But, Alladi Krishnaswami Ayyar pointed out, the omission of the qualifying word "just" in the Article was significant in that it showed that the language employed in the Article was not in *pari materia* with the language employed in corresponding provisions in other constitutions, especially in the U. S. and Australian Constitutions which stipulated compulsory acquisition of property on payment of "just compensation". By implication, therefore, the construction of the word "compensation" in Art. 31 would, according to him, vary from the construction put by the American and Australian Constitutions on the expression "just compensation"

43. *Ibid.*

found in their respective Constitutions. Apart from that the principles of compensation, he said, by their very nature could not be the same in every species of acquisition. "In formulating the principles," he stated, "the Legislature must necessarily have regard to the nature of the property, the history and course of enjoyment, the large class of people affected by the legislation and so on."[44]

Then, speaking about the role of the courts in relation to Art. 31, Alladi Krishnaswami Ayyar said, "The principles formulated by the legislature may commend themselves to a court or they may not. The province of the courts is normally to administer the law as enacted by the Legislature within the limits of its power. Of course, if the legislation is a colourable device, a contrivance to outstep the limits of the legislative power or, to use the language of private law, is a fraudulent exercise of the power, the court may pronounce the legislation to be invalid or *ultra vires*. The court will have to proceed on the footing that the legislation is *intra vires*. A constitutional statute cannot be considered as if it were a municipal enactment and the legislature is entitled to enact any legislation in the plenitude of the power confided to it."[45] Evidently, therefore, the court is expected to intervene only when a legislation is proved to be a colourable device to snuff out right to property but not when a legislation intended to carry into effect the socio-economic policies embodied in the Constitution. Therefore, with respect to Art. 31, the court is expected to act only within the narrow sphere delimited by the framers of the Constitution.

Finally, concluding his observations Alladi Krishnaswami Ayyar said, "Law, according to me, if it is to fulfil its larger purpose, must serve as an instrument of social progress. It must reflect the progressive social tendencies of the age. Our ancients never regarded the institution of property as an end in itself. Property exists for *dharma*. *Dharma* and the duty which the individual owes to the society form the whole basis of social framework. *Dharma* is the law of social well-being and

44 *Ibid*., pp. 1271-72
45. *Ibid*., p. 1272.

varies from *yuga* to *yuga*. Capitalism as it is practised in the West came in the wake of the Industrial Revolution and is alien to the root idea of our civilisation. The sole end of property is *yagna* and to serve a social purpose . . . ."[46]

However, support to Art. 31 was not unanimous. There was a small segment of opinion in the House which was against it. Members who belonged to this group held the view that right to property was a natural right and, therefore, "compensation" for deprivation of property must of necessity mean *quid pro quo*, that is, just equivalent of what has been deprived.[47] Consequently, Thakur Das Bhargava, one of the protagonists of the above view, characterised Art. 31 (2) as "a fraud on us because I understand that it is not justiciable."[48] But even he was not averse to the idea of making the legislature a judge or an arbitrator to decide as to what amount of compensation would be equitable in cases of acquisition of property for purposes of agrarian reforms. In fact, he suggested insertion of a new clause to the effect that if any State passed a law designed to execute a scheme of agrarian reform in the State by abolition of zamindari, etc., with such compensation as the State legislature considered fair, such law should be submitted by the Governor to the President for his certification; and if the President by public notification certified the law, it would not be called in question in any court on the ground that it contravened the provisions of clause (2) of Article 31.[49] The only fear he nursed, as is evident from his speech, was that the unqualified word "compensation" might be made use of by the unscrupulous States to give nominal compensation even in cases of acquisition of small bits of lands and properties for purposes other than economic or agrarian reforms. Therefore, he remarked that in regard to ordinary properties, excepting zamindari, etc., it was not understandable how the principle of superiority of the rights of the

46. *Ibid.*, p. 1274.
47. *Ibid.*, p. 1227
48. *Ibid.*
49. *Ibid*, p. 1226.

community would have precedence over the rights of the individual.[50]

But similar fear was not entertained by the supporters of Art. 31, because they clearly envisaged that in all cases of acquisition of property for agrarian reforms or for ushering in a new social order assuring socio-economic justice as visualised in the Constitution, the compensation would be what the representative body of the people, viz., the legislature, deems fair or reasonable under a given circumstance, and courts would not come in to question it ; and in all cases of acquisition of property for purposes other than agrarian and economic reforms, that is, for governmental purposes, the compensation must be fair and just, as otherwise the inadequacy of compensation in such cases and for such purposes would render acquisition law a "colourable device" and the law could be set aside as unconstitutional. So, according to them, the courts could definitely examine the law in the latter case to see whether it is colourable device to deprive an individual without giving him adequate compensation. Therefore, the members did not find it necessary to accept the views of Thakur Das Bhargava.

From the foregoing analysis of the Constituent Assembly debates the following propositions emerge :

(1) Property exists for social purpose. Art. 31, therefore, takes into consideration not only individual right to property but community's interest and right in property as well.

(2) Property may be acquired by the State either for "social purposes", that is, for agrarian reforms and for ushering in a new social order stipulated in the Constitution, or for "governmental purposes", that is, for improving a town, establishing an industrial estate, etc. In the former case "compensation" to be given to persons affected by socio-economic reform legislation is the amount determined by the legislature and is, therefore, final, whereas in the latter case compensation to be granted to persons affected by acquisition law must be just equivalent

50. *Ibid.*, p. 1229.

of what they have been deprived of, lest the legislation should amount to fraudulent measure to exterminate the minimum right to property of citizens.

(3) The word "compensation" has been left unqualified deliberately to impart flexibility into it, so that in cases of acquisition for "social purposes" courts could respect the quantum of compensation which the legislature determines in conformity with the interest of the community, and in cases of acquisition for "governmental purposes" the quantum of compensation could be examined by the courts to see if it is consistent with the concept of minimum right to property.

**Judicial Attitude and Original Intentions of the Framers of the Constitution**

*The First Phase : From the commencement of the Constitution to the First Amendment.* Many States in India were anxious to bring about economic and agrarian reforms. Several States enacted legislations abolishing zamindari system and similar other proprietary rights which were considered to be the base of the progress and prosperity of the Indian peasantry. These legislations, however, had to run the gauntlet of judicial scrutiny and some of them met with rough weather in the High Courts.

The commencement of the Constitution was a signal to challenge the validity of these agrarian reform legislations. The truth of the matter is that the agrarian reform legislations, which purported to take large tracts of land from the zamindars and absentee landlords and vest in the hands of the actual tillers of the soil, were enacted for "social purpose", but that fact did not prevent the affected zamindars from putting up the fight against the legislations. The Bihar State Management of Estates and Tenures Act, 1949 was challenged before the Patna High Court in *Kameshwar Singh v. State of Bihar*[51] on the ground that the provisions made therein offended against the fundamental rights guaranteed by Arts.

51. A.I.R 1950 Pat. 392.

14, 19 and 31. The Patna High Court ruled that the impugned law was unconstitutional in that it imposed restrictions of the most far-reaching and drastic kind on the property right of proprietors and tenure holders guaranteed under Art. 19, and it could not fairly be said that those restrictions were reasonable. Similarly, in Uttar Pradesh the validity of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951 was challenged in *Surya Pal v. State of U. P.*[52] but was dismissed by the Allahabad High Court.

While large number of litigations raising questions of constitutionality of agrarian reform laws were obstructing and delaying the move for such agrarian reforms, the divergence of views expressed by the High Courts as to the validity of such laws rendered the fate of every agrarian reform law uncertain. The young Republic which was anxious to see through the socio-economic reforms envisaged in the Constitution as early as possible naturally became impatient and restive.

That apart, the decision of the Patna High Court in *Kameshwar Singh* case[53] was against the original intention of the framers of the Constitution. As shown earlier, according to the Framers the expression "public purpose" enables the State to acquire property for "governmental purposes" and for "social purposes" and in the latter case compensation to be granted need not be just or fair, whereas in the former case it must be just equivalent of what a person is deprived of. In order to ensure flexibility in the matter of granting compensation in the two different categories of acquisitions the word "compensation" has been left deliberately unqualified. This being the position, no doubt, whenever the State stipulates less than just compensation in case of acquisition of property for "social purposes" and just compensation in case of acquisition of property for "governmental purposes", the former may appear to be discriminatory from the point of view of recipients of the compensations and hence violative of Art. 14. But the framers of the Constitution, when they emphasised that the courts would not come into the picture in these cases except to see if a fraud has been committed on the

52. A.I.R. 1951 All. 674.
53. A.I.R. 1950 Pat. 392.

Constitution, made it clear that if a law of acquisition has been made in pursuance of one of the avowed social purposes the courts should administer it as a valid piece of legislation without examining the adequacy of compensation stipulated in the law. If agrarian reform law, which provides for less than just compensation, is a valid piece of legislation under Art. 31, it necessarily follows that it is valid under Art 14 as well because it is based on reasonable classification of purposes for which the property is sought to be acquired. So when the Patna High Court voided the Bihar land reform law on the reasoning that it contravened the provisions of Art 14, members of the Provisional Parliament, who were earlier members of the Constituent Assembly, felt that it was against the intention of the framers of the Constitution.

Besides, agrarian or economic reform law, made for the benefit of the community as a whole and valid under Art. 31, is by all standards valid under Art. 19 (5) in that the law is in the "interest of general public" and any consequential restriction on individual right to property is reasonable. The Supreme Court more or less subscribed to this view though there was no unanimity among the judges on this point. In *A. K. Gopalan* v. *State of Madras*[54] S.R Das J. maintained that "the rights enumerated in Art. 19 (1) subsist while the citizen has the legal capacity to exercise them. If this capacity to exercise them is gone, by reason of a lawful conviction with respect to the rights in sub-clauses (a) to (e) and (g) or by reason of a lawful compulsory acquisition with respect to the right in sub-clause (f), he ceases to have those rights while his incapacity lasts."[55] He pursued this line of reasoning in *Chiranjit Lal v. Union of India*[56] wherein he said that the right to property guaranteed by Art. 19 (1) (f) would "continue until the owner was, under Art. 31, deprived of such property by authority of law"[57] In the same case Justice Mukherjee came to similar conclusion but on slightly different reasoning. Meeting the argument that compulsory acquisition or taking possession of property offended

54. (1950) S C.R. 88
55. *Ibid.*, pp. 304-05
56. (1950) S.C R 869.
57. *Ibid.*, p. 915.

against the provisions of Art. 19(1) (f), he said that "even if it is conceded for argument's sake that the disabilities imposed by the impugned legislation amount to restrictions on proprietary right, they may very well be supported as reasonable restraints imposed in the interests of general public."[58]

The foregoing views of the Judges of the Supreme Court no doubt fortified the agrarian and economic reform laws against attack under Art. 19(1) (f), but the lack of unanimity among the judges on the point, constant attack on agrarian reforms laws under Art. 19(1) (f) and the possibility of shift in the majority view of the Supreme Court on the point gave rise to a doubt whether agrarian reforms could be carried out without undue delay and hindrance. The members of the Provisional Parliament felt that if the tendency to question the validity of such agrarian reform laws under Arts. 14 and 19 was not arrested in time, their original intention would be blurred beyond recognition and the agrarian reforms would be made well nigh impossible. The Provisional Parliament, therefore, amended Art. 31 by the First Amendment Act of 1951 in order to protect agrarian reform laws against attack under Part III, particularly under Arts. 14 and 19, to facilitate the States to see through the much needed and avowed agrarian reforms and to clarify the original intention of the framers of the Constitution.

The First Amendment Act, 1951, inserted two new Articles, viz., 31A and 31B, and a new Schedule, viz., Schedule IX. Art. 31A immunises all laws providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights from attack under any of the fundamental rights in Part III of the Constitution.[59]

58. *Ibid.*, pp. 909-10.

59. Art. 31A states: "(1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is consistent with, or takes away or abridges any of the rights conferred by any provisions of this Part:

Provided that where such law is a law made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

In other words, no such law shall be called in question or set aside on the ground that no compensation has been provided for, or that there is no public purpose or that it violates some other Articles in Part III of the Constitution. The scope of the Article is confined to "estates" as defined in clause (2) (a) of the Article.[60] Besides, the proviso in Art. 31A made the application of the protection of Art. 31A to State enactments conditional upon the receipt of the assent of the President to such enactments. Art. 31B has been inserted to save the specific Acts included in the Ninth Schedule of the Constitution from being declared unconstitutional and also to validate some of them which were declared unconstitutional by the courts.[61] The Ninth Schedule, which specifies thirteen State Acts, has been added to the Constitution. A joint reading of all these provisions would show that what has been done, in effect, by the First Amendment is nothing but the immunisation of agrarian reform laws from challenge under any of the fundamental rights and from judicial interference. This is exactly what the Framers postulated when they drafted Art. 31.

*The Second Phase: From the First Amendment to the Fourth Amendment.* The second phase of constitutional deve-

60. Art. 31A (2) states: "In this Article—

"(a) The expression 'estate' shall in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any jagir, inam or maufi or other similar grant;

"(b) The expression 'rights', in relation to an estate, shall include any rights vesting on a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue."

61. Art. 31B provides: "Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any one of the provisions thereof shall be deemed to be void, or even to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any Court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

lopment relating to individual right to property is witnessed during the period between the First and the Fourth Amendments of the Constitution. During this period the problem centred round the expression "compensation" in Art. 31 (2). It may be recalled here that Alladi Krishnaswami Ayyar made clear in the Constituent Assembly the actual purport of the expression. The qualifying word "just" was deliberately omitted to show that the language used in the Article was not in *pari materia* with the language employed in the U. S. and Australian Constitutions. This material difference in the language, therefore, would indicate, according to him, that the construction of the word "compensation" in Art. 31 must necessarily be different from the construction put by the American and Australian Courts on the expression "just compensation" found in their Constitutions. In other words, the qualifying word "just" was deliberately omitted to forestall any attempt to import American or Australian rule of construction into the Indian constitutional arena for the purpose of interpreting the word "compensation". Besides, as Alladi Krishnaswami Ayyar pointed out, the principles of compensation by their very nature could not be the same in every species of acquisition. It must definitely vary in accordance with the varying purposes for which property is acquired. And such variation could not have been made possible if the word "compensation" in Art. 31 had been made rigid, as in American and Australian Constitutions, by insertion of a qualifying word "just". Highly underdeveloped country like India, with its vast resources unevenly distributed among its people, needed very much a complete readjustment of its socio-economic structure, and, therefore, it could not afford the luxury of the rigid expression "just compensation" used in the Constitutions of highly developed countries like America and Australia.

This rationale, however, did not appeal to some of the constitutional lawyers in India who firmly held the view that the word "compensation", irrespective of whether it was qualified by the word "just" or not, inherently meant just money equivalent of what one was compelled to part with. According to this view, compensation meant just compensation, for payment of just compensation for compulsory acquisition of property

was but an affirmation of the great doctrine established by the common law for the protection of private property. In support of this view much reliance was placed on the writings of American and Continental constitutional authorities.[62]

The problem was brought to the forefront when the Supreme Court accepted the above mentioned view in *State of West Bengal* v. *Mrs. Bela Banerjee*[63] and by implication rejected the explanation of Alladi Krishnaswami Ayyar given in the Constituent Assembly. The West Bengal Land Development and Planning Act of 1948, which was the impugned Act in the case, provided for the acquisition and development of land for public purposes, viz., for the settlement of immigrants who had migrated into West Bengal due to communal disturbances in East Bengal. The impugned Act had limited the compensation to the market value of the land on 31st December, 1946, no matter when the land was acquired. The controversy before the Supreme Court centred round the constitutionality of the compensation stipulated in the Act. On behalf of the State it was contended that in the Constitution the term "compensation" was not used in any rigid sense implying equivalence in value but had reference to what the legislature might think was a proper indemnity for the loss sustained by the owner. This construction regarding the legislative discretion in determining the measure of the indemnity could be derived, it was claimed, from the language of Entry 42 of List III of the Seventh Schedule and from the concluding words used in Art. 31 (2), according to which the compensation to be "given" was only "such compensation" as was determined on the principles laid down by the law enacted in exercise of the power. But the Supreme Court rejected the contention and held that "while it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is

62. *In State of Bihar v. Kameshwar Singh*, A I R 1952 S C. 252. Mahajan J. quotes various American and Continental authorities on the point.

63. (1954) S.C.R. 558.

determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court."[64] Thus, the Supreme Court in this case construed the term "compensation" to mean "a just equivalent of what the owner has been deprived of" and a "full indemnification of the expropriated owner".

It may be noted here that in the above mentioned case the State sought to acquire land for "governmental purposes" as distinguished from "social or socio-economic purposes", that is, for the government scheme of rehabilitating refugees who were then pouring into the State from East Pakistan, and compensation to be granted to persons affected by the acquisition must, even according to the intention of the framers of the Constitution, of necessity be just equivalent of what they had been deprived of. The State law, which attempted to give less than just compensation to the expropriated owners by limiting compensation to the market value of the land on 31st December, 1946, instead on a date in 1948, was undoubtedly *ultra vires* the Constitution, and, therefore, it is difficult to disagree with the decision of the Supreme Court.

But its unguarded and unqualified proposition that compensation meant "a just equivalent of what the owner has been deprived of "had an adverse effect on the compulsory acquisition for "social or socio-economic purposes". The States with meagre economic resources found it difficult to see through socio-economic reforms by granting full indemnification to the owners of the expropriated property as laid down by the Supreme Court. And the society could not wait indefinitely for the much needed and aspired socio-economic reforms. The

64. *Ibid.*, pp. 563-64

only way out of the impasse created by the *Bela Banerjee* doctrine of compensation was to clear the way by amending the provisions of Art. 31 and other allied provisions suitably. This was done by Parliament in 1955 by enacting the Constitution (Fourth Amendment) Act.

The Fourth Amendment made a few substantial changes in Arts. 31 and 31 A of the Constitution. It made some important changes in the provisions of Art. 31 (2)[65] and also inserted a new clause (2A)[66] in Art. 31 of the Constitution. One major effect of this change is that deprivation of property has been divided into two categories. To the first belong compulsory acquisition and requisitioning of property by the State for a public purpose. It must be effected by law and the law must provide for compensation or specify the principles of compensation.[67] To the second category belong all cases in which the ownership or right to possession of property is not transferred to the State. These cases are not deemed to provide for compulsory acquisition or requisitioning within the meaning of clause (2) of Art. 31.[68] Thus, whereas in cases under the amended clause (2) of Art. 31 the "public purpose" and "compensation", but not its adequacy, are justiciable, cases falling under the new clause (2A) do not come in this respect under the jurisdiction of the courts, notwithstanding that they may

65. Art. 31 (2) after amendment by Fourth Amendment Act reads as follows: "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate."

66. The new clause (2A) of Art. 31 inserted by the Fourth Amendment Act provides: "Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

67. Art 31 (2).

68 Art. 31 (2A).

virtually deprive a person of his property.[69] The second major change made in Art. 31 (2) by the Amendment is the adoption of a new provision by which the adequacy of compensation is expressly made non-justiciable.[70]

In Art. 31 A the Fourth Amendment substituted a much inflated new clause for clause (1) by which a wider range of laws were made immune from challenge before the courts. It also declared that they shall not be deemed to be void on the ground that they are inconsistent with, or take away or abridge any of the fundamental rights conferred by Arts. 14, 19 or 31.[71] To this enlarged category of legal enactments belong laws providing for :[72]

"(*a*) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(*b*) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(*c*) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(*d*) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations or of any voting rights of share holders thereof, or

69. C.H. Alexandrowicz, *Constitutional Developments in India*, 1957, pp. 92-93.

70. *Ibid.*, for a superb analysis of Art. 31 (2) and (2A).

71. The material provision of Art. 31A (1) after the amendment by the Fourth Amendment Act reads thus: "(1) Notwithstanding anything contained in article 13, no law providing for—

(a) the acquisition by the State of any estate . . .

(b) . . . .

(c) . . . .

(d) . . . .

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or Article 31."

72. See C H. Alexandrowicz, *op. cit.*, p 93.

(*e*) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence."[73]

Thus, as pointed out by Prof. Alexandrowicz, "this new category of laws which are made immune from judicial review extends from the field of land reform to the industrial and commercial fields."[74]

Prof. C. H. Alexandrowicz after a searching and thorough analysis of the discussions in the Constituent Assembly on Art. 31 and of the new changes introduced by the Fourth Amendment Act states that "it is difficult for the reader of the Fourth Constitution Amendment Act to escape the conclusion that it simply aims at restoring to some extent what was laid down by the Constituent Assembly but changed by judicial interpretation."[75] In this connection he refers to Prime Minister Nehru's statement in Parliament. Nehru recalled, after the introduction of the Amendment Bill in the House, his views expressed in the Constituent Assembly when Art. 31 was under consideration and said: "The Supreme Court has completely differed from those views and we have to accept the interpretation and the only way is to change the Constitution."[76] In view of this fact, Prof. Alexandrowicz rightly concludes that "in fact the Constitution has not been changed much but rather redrafted in order to reflect better the original intentions of the Constitution-makers."[77]

*The Third Phase: From the Fourth Amendment to the Seventeenth Amendment.* Article 31 A (1) of the Constitution, as amended by the Fourth Amendment Act, has made every law providing for the "acquisition by the State of any estate or of

73. Art. 31A (1) (a) to (e).
74. C.H. Alexandrowicz, *op. cit.*, p 94.
75. C.H. Alexandrowicz, *op. cit.*, p 94
76. *Ibid.* Also see *The Hindu*, 21 December 1954, 3 January 1955 (Parliamentary Reports).
77. C H Alexandrowicz, *op. cit.*, p 91

any rights therein or the extinguishment or modification of any such right" immune from challenge under Arts. 14, 19 or 31 of the Constitution. The expression "estate" has been defined in clause (2) (a) of Art. 31 A to bear, in relation to any local area, the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and also to include any *jagir*, *inam* or *manfi* or other similar grant and in the States of Madras and Kerala, any *janmam* right. Thus, clearly enough these provisions of Art. 31 A have made all agrarian reform laws pertaining to "estate" and rights therein immune from challenge in any court of law.

In 1961 the Kerala legislature enacted the Kerala Agrarian Relations Act, the object of which was to impose a ceiling on the area of land a landowner could hold and to vest proprietorship in the land in the cultivating tenants. The law made sufficient provisions for the determination and payment of compensation to the landowners. The law covered all lands in the State including ryotwari lands situated in those parts of Kerala which were part of Madras State till the Reorganisation of States in 1956. A few ryotwari *pattadars*, who were affected by the law, filed a petition before the Supreme Court challenging the validity of the Act on the ground that it violated, among others, the provisions of Art. 14. One of the provisions of the Act, which was virulently attacked under Art. 14, related to compensation. Section 52 of the Act laid down a scheme for the determination and payment of compensation, according to which first the compensation was to be determined on the purchase price, and then the first Rs. 15,000 of the compensation would have to be paid in full and thereafter there would be a reduction of 5 per cent in each slab of Rs. 10,000 upto the compensation of Rs. 1,45,000. Beyond this amount the compensation was reduced by 70 per cent and the landowner or the intermediary could get only 30 per cent of what had been arrived under Section 52 of the Act. It was, therefore, urged before the Supreme Court in *Karimbil Kunhikoman* v. *State of Kerala*[78] that the progressive cuts in the compensation amount envisaged by the Act was discriminatory and could not be

78. A I.R. 1962. S.C 723.

justified except on the principle on which the slab system for the income-tax was justified, which principle would not apply to a case of compensation.

But Art. 31A saves all land reform laws froms attack under Art. 14. So, in order to lift the protective wings of Art. 31 A it was contended that ryotwari lands did not come within the purview of the expression "estate" as defined in Art. 31A (2) (a). Therefore, the question before the Supreme Court was whether ryotwari system was "estate" within the meaning of "existing law" in Madras at the commencement of the Constitution.

Facts showed that the ryotwari tenures were governed by standing orders of the Board of Revenue. The word "estate", in fact, was defined by the Madras legislature in the Madras Estates Land Act of 1908, as amended from time to time upto 1950, and the definition did not include ryotwari land tenures. At the commencement of the Constitution this definition was in force in the State of Madras which included parts of the present Kerala State from where the present petitions came. On the basis of these facts the Supreme Court reached the position that "in a law relating to land-tenures which was in force in the State of Madras when the Constitution came into force the word 'estate' was specifically defined. This law was in force in the whole of the State of Madras except some parts and was thus in force in the area from which the present petitions come . we are therefore of the opinion that the word 'estate' in the circumstances can only have the meaning given to it in the Act of 1908 as amended upto 1950 in the State of Madras as it was on the date the Constitution came into force."[79] So the Court came to the conclusion that "lands held by ryotwari pattadars in this part which has come to the State of Kerala by virtue of the States Reorganisation Act from the State of Madras are not estates within the meaning of Art. 31A (2) (a) of the Constitution and therefore the Act is not protected under Art. 31A (1) from attack under Arts. 14, 19 and 31 of the Constitution."[80] Once the protective shell of Art. 31A (1) was

79. *Ibid.*, p. 731.
80. *Ibid.*, p. 732.

broken the impugned law became vulnerable and it fell easily to the incessant attack under Art. 14 of the Constitution. Consequently, the law in so far as it applied to ryotwari lands was declared unconstitutional by the Court.

The result of the decision was that while the Kerala Agrarian Relations Act applied throughout the State of Kerala, the ryotwari pattadars escaped from the clutches of the law. That is to say, whereas all landowners in Kerala were obliged to comply with the ceiling limit and surrender the surplus land in accordance with the law, the ryotwari pattadars were left free to hold ryotwari lands even beyond the ceiling limit without any compensation. This made the agrarian reforms in Kerala meaningless. Besides, the *raison d'etre* in the decision was a sufficient warning that if land reform laws enacted by other States were found, on subtle interpretation of existing law in each State, not in respect of estates within the meaning of the existing law relating to land tenures in each State, they might lose the protection of Art. 31A(1) and be challenged under Arts. 14, 19 and 31. Thus, various land reform laws passed by many State legislatures were in imminent danger of being challenged before the Court and their implementation being delayed. Therefore, in order to remove such impediments to comprehensive land reforms and also to save several land reform legislations from vexatious litigations, Parliament enacted Constitution (Seventeenth Amendment) Act in 1964.

The Seventeenth Amendment Act introduced three important provisions. First, it inserted a new proviso in Art. 31A(1) by which it made clear that if a State seeks to acquire by law any estate held by a person within the ceiling limit applicable to him under any law for the time being in force and is held by him under his personal cultivation, the law shall not be valid unless it provides for payment of compensation at the market value.[81] Secondly, clause (2) (a) of Art. 31A has been

81. The new proviso added to Art. 31A(1) by the Seventeenth Amendment, 1964, reads thus: "Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time

recast and the definition of the word "estate" has been expanded to include "any land held under ryotwari settlement" and "any land held or let for purposes of agriculture or for purposes ancillary thereto", including waste land, forest land, land for pasture, etc.[82] Thirdly, forty-four land reform laws, including the Kerala Agrarian Relations Act, have been validated by placing them in the Ninth Schedule to the Constitution.

*The Last Phase : A Constitutional Stalemate.* The land owners, who were very much increased by the Seventeenth Amendment, made a determined attempt to fight to the last to prevent the land reforms and retain their right on land in fact. A number of writ petitions were filed before the Supreme Court challenging the validity of the Seventeenth Amendment, which came up before the Supreme Court for discussion in *Sajjan Singh* v. *State of Rajasthan*.[83] In this case, besides challenging the validity of the Seventeenth Amendment Act, the petitioners requested the Court to review its earlier decision in *Shankari Prasad* v. *Union of India*[84] which was considered a stumbling block for effective challenge against the Amendment Act.

In the latter case it was contended that the First Amendment Act of 1951, in so far as it purported to take away or

being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than market value thereof."

82. Clause (2) (a) of Art. 31A as amended by the Seventeenth Amendment reads as follows:

"(a) the expression 'estate' shall, in relation to any local area have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

(i) any jagir, inam or muafi or other similar grant and in the States of Madras and Kerala, any janman right,

(ii) any land held under ryotwari settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans."

83. A.I.R. 1965 S.C. 845.

84. (1952) S.C.R. 89.

abridge any of the fundamental rights, fell within the prohibition of Art. 13 (2) of the Constitution. The argument was that the law to which Art. 13 (2) applies would include a law passed by Parliament by virtue of its constituent power to amend the Constitution, and so its validity would have to be tested under Art. 13 (2) itself. Rejecting the above contention the Supreme Court stated "although 'law' must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power."[85] Proceeding further the Court said that in the absence of a clear indication to the contrary in Art. 368, it would be difficult to suppose that the Constitution-makers intended to make fundamental rights immune from constitutional amendment. "We are inclined to think," declared the Court, "that they must have had in mind what is of more frequent occurrence, that is, invasion of the rights of the subjects by the legislative and the executive organs of the State by means of laws and rules made in exercise of their legislative power and not the abridgment or nullification of such rights by alterations of the Constitution itself in exercise of sovereign constituent power . . . . the terms of Article 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. In short, we have here two Articles each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Having regard to the considerations adverted to above, we are of opinion that in the context of Article 13 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that Article 13 (2) does not affect amendments made under Article 368."[86]

85. *Ibid*, p. 106
86. *Ibid*, pp. 106-07

In *Sajjan Singh* case[87] the Supreme Court not only rejected the plea for review of the decision in *Shankari Prasad* case[88] but also reaffirmed the views expressed therein. While concurring with the earlier view the Court said the expression "amendment of the Constitution" in Art. 368 "plainly and unambiguously means amendment of all the provisions of the Constitution. It would, we think, be unreasonable to suggest that what Article 368 provides is only the mechanics of the procedure to be followed in amending the Constitution without indicating which provisions of the Constitution can be amended and which cannot. Such a restrictive construction of the substantive part of Article 368 would be clearly untenable."[89] "Article 368 confers on Parliament," the Court declared, "the right to amend the Constitution and the power in question can be exercised over all the provisions of the Constitution. How the power should be exercised has to be determined by reference to the question as to whether the proposed amendment falls under the substantive part of Article 368, or attracts the provisions of the proviso."[90] Then, in conclusion, the Court observed "it is true that Article 13 (2) refers to any law in general, and literally construed, the word 'law' may take in a law made in exercise of the constituent power conferred on Parliament; but having regard to the fact that a specific, unqualified and unambiguous power to amend the Constitution is conferred on Parliament, it would be unreasonable to hold that the word 'law' in Article 13 (2) takes in Constitution Amendment Acts passed under Art. 368."[91]

Undaunted by the failure to get the Seventeenth Amendment voided in *Sajjan Singh case*,[92] the landowners from different States filed subsequently writ petitions before the Supreme Court challenging the validity of the Seventeenth Amendment. The Court delivering its six to five judgment in *Golaknath case*

87. A.I.R. 1965 S.C. 845.
88. (1952) S.C.R. 89
89. A.I.R. 1965 S.C. 845, pp. 856-57.
90. *Ibid*, p. 857.
91. *Ibid*.
92. *Ibid*.

overruled its earlier decisions in *Shankari Prasad*[93] and *Sajjan Singh* cases[94] and held (*i*) that the power of Parliament to amend the Constitution was derived from Articles 245, 246 and 248, which deal with the ordinary legislative powers of Parliament, and not from Art. 368; and (*ii*) that the Constitution amendment was "law" within the meaning of Art. 13(2) of the Constitution and, therefore, if a constitution amendment took away or abridged fundamental rights it was void.[95] Thus, quite contrary to the earlier ruling, the Court treated the amendment as an ordinary legislation made by Parliament in its legislative capacity, and construed Art. 368 as a provision intended only to lay down the mechanics of the procedure to be followed in amending the Constitution.

The Court, however, applied the "doctrine of prospective overruling" and said that its decision would have only "prospective operation." That is to say, though the concerned Constitution Amendment was void as it abridged fundamental rights, it would continue to be valid.[96] The Court also declared that Parliament would have no power from the date of this judgment to take away or abridge the fundamental rights by amending the Constitution.[97]

The net result of the judgment is that the Seventeenth Amendment and the earlier amendments to Part III of the Constitution would continue to be valid, but any future amendment to fundamental rights would be invalid.[98] So to the extent Parliament is prevented from amending in future fundamental rights, the landowners succeeded at last in their fight for their property right. This, in fact, belies the statement of Patanjali Sastri, C. J., in *State of Bihar* v. *Kameshwar Singh*[99] that "Zamindars lost

93. (1952) S C R 89.

94. A.I R. 1965 S.C 845.

95. *The Hindu, February* 28, 1967, *Golaknath v. State of Punjab* (1967) 2 S.C.J. 486.

96. *Ibid*

97. *The Hindu,* February 28, 1967; *Golaknath V. State of Punjab* (1967) 2 S.C J. 486, at p. 512.

98. *The Hindu,* February 28, 1967, and March 1, 1967; *Golaknath case* (1967) 2 S C J., 486, at p. 512.

99. A.I.R. 1952 S. C. 252.

the battle in the last round when this Court upheld the constitutionality of the Amendment Act which the Provisional Parliament enacted with the object, among others, of putting an end to this litigation."[100] The fact of the matter, as is evident from the *Golaknath decision,* is that what they lost in *Shankari Prasad* case was not a battle in the last round, but a battle in the first round. Having thus lost in the first round, they snipped at Parliament's power to amend fundamental rights again, but unsuccessfully, in *Sajjan Singh's* case, and finally won the battle in the last round, though victory is limited, when the Supreme Court ruled in *Golaknath* case that in future Parliament would be incompetent to amend the fundamental rights.

The latest decision of the Supreme Court mentioned above, besides putting the fundamental rights in a constitutional strait jacket, has sufficient potentialities to effect adversely socio-economic measures in future. If the Supreme Court in future adopts, as in the past, a narrow and restrictive interpretation on the provisions relating to property right with little or no consideration for society-benefiting or structure-transforming socio-economic legislative measures, Parliament will not be in a position to remove the impediment and to facilitate the speedy implementation of the socio-economic reforms by amending suitably the provisions relating to fundamental right . In such a circumstance Parliament has only to watch the situation helplessly whatever might be its commitment to the people to bring about a new social order and transformation in the economic structure. The entire situation created by the decision, therefore, comes to this: socio-economic reforms contemplated in the legislative enactments included in the Ninth Schedule of the Constitution are all that could be carried into effect without delay and without any hindrance or challenge from any quarter, but future socio-economic reforms depend solely upon what the judiciary thinks about them or how it interprets provisions relating to fundamental rights. Thus, with respect to socio-economic reforms the decision has created, in effect a constitutional stalemate which can be lifted only with the willing

100 *Ibid.*, p. 262.

co-operation of the judiciary which may not be forthcoming always as it is very often impervious to popular sentiments and aspirations.

*Conclusion.* The provisions of Art 31(2), as amended upto 1962, establish that acquisition or requisitioning of property by authority of law for public purpose is perfectly valid provided the law fixes the compensation or lays down principles for the determination of the compensation to be paid to the deprived owner. However, the "adequacy" of the compensation cannot be questioned in any court of law. But there is nothing in the Article to prevent the Court from examining the principle of compensation[101] and the "public purpose" for which the land is acquired. In other words, in all acquisitions of property coming under Art. 31(2) "public purpose" and "principle of compensation" are justiciable issues. What is more, the law of acquisition may be questioned under Art. 14 as well. Thus, in all cases of acquisition or requisitioning of property for "public purposes" such as building a hospital, construction of a new town, rehabilitation of displaced persons, etc., wherein the acquisition or requisitioning of property results in the obligation of property right of a few persons without causing any agrarian reforms, the courts can intervene to examine the "public purpose", for which land is sought to be acquired, and the "principle of compensation" stipulated in the law to see whether any fraud has been committed on the right by the legislature either by acquiring property for purpose other than "public purpose", or by providing an illusory compensation for property taken for public purposes. However, provisions of clause (2A) and clause (5) (b) (ii) of Art. 31 together exempt from the provisions of clause (2) of Art. 31 any law, which does not provide for the transfer of ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, even if it deprives a person of his property for the purpose of promoting morality, public health or of preventing danger to life or property etc.

101. See *Vajravelu Mudaliar* v. *Special Deputy Collector for Land Acquisition*, A I.R. 1965 S C. 1017.

It may be noted that by virtue of clauses (1) (a) and (2) of Art. 31A the State may by authority of law acquire any estate or any rights therein or extinguish or modify any such rights, and no such law shall be deemed to be void on the ground that it contravenes or is inconsistent with Arts. 14, 19 or 31 of the Constitution. The definitions of expressions "estate" and "rights" in clause (2) indicate that the acquisition contemplated in the Article relates to agricultural lands and other lands auxiliary thereto. The fact that the law of acquisition coming under Art. 31A is made immune from the provisions of Art. 31 shows that in such cases of acquisition compensation need not be paid at all, and in case it is paid neither its adequacy nor its principle can be questioned in a court of law. To state briefly, under Art. 31A State may acquire any estate or any rights therein for purposes of agrarian reform with such compensation as the legislature deems or considers just in each case. In such cases the courts are clearly kept out. Similarly, if the State, by the authority of law, takes over the management of any property for a limited period or amalgamates two or more corporations in the public interest, etc., or extinguishes or modifies any rights of managing agents, secretaries and treasurers, managing directors, etc., the act is immune from attack under Art. 14, 19 or 31, which means, *inter alia*, that in such cases compensation need not be provided, and if it provides for compensation the State's decision as to the quantum of compensation is final and unimpeachable.

However, two provisos incorporated into Art. 31A lay down two conditions, which should be fulfilled by agrarian and economic reform laws to claim the protection of Art. 31A. First condition is that any such law passed by State legislature must be reserved for the consideration of the President and receive his assent. According to the second condition, no law of acquisition adopted by the State, which purports to acquire a land which is under the personal cultivation of a person and is within the ceiling limit applicable to him under any law for the time being in force, shall be valid unless such law provides for compensation at a rate not less than the market value. The entire position boils down to this. If a State passes a general agrarian reform law pertaining to estates and any rights therein

and fixes a ceiling limit uniformly on the land holding, and if it is reserved for the consideration of the President and has received his assent, then it comes within the protective wings of Art. 31A. This proposition applies *mutatis mutandis* to economic reform laws that may be passed by any state. But after fixing a ceiling limit on the land holding under a general law, if any specific or special law is passed acquiring the estate land, which is under personal cultivation of a person and is within the ceiling limit, then such law, in order to claim the protection of Art. 31A, besides fulfilling the condition of being reserved for the consideration of the President and received his assent, must provide, irrespective of the purpose of acquisition, compensation at the market value. Its failure to do so would entail its removal from the protective wings of Art. 31A which would be fatal as far as its validity is concerned. The second proviso is intended to serve two purposes. First, it seems to have been intended to serve as a bulwark against any political vendetta that may be taken against a political adversary whose property may be singled out by the ruling party in a State for acquisition without compensation. Secondly, it prevents complete obliteration of rights to property without adequate compensation.

Thus it is clear that Art. 31A, as amended up to 1962, deals with agrarian and economic reform laws. Clause (1) (a) and clause (2) of Art. 31A enable the State to embark on agrarian reforms without hindrance from litigant landowners and intervention of the courts, whereas sub-clauses (b) to (e) of clause (1) of Art. 31A enable the State to bring about economic reforms. In other words, the Article as a whole enables the State to acquire or requisition property for "social purposes."

A close scrutiny of the provisions of Arts. 31 and 31A, as amended up to 1962, therefore, reveals that these amended provisions now maintain clearly a dichotomy between two categories of State acquisitions of property, namely, acquisition of property for "governmental purposes" and acquisitions for "social or socio-economic purposes." In the former category of cases, as is evident from the provisions of Art. 31 (2), the courts are permitted to examine the "public purpose" and "principle

of compensation" and to prevent any colourable legislation. But in the latter category of cases, as is clear from the provisions of Art. 31A, the courts are clearly kept "out of the arena and the determination of compensation is left entirely to the legislatures. This is exactly what had been visualised by the Constitution-makers when they drafted the original Art. 31 of the Constitution. So what the three amendments have done, in effect, is to redraft the constitutional provisions relating to property so as to reflect the original intentions of the Constitution-makers more fully and clearly.[102] Had the judiciary given up its obscurantism and its conceptualistic attitude and had it cared to ascertain the intentions of the Constitution makers from the constitutional provisions as well as from the Constituent Assembly debates, Parliament would have been saved from the odium of amending the Constitution to reflect the original intention of the Constitution-makers more clearly. The amendments, in fact, did nothing to obliterate the individual right to property, but instead, by suitable alterations in the provisions, paved the way for the State to usher in without delay a new social order wherein the right to property could become a meaningful right for greater number of people of the society than ever before. In fact, such constitutional causeway is necessary to achieve peacefully the goal of socio-economic justice, lest it be tried to be reached through other avenues of approach which may put the life of the society in a cauldron of hatred and tumult. It is exactly to prevent any such extra-constitutional method to achieve the socio-economic justice that the Constitution-makers not only affected a happy marriage in the Constitution between the conservative libertarian and the impatient social reformer by providing side by side fundamental rights and directive principles of State policy, but also devised constitutional ways to achieve the socio-economic justice. Therefore, any judicial obscurantism in this field is fatal to the peaceful working of the constitutional methods.

The decision of the Supreme Court in *Golaknath* case has

102. What Prof. C. H. Alexandrowicz said of the First and Fourth Amendments (see *supra*) is equally applicable to Seventeenth Amendment

laid down that Parliament is incompetent from the date of the decision to amend Part III of the Constitution. Consequently, in future if any change or adjustment in the provisions of Part III is essential to push through socially beneficial measures, it cannot be brought about by Parliament by resorting to its amending power. In such a situation in future the only solution is to look up to the judiciary to bring about such essential changes by its judicial interpretation. This decision, therefore, while it assigns a key position to the judiciary in all socio-economic measures, whose will or decision would in future decide the tempo of progress of reforms in India, has rendered the position of Parliament, which is supposed to represent the will of the people from time to time, ineffective with respect to such matters. This position reminds us of a similar position created in America by the Federal judiciary in the early thirties of this century when it voided some very important New Deal legislations. Finding such an unenviable position, in which the Americans were placed by the rulings of the Federal judiciary, an American thinker said that "if five lawyers can negative the will of 100,000,000 men, then the art of government is reduced to the selection of those five lawyers"[103] This statement has greater application to-day to the Indian position and we may rightly say that if six lawyers can negative the will of several crores of men, then the art of government in India is reduced to the selection of those six lawyers. But it would mean repudiation of popular sovereignty which is the very basis and source of the Constitution.

103 Quoted in Mason and Beaney, *The Supreme Court in a Free Society*, 1959, p. 162.

## Chapter Six

# THE CONCEPT OF SOCIAL JUSTICE AND FUNDAMENTAL RIGHTS

The concept of social justice is primarily based on the idea that all men are equal in society without distinction of religion, race, caste, colour or creed. It also means the absence of privileged classes in the society. The concept of social equality has been considered a *sine qua non* for effective exercise of the rights guaranteed in the Constitution to all citizens. "The more equal are the social rights of citizens," says Harold J. Laski, "the more likely they are to be able to utilize their freedom in realms worthy of exploration. Certainly history of the abolition of special privileges has been, also, the history of the expansion of what in our inheritance was open to the common man. The more equality there is in a state, the more use, in general, we can make of our freedom."[1]

However, in a caste-ridden and economically imbalanced society, like the Indian society, wherein, due to historical reasons, certain castes and classes were for decades socially oppressed, economically condemned to live the life of penury, and educationally coerced to learn the family trade or occupation and to take education set out for each caste and class by the society, the strict application of the doctrine of social equality would, in fact, mean perpetuation of age-long distinction based on caste and class. The doctrine of social equality would be meaningful in the Indian society only if "protective discrimination" or initial advantage or privilege is given as an equalizer to those who are too weak, socially, economically and educationally, to avail of the advantages of the guaranteed freedoms on a footing of equality. That is to say the reality of the situation in the society requires that the doctrine of "equality in fact" must be taken into consideration for achieving a wholesome social justice. In other words, the concept of social justice must of necessity be based on the doctrine of

1. Harold J. Laski, *Liberty in the Modern State*, 1948, p. 52.

social equality in law and the doctrine of "equality in fact." It is, therefore, not surprising to see that the Constitution-makers with all their wisdom incorporated these two doctrines in the Constitution to ensure to all social justice in the full sense of the term.

### Doctrine of Social Equality

The doctrine of social equality is embodied in Art. 15 of the Constitution. Clause (1) of the Article states that "the State shall not discriminate against any citizens on grounds only of religion, race, caste, sex, place of birth or any of them." This provision is addressed solely to the "State" as defined in Art. 12 and confined to "citizens," thus leaving aliens out of its purview. The word "only" and the expression "any of them" in the clause suggest that discrimination based either on any ground not mentioned in the clause or on a combination of one of the grounds mentioned in the clause and some other ground not mentioned therein is not a violation of the provisions of Art. 15. However, such discrimination must satisfy the provision of Art. 14, which guarantees "equality before the law" and "equal protection of the laws" to all persons within the territory of India.

The provision is intended to ensure social equality to all citizens without any distinction of their religion, race, caste, sex, and place of birth. It is common knowledge that much social injustice resulted from social inequality based on religion, race, caste, and sex. History records the unhappy spectacle of many internecine wars waged in each nation between the oppressed and the oppressors to get the social justice sanctioned to all without any distinction. India's history is not an exception to this in that it bristles with events of social oppression of certain castes and racial groups and of much sufferings of those who were socially assigned inferior status in the society. The provision, therefore, marks a break from the past and guarantees social equality to all, so that every citizen shall have a chance for honourable existence and full growth.

Any invidious discrimination based on any one of the prohibited grounds is, therefore, palpably unconstitutional. In

fact, courts have acted promptly whenever aberrations were caused to the doctrine of social equality by the State acts. In *Champakam* v. *State of Madras*[2] the Madras High Court held that the communal Government Order, which classified citizens according to their caste and religion, such as Brahmins, non-Brahmins, Anglo-Indians and Muslims for purposes of admission to professional colleges and allotted seats in definite and fixed proportions according to different castes and religions, operated effectively to shut out a large number of students with higher qualifications and on the other hand to let in a large number of students with lower qualifications, solely on account of their belonging to particular castes, communities or religion. The court, therefore, ruled that the order, which classified citizens and thereby discriminated against them solely on ground of caste or religion, was void being in contravention of Art. 15(1) of the Constitution.[3] Similarly in Bombay, section 27(2A) of the city of Bombay Police Act of 1902, which provided that a person who was once convicted of certain offences could be externed from Greater Bombay if he was a person born outside Greater Bombay, which a person born within Greater Bombay could not be externed in the same circumstances, was held to be void on the ground that the law discriminated between citizens on the ground of place of birth.[4] Thus, the provisions of Art. 15(1) have served as a formidable bulwark against attempts by the State to whittle down social equality.

While clause (1) of Art. 15 guarantees social equality against State acts, clause (2) of the Article guarantees it against discriminatory practices by the individuals in the society. It states that "no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restuarants, hotels and places of public entertainment ; or

2. D D Basu, *Commentary on the Constitution of India*, 2nd edn. p 80; (1950) 2 M L.J. 404 (F.B.).

3. *Ibid.*

4. *Ibid.*, p. 81; *State v. Shaikh Husein*, (1951) 6 D.L R. 36.

(b) the use of wells, tanks, bathing ghats, roads, and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public." The clause makes the individual violation of social equality in places of social intercourse an unconstitutional act and facilitates commingling of citizens in the society upon terms of perfect equality.

It may be noted that in the United States, Congress made a similar provision in 1875 when it enacted Civil Rights Act making it a misdemeanour to deny any person equal rights and privileges in inns, theatres and on transportation facilities. But the Supreme Court balked at giving the law a positive meaning in *Civil Rights Cases*.[5] By reading the first and fifth sections of the Fourteenth Amendment,[6] the court said that they together meant that Congress could pass legislation to supersede discriminatory State legislation and official acts, and could not legislate against private acts of a discriminatory character.[7] Because of this ruling and lack of sufficient express provisions in the Constitution to secure the social equality to all, the American nation had to wait for nearly a hundred years to mould the opinion and get enacted once again by Congress a similar law. It is only in 1964 that Congress could pass such a law guaranteeing to all the right to equal enjoyment of public inns, conveyances and amusements, regardless of race.[8] It, therefore, redounds to the wisdom of Indian Constitution-makers to have provided in the Con titution itself, without leaving it to chance, for the social equality, which is vital for the exercise of freedoms guaranteed in the Constitution.

5. Mason and Beaney, *The Supreme Court in a Free Society*, 1954, p. 255; 109 U.S. 3.

6. Section 1 of Fourteenth Amendment states: "All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside No State shall . . deny to any person within its jurisdiction the equal protection of the laws."

Section 5 of Fourteenth Amendment reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

7 Mason and Beaney, *op. cit.*, pp. 255-56.

8. See the Provisions of the Civil Rights Act of 1964.

## Doctrine of Equality in Fact

The doctrine of "equality in fact" had been expounded by the Permanent Court of International Justice in its two opinions in *German Settlers in Poland*[9] and Minority Schools in *Albania*[10] cases. Facts in the latter case reveal that when the State of Albania was newly formed soon after the First World War, a large number of Greeks were left within the new State. Attempts were, therefore, made on international level to secure rights and equality of treatment to this minority community in Albania. This resulted in signing of a Declaration in 1921 by the Government of Albania on its admission to the League of Nations that "Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein."[11] In 1933 the Albanian Constitution was amended, and by Arts. 206-7 it was provided that "instruction and education of Albanian subjects are reserved to the State and will be given in State schools. Primary education is compulsory for all Albanian nationals and will be given free of charge. Private schools of all categories at present in operation will be closed."[12] The Greek minority in Albania petitioned the Council of the League alleging that these amendments contravened the Declaration of 1921. The Albanian Government contended, however, that as the measure applied to both the majority and the minority it could not be considered as discriminatory.[13] The League Council referred the matter to the Permanent Council of International Justice for an advisory opinion. The point

9. (1923) Series B, No 6, I. C. Green, *International Law Through Cases*, 2nd edn 1959, p. 340

10. (1935) Series A/B, No. 64, Green, *op. cit.*, p. 340.

11. Declaration of Oct. 2, 1921, Art. 5, para 1. (See Green, *op. cit.*, p. 340).

12. See Green, *op cit*, p. 340

13. ***Ibid.***

at issue before the Court was whether the said constitutional amendments violated the guarantee to the Greek minority community in the Declaration of 1921 of "the same treatment and security in law and in fact as other Albanian nationals."

The Court pointed out that the Albanian majority would not suffer materially by the abolition of private Albanian schools; the Greek minority, on the other hand, would lose its rights to be educated in its own language and its own culture.[14] In this connection the Court referred to the crucial clause in the Declaration, which assured the "same treatment and security in law and in fact" to all Albanian nationals. According to the Court, the clause implied "a notion of equality which is peculiar to the relations between the majority and minorities."[15] "It is perhaps not easy," the Court declared, "to define the distinction between the notions of equality in fact and equality in law; nevertheless, it may be said the former notion excludes the idea of merely formal equality . . . . . Equality in law precludes discrimination of any kind, whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."[16] The Court then proceeding further said, "It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact, . . . . . The equality between members of the majority and of the minority must be an effective, genuine equality."[17] A similar view was expressed by the same Court in its opinion on the *German Settlers in Poland* when it said, "There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law."[18]

In the above mentioned opinion of the Permanent Court of International Justice two doctrines have been expounded, viz., the doctrine of "equality in law" which is often described

14. L.C Green, "The Right to Learn", 3 *I. Y. B. I. A.*, 1954, p. 269.
15. L.C Green, *International Law Through Cases*, 2nd edn. 1959, p. 343.
16. *Ibid.*, p. 344
17. *Ibid.*, p. 344.
18. Series B, No 6, p. 24, at p. 140 (see Green, *op. cit.*, p. 344)

as "legal equality", and the doctrine of "equality in fact". These two doctrines are two aspects of the concept of equality. The World Court defines legal equality to mean "the absence of discrimination in the words of the law", or the preclusion of "discrimination of any kind". "Legal equality" or "equality in law" in this sense has been embodied in clauses (1) and (2) of Art. 15 of the Constitution of India.

As to the doctrine of "equality in fact", the World Court says that "equality of treatment of the majority and of the minority, whose situation and requirement are different, would result in inequality in fact". It may be borne in mind that what the Court says about the equality of treatment of the majority community and of the minority community in a State equally applies to "socially and educationally forward" class and "socially and educationally weaker or backward" section in a State. Therefore, according to the Court, "equality in fact" must of necessity mean "different treatment in order to attain a result which establishes an equilibrium between different situations". The doctrine of "equality in fact" is, therefore, essentially equilibrium-creating or equilibrium-oriented "different treatment" or what Prof. Alexandrowicz calls "protective discrimination."[19]

A similar view has been expressed by Justice Subba Rao. He says that the concept of equality "in practice can only be worked out by accepting two principles: (*i*) to give equal opportunity to every citizen of India, to develop his own personality in the way he seeks to do; and (*ii*) to give adventitious aids to the under-privileged to face boldly the competition of life. Though the two principles appear to be conflicting . . ., the harmonious blending of both gives equal opportunities to all citizens to work out their way of life. Doctrinaire insistence of an abstract equality of opportunity leads in practice to inequality which the doctrine seeks to abolish."[20]

There is another fact to be taken into consideration in order to ensure equality in fact in a society. In almost every

19 Alexandrowicz, *op. cit.*, pp. 56-64.

20 Justice K. Subba Rao, *Fundamental Rights Under the Constitution of India*, (Rt. Hon. V. S. Srinivasa Sastri Lecture), p. 28.

society, and much more so in a traditional and old society like Indian society, there are certain factors which create inequality in fact. These factors are more often the result of social set up. Unless these social evils or factors of social inequality are eliminated, the realisation of equality in fact would be well nigh impossible. The doctrine of equality in fact, therefore, necessarily means, on the one hand, "different treatment" between the "forward class" and the "under-privileged section" of the society or "protective discrimination" or "adventitious aid" in favour of the latter to equilibrate between different situations in which the two classes are found, and, on the other hand, elimination of social evils or factors of social inequality. The Constitution of India has, in fact, adopted both the principles of the doctrine of "equality in fact", and thus given effect to the doctrine in its fullest sense.

**'Protective Discrimination' to Promote 'Equality in Fact'**

The Constitution of India has made adequate provisions for granting "protective discrimination" to certain categories of persons. Clause (3) of Art. 15 enables the State to make any special provision for women and children.[21] This clause takes into consideration reality of the situation, for strict observance of formal equality between sexes guaranteed by clauses (1) and (2) of Art. 15 would mean inequality in practice as it is impossible for women to compete with men without some adventitious aid or protective discrimination. It is, however, not very clear why the word "children" is included in clause (3); and there is nothing in clauses (1) and (2) of Art. 15 to prevent the State from making any discrimination on the ground of age. A possible explanation seems to be that the word "children" has been included as an abundant caution.

The more important provisions relating to "protective discrimination" are found in clause (4) of Art. 15, which makes it possible for the State to make "any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled

21. Art. 15 (3) provides: "(3) Nothing in this article shall prevent the State from making any special provision for women and children."

Tribes."[22] So, two groups of people, in whose favour "protective discrimination" can be made are "the Scheduled Castes and the Scheduled Tribes" and "socially and educationally backward classes". The meaning of the phrase "the Scheduled Castes and the Scheduled Tribes" is clear from the definition given in clauses (24) and (25) of Art. 366.[23]

But nowhere in the Constitution the term "socially and educationally backward class" is defined. An expression "backward class" is used in clause (4) of Art. 16. It provides that nothing in Art. 16 shall prevent the State from making any provision for the reservation of appointments or posts in the services under the State in favour of "backward class" of citizens. This provision is intended to ensure equality in fact to the under-privileged in the realm of employment opportunities. The term used in Art. 15 (4) is obviously different from the expression employed in Art. 16 (4) in that the former, unlike the latter, is qualified by the words "socially and educationally". This difference proves that the term "socially and educationally backward class" is intended to connote something different from the expression "backward class" in Art. 16 (4).

It may be noted that Art. 46, which enjoins on the State a duty to promote the educational and economic interests of the weaker sections of the people, uses the phrase "weaker sections of the people". The phrase in this Article is wider in connotation than the terms "socially and educationally back-

22. Art. 15 (4) provides: "Nothing in this Article or in clause (2) of Art 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes"

Art. 29 (2) provides: "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."

23. Art. 366 (24) states: "Scheduled Castes means such castes, races, or tribes or part of or groups within such castes, races or tribes as are deemed under Art 341 to be Scheduled Castes for purposes of this Constitution."

Art. 366 (25) states: "Scheduled Tribes means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution."

ward class" and "backward class". Besides, Art. 46 being a directive to the State to endeavour to promote the educational and economic interests of the "weaker sections of the people" and Arts. 15 (4) and 16 (1) being the indicators of lines through which State's endeavours or efforts could be channelised to promote the said interests of the weaker sections of the people, the phrase "weaker sections of people" in Art. 46 must be deemed to comprehend the terms "socially and educationally backward class" and "backward class" found in Arts. 15 (4) and 16 (4) respectively. So neither the expression "backward class" in Art. 16 (4) nor the phrase "weaker sections of the people" in Art. 46 is very helpful in ascertaining the meaning of the term in Art. 15 (4).

It may be noted that the same term is used in Art. 340 (1),[24] which provides that the President may by order appoint a Commission to investigate the conditions of "socially and educationally backward classes" within the territory of India. The Commission so appointed may in its report suggest, *inter alia,* steps that should be taken to improve their condition. But even this Article fails to furnish a definition of the term. In the absence of a clear-cut definition of the term, it is anybody's guess as to what criteria or units and factors should be taken into consideration in determining the "socially and educationally backward classes" of citizens. But that does not mean that as to the said criteria or factors any guess can be hazarded or any interpretation can be put on the term. Any such guess or interpretation must be consistent with its provisions as well as its spirit.

The President, acting under clause (1) of Art. 340 ap-

24. Art 340 (1) states: "The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission."

pointed in 1953 a Backward Classes Commission under the Chairmanship of Kaka Saheb Kalelkar. One of the functions of the Commission, according to the terms of appointment, was to "determine the criteria to be adopted in considering whether any sections of the people in the territory of India (in addition to the Scheduled Castes and Scheduled Tribes . . .) should be treated as socially and educationally backward classes; and, in accordance with such criteria prepare a list of such classes . . . . ."[25] The Commission in its report submitted in 1955 made a preliminary observation that besides the Scheduled Castes and the Scheduled Tribes, there were other communities, castes or social groups which were also backward socially and educationally. No definite provision could be made for these social groups on account of paucity of information regarding their backwardness. It was thought necessary, therefore, to collect data regarding the conditions of these communities.[26] Then, it interpreted the term "socially and educationally backward classes" as relating primarily to social hierarchy based on caste,[27] and said that such an interpretation "is not only correct but inevitable and no other interpretation is possible"[28] The Commission thus, as pointed out by N. Radhakrishnan, used "classes" synonymously with "castes" and "communities" and prepared the lists of the backward classes by taking "castes" and units.[29]

But the Government of India rejected the criteria prescribed by the Commission for determining which classes might be regarded as backward classes for the purposes of Art. 15 (4) on the ground that they were far vague and wide to be of much practical value.[30] The State Governments were, therefore,

25 See D D Basu *Commentary on the Constitution of India*, 4th edn. Vol 5, p. 156, and Vol 1, p. 469

26. *Report of the Backward Classes Commission*, Vol I, p 1 See N Radhakrishnan, *Units of Social, Economic and Educational Backwardness: Caste and Individual*, 7 J I L I (1965), 263, p 265

27 N Radhakrishnan, *op cit*, p 265

28 *Report of the Backward Classes Commission*, Vol I, p. 12 (See N Radhakrishnan, *op cit*, p 265

29. N Radhakrishnan, *op cit*, p. 265.

30 Basu *op cit*, 4th edn Vol 5, pp 156-57.

authorised to render every possible assistance, until the determination of more satisfactory tests, to those classes of backward people whom the State Government might consider "socially and educationally backward" in the existing circumstances.[31]

Subsequently, the Government of India directed the Deputy Registrar General to conduct a pilot survey of socially and educationally backward classes on the basis of "occupations". But the Deputy Registrar General reported after the survey that it was impossible to draw up any precise and complete list of "occupations" the members of which could be treated as socially backward.[32]

In 1964 the Government of Kerala appointed a Commission under the Chairmanship of G. Kumara Pillay to suggest what sections of the people in the State (other than Scheduled Castes and Tribes) should be treated as socially and educationally backward and therefore deserving of special treatment by way of reservation of seats in educational institutions. The Kumara Pillai Commission in its report submitted in 1966 has recommended that only those who are members of families with an aggregate annual income of Rs. 4,200 and belonging to the castes and communities listed by it, should constitute socially and educationally backward classes for purposes of Art. 15(4) of the Constitution.[33] The castes and communities listed by the Commission are Ezhavas, Muslims, Latin Catholics (other than Anglo-Indians), backward Christians including converts to christianity from Scheduled Castes and other backward Hindus.[34]

In regard to representations that the economic test should apply to all without reference to caste or community, the Commission's reply is that "in the present circumstances of the State, a wholesale classification of all persons below a certain economic level as socially backward is not justified. Social backwardness, though to a considerable extent dependent on

31 *Ibid.*, at p 157.

32 See *Report of the Commission for Scheduled Castes and Scheduled Tribes for the year* 1960-61, Tenth Report, Part II, p 366; (also see N Radhakrishnan, *op. cit.*, p. 271, footnote 30)

33 *The Hindu*, March 8, 1966.

34 *Ibid.*

economic factors, depends also to a large extent in this State on popular conceptions of the status of a caste or community."[35] Thus the Kumara Pillai Commission has adopted "means-cum-caste or community" test, or what is called a "blended approach", taking both economic factors and caste or community into consideration,[36] for determination of socially and educationally backward classes in the State.

The Mysore Government, for the purpose of reserving seats in professional colleges in the State in favour of backward classes, issued an order in 1962 classifying ninety per cent of the total population of the State as "backward" solely on the basis of caste. The Government order further divided the backward classes into "backward classes and more backward classes" on the basis of castes and communities. The validity of this order was challenged before the Supreme Court in *Balaji* v. *State of Mysore*[37] on the ground that it violated the provisions of Art. 15 and was not saved by clause (4) of the Article. One of the issues before the Court was whether classification of backward class made entirely on the basis of caste was valid.

The Court ruled in this case that the impunged order is not justified by Art. 15(4). Adducing reasons for the ruling, the Court said that the backwardness under Art. 15(4) is "social and educational" and "the 'caste' basis is undoubtedly a relevant, nay an important basis in determining the classes of backward Hindus but it should not be made the sole basis."[38] The Court also pointed out that the test of "caste", besides helping to perpetuate caste system when used to the exclusion of other considerations, would break down in relation to those groups, viz., Sikhs, Jains, Christians, etc., which do not recognise "caste" in the conventional sense.[39] According to the Court, social backwardness is largely due to "occupation" of persons and in the ultimate analysis is the result of poverty.[40] Apparently the Court has felt that the social backwardness of

35. *Ibid.*
36. *Ibid.*
37. A I R 1963 S.C. 649.
38. *Ibid.*
39. *Ibid.*
40. *Ibid*, at p. 664

the people ought to have been determined by applying the "poverty" and "occupation" tests in addition to the "caste" test.

Apparently following the above decision the Mysore Government issued a new order classifying the people into socially and educationally backward classes on the basis of "economic condition" and "occupation". For the purpose of classification the order took "family" as a unit. According to the order a "family" whose income is Rs. 1,200 per annum or less, and persons or classes following "occupations" of agriculture, petty business, inferior services, crafts or other occupations involving manual labour, are, in general, socially, economically and educationally backward. The Government lists the following occupations as contributing to social backwardness: (*i*) actual cultivator, (*ii*) artisan, (*iii*) petty businessman, (*iv*) inferior services (i.e. class IV in Government services and corresponding class or service in private employment) including casual labour, and (*v*) any other occupation involving manual labour. Evidently, "caste" test has been completely ignored by the Government while determining social backwardness of groups or classes of people.

On a writ petition, the Mysore High Court upheld the validity of the new order of the Government, but, relying on *Balaji* decision, it observed that the scheme adopted by the State was very imperfect and that in addition to the "occupation" and "poverty" tests, the State should have adopted the "caste" and "residence" tests in making the classification.[41]

In an appeal entered against the Mysore High Court decision in *Chitralekha* v. *State of Mysore*,[42] the Supreme Court was called upon to explain and clarify its *Balaji* decision and to correct the observations of the High Court, lest the State should be forced to change the criteria for ascertaining the backward classes under Art. 15(4) of the Constitution. In deference to the wish the Supreme Court, speaking through Justice Subba Rao, clarified Justice Gajendragadkar's statements in *Balaji's* case. Justice Subba Rao, referring to observations

41 *D. G. Vishwanath* v. *Govt. of Mysore*, A.I.R. 1964 Mys. 132.
42. A.I.R. 1964 S.C. 1823.

in *Balaji's* case, said : "Two principles stand out prominently from the said observations, namely (i) the caste of group of citizens may be relevant circumstance in ascertaining their social backwardness ; and (ii) though it is a relevant factor to determine the social backwardness of a class of citizens, it cannot be the sole or dominant test in that behalf."[43] Justice Subba Rao felt that the High Court's observations were in conflict with the Supreme Court's observations in *Balaji's* case. So he found it necessary "to make it clear that caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this Court which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste. While this court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one of the compelling circumstances affording a basis for ascertainment of backwardness of a class. To put it differently, the authority concerned may take caste into consideration in ascertaining the backwardness of a group of persons ; but, if it does not, its order will not be bad on that account, if it can ascertain the backwardness of a group of persons on the basis of other relevant criteria."[44]

Then, referring to the provisions of Arts. 46, 341, 342 and 15 (4), he made the following observations : "These provisions recognise the factual existence of backward classes in our country brought about by historical reasons and make a sincere attempt to promote the welfare of the weaker sections thereof. They shall be construed as to effectuate the said policy but not to give weightage to progressive sections of our society under the false colour of caste to which they happen to belong. The important factor to be noticed in Article 15 (4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said as they have said in the case of the Scheduled Castes and the Scheduled Tribes. Though it may be suggested that the wider expression

43. *Ibid.*, at p. 1833.
44 *Ibid.*

'classes' is used in clause (4) of Article 15 as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution to use the expression 'Backward Classes or Castes'. The juxtaposition of the expression 'Backward Classes' and 'Scheduled Castes' in Article 15 (4) leads to a reasonable inference that the expression 'classes' is not synonymous with castes. It may be that for ascertaining whether a particular citizen or a group of citizens belong to a backward class or not, his or their caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong."[45]

The Supreme Court has thus put an end in *Chitralekha* case to the controversy raked over its ruling in *Balaji's* case and laid down in an unmistakable language that caste is not a sole or dominant test, but one among the few tests, like poverty, occupation, etc., for ascertaining the backwardness of the people. Thus, the court rejected, and rightly so, the inevitability of the 'caste' test in determining the backward classes for the purposes of Art. 15 (4) of the Constitution. Consequently, the State's determination of backward class for the purpose of Art 15 (4) entirely on the basis of poverty and occupation ignoring the basis of caste altogether is as much valid as the State's determination of backward class on the basis of caste alone or on the basis of caste plus occupation, poverty, etc.

It may be noted here that there is a school of thought which firmly believes in the inevitability of 'caste' test. According to this school of thought "the principle of reservation enshrined in Article 15 (4) cannot make sense except as a measure to uplift the backward castes as against the highly placed upper castes who were strongly entrenched in coveted positions in educational institutions and services".[46] This view is very much akin to the view of Kalelkar Commission that "socially and educationally backward classes" is a term related primarily to social hierarchy based on caste. Even the doctrine of "blended approch" adopted by the Kumara Pillai Commission lays emphasis

45. *Ibid*, at pp 1833-34
46. N Radhakrishnan, *op. cit.*, p 267

on the inevitability of 'caste' test by making caste one of the two essential factors in the blend.

The foregoing discussion and analysis of views give rise to a question whether the inevitability of the caste test or the non-inevitability of the caste test is in conformity with the principles embodied in the Constitution.

Art. 15 (4), as pointed out by the Supreme Court, places two expressions, namely, "socially and educationally backward classes" and "the Scheduled Castes and the Scheduled Tribes", in juxtaposition. The presence of two expressions in a single Article clearly indicates that they mean two different things as otherwise one of them would be redundant. Ascertainment of meaning of the latter expression may help a great deal in assessing the implications of the former expression.

The phrase "Scheduled Castes" in the latter expression[47] is defined in Art. 366 (24), according to which it "means such castes, races, or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution". Under Art. 341 the President may by public notification "specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purpose of this Constitution be deemed to be Scheduled Castes". It may be noted here that these two Articles use expressly words 'caste', 'race' and 'tribes', which indicate that in ascertaining the "Scheduled Castes", 'caste', 'race' or 'tribe' would be the sole or dominant factor. This inference or conclusion gains added support from the actual practice and working of Art. 341. The Constitution (Scheduled Castes) Order of 1950 and the Constitution (Scheduled Castes) (Part C States) Order of 1951 issued under Art. 341 have specified several groups of people,[48] which are deemed to be Scheduled Castes. Each and every group specified in these two orders is either a 'caste' group or a 'racial' or a 'tribal' group. The two orders, though include certain castes professing Sikh religion in the Punjab within the Scheduled Castes, declare expressly

47 The other phrase 'Scheduled Tribes' is defined in Art. 366 (25). Since it is not very essential for our discussion, it is left out.

48. Basu, *op. cit.*, 2nd edn., pp. 779-86.

that "no person who professes a religion different from Hinduism shall be deemed to be a member of a Scheduled Caste",[49] which means "castes" within the Hindu fold which are considered backward are alone entitled to be included within the "Scheduled Castes". In other words, "caste" as understood in Hindu religion is the only basis for determining the "Scheduled Castes". Thus, the relevant constitutional provisions and their working in practice clearly show that the expression "Scheduled Castes and Scheduled Tribes" in Art. 15(4) of the Constitution is intended to cover "backward castes" found, due to historical reasons, within the Hindu religion. This conclusion naturally leads to the second conclusion that 'caste' as understood in Hindu religion is the sole test in determining the "Scheduled Caste".

If caste is the sole or dominant test in determining the "Scheduled Caste", can it be said that 'caste' must be treated as a sole test in determining "socially and educationally backward classes"? It is reasonable to think that if 'caste' is the sole basis of "Scheduled Castes" and socially "backward classes" there is hardly any need for both the expressions in the same Article. In other words, 'caste' can hardly be considered as a sole basis of both expressions without rendering one of them purposeless. The Court, therefore, stated the point more precisely and tersely when it said that the word 'class' in Art. 15(4) is not used synonymously with the word 'caste'.

Besides, backward classes are not the monopoly of the Hindu religion. Socially backward classes are found in the Hindu society as well as the other religious groups. Even in the Hindu society social backwardness does not strictly synchronize with 'castes'. Socially backward groups are found as much in the upper castes as in the lower castes. The expression 'socially and educationally backward classes" in Art. 15(4) is, therefore, designed to accord "protective discrimination" to the under-privileged irrespective of their caste or religion. Therefore, if "caste" is construed, as some feigned to think, as the

49. See clause 3 of the Constitution (Scheduled Castes) Order, 1950, and clause 3 of the Constitution (Scheduled Castes) (Part C States) Order, 1951. See Basu *op cit.*, 2nd edn, pp. 779 and 785

sole basis for determining the backward class for purposes of Art. 15(4), such construction would not only deprive a large number of socially backward citizens who belong to upper castes in Hindu religion and other casteless religious groups of their constitutional privilege assured in the Article but defeat the underlying purpose of the Article as well.

The entire problem may also be viewed from the point of view of the great ideal embodied in the Constitution. One of the great ideals, as pointed out earlier, is social justice. Realisation of this ideal depends on the effective realisation and practice of social equality in the society both in law and fact. "Protective discrimination", which helps to establish an equilibrium between different situations in which the members of "forward class" and "backward class" are found, is a necessary corollary of the doctrine of "equality in fact". The provisions in clause (4) of Art. 15 are obviously designed to grant such equilibrating "protective discrimination" to the under-privileged or the backward classes irrespective of their caste and not to dispense advantages and benefits to the people on caste lines. In other words, Art. 15(4) is intended to accomplish equality in fact in the society and not to perpetuate caste system. So viewed, any interpretation of Art. 15(4) which will make caste a sole test for determining both the socially backward classes and the Scheduled Castes and Scheduled Tribes would be contrary to the great progressive ideal enshrined in the Article. Therefore, it cannot be denied that the Supreme Court's views expressed in *Balaji* and *Chitralekha* cases are in conformity not only with the intendment of the Constitution-makers but also with the great ideals embodied in the Constitution.

**Elimination of Factors of Social Inequality**

Elimination of factors which create inequality among the people in the society, is as essential for the realisation of equality in fact as the equilibrium creating 'protective discrimination'. This is essentially a theory of levelling which helps to level up artificial social contours. Two provisions in the Constitution, which seek to eliminate factors of social inequality, are Arts. 17 and 18. The former prohibits "untouchability" and the latter abolishes "titles".

*Prohibition of "Untouchability"*. Art. 17 of the Constitution states: "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." Then, Art. 35 authorises Parliament to prescribe punishment for those acts which are declared offences under Part III of the Constitution (which deals with fundamental rights).[50]

Exercising the power under this provision, Parliament enacted in 1955 the Untouchability Offences Act.[51] The Act outlaws the enforcement of disabilities on the ground of untouchability in regard to, among others, entrance to, and worship at, temples, access to shops and restaurants, the practice of occupations and trades, use of water sources, places of public resort and accommodation, public conveyances, hospitals, educational institutions, construction and occupation of residential premises, holding of religious ceremonies and processions, etc.[52] Violation of these provisions is made an offence punishable by fine up to Rs. 500, imprisonment upto six months, cancellation or suspension of licences, etc.[53]

"Untouchability" is a social stigma attached to certain classes of people and its practice resulted in the creation of two classes of people in the society, one superior and the other inferior class. The badge of inferiority carried with it all the disadvantages, and the social atmosphere was not conducive to the people of inferior class as it was to the members of the superior class for the full growth of their personality. Art. 17 is intended to remove this particular social stigma and the badge

50 Art. 35(a)(ii) states: "Notwithstanding anything in this Constitution, (a) Parliament shall have, and the Legislature of State shall not have, power to make laws - (ii) for prescribing punishment for those acts which are declared to be offences under this Part;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii)."

51. The Untouchability Offences Act XXII of 1955

52 Sections 3 to 6.

53 Sections 8 and 9.

of inferiority. It is, therefore, interesting to examine the ambit of the Article.

Prof. Mare Galanter is of the view that Art. 17 deals with two classes of conduct: acts constituting the "practice of untouchability in any form" and acts which are the "enforcement of disability arising out of untouchability". The first is apparently broader and inclusive of the latter. But while all of the former are 'forbidden', only the latter are declared an "offence punishable in accordance with law".[54] The "practice of untouchability", according to him, may include such acts as refusal of commensality, invidious separation at private functions, perhaps even observance of purificatory rites after contact. "Yet it is difficult," he says, "to believe any of these would be included in the 'enforcement of disabilities'. The latter would seem to be confined to some narrower class of acts which involve deprivation of some legally protected right and not merely denial of social acceptance."[55] Evidently Prof. Galanter put very broad construction on the phrase "practice of untouchability" to include private acts, which constitute in a broad sense practice of untouchability but which take place within the private domestic sphere. Therefore, he comes to the inevitable conclusion that the phrase "practice of untouchability in any form" is broader in scope than the expression "enforcement of disability arising out of untouchability" and the latter covers only a few acts but not all the acts con tituting "practice of untouchability in any form".

It may be noted that the provision, which forbids practice of untouchability, is self-executing and, therefore, does not require a supplementary or aiding legislation for its effectiveness. Therefore, violation of this provision, that is, practice of untouchability, whether by the State or by an individual, would *per se* be unconstitutional, for which remedy lies under Arts. 32 and 226 of the Constitution. A per on aggrieved by such unconstitutional act has a right to approach the Supreme Court for remedy, and the Court has ample power under the Constitution to issue an appropriate writ or order directing the State

54. Mare Galanter, "Caste Disabilities and Indian Federation", 3 *J. I. L. I.*, 205, at p 218

55. *Ibid.*

or an individual, as the case may be, to desist from practising untouchability.

Refusal of entry of persons to one's house on the ground of untouchability, invidious separation at private functions, observance at home of purificatory rites after contact, etc., are, no doubt, acts which constitute "practice of untouchability", but they evidently take place in the private domestic sphere. If by broader construction these acts are included within the purview of the phrase "practice of untouchability", nothing would prevent an aggrieved or affected party or person from seeking the intervention of the court to gain an entry to a private house on the footing of equality and without discrimination, to end invidious separation at private functions and to restrain an individual from observing purificatory rites at home after contact outside the house. Such a construction, besides recognising individuals' right to interfere with individuals' private affairs, would throw the sanctity, privacy and peace of home into complete disarray. It is, therefore, difficult to say, without a positive indication in the Constitution, that such a construction or situation is contemplated by the Constitution-makers. Moreover, what is forbidden by the Constitution is practice of untouchability "in any form", which means prohibition of untouchability in all its manifestations. The use of the phrase "in any form" is significant in that it is intended to cover all facets of practice of untouchability but not all places wherein it may take place. Had the Constitution-makers intended to catch within the net of constitutional prohibition acts amounting to practice of untouchability which take place in the private domestic sphere also they would have surely used the phrase "practice of untouchability in any form or in any place". In the absence of such a positive indication it is difficult to give a wider meaning to the phrase "practice of untouchability in any form" to include even acts constituting practice of untouchability which take place in the domestic sphere.

A reasonable view seems to be that Art. 17 forbids practice of untouchability in any form in the public sphere, where citizens have equal right to enjoy the public facilities. Denial of access to shops and restaurants, restrictions on the practice of occupations and trades, denial of use of water sources, places of

public resort and accommodation, invidious separation in public conveyances, hospitals and educational institutions and similar other acts in regard to the use of public facilities, which are practised on the ground of untouchability, amount to "practice of untouchability" which is forbidden by the Constitution. So, a discriminatory act would come within the constitutional prohibition only if it fulfils two conditions: (*i*) it should be based on the ground of untouchability, and (*ii*) it should be in regard to public institutions, public places and public facilities. Such a construction seems to be quite reasonable as well, because the Constitution guarantees to all without any discrimination the right to enjoy the facilities offered in public institutions, places, conveyances and in places or undertakings impressed with public interest.

Art. 17, as pointed out earlier, is intended to eliminate the social evil of untouchability, which created disability in certain members of the society, against whom it is practised in the matter of rights guaranteed by the Constitution. But for this provision many a right guaranteed in Art. 15 and the right to social equality assured to all citizens in the Constitution would have remained as a mere paper right without much substance to persons against whom untouchability was practised. So, when Art. 17 forbade "practice of untouchability", it forbade, in effect, the position of disabilities arising out of the practice of untouchability. In fact it is difficult to understand "practice of untouchability" in any sense other than the "imposition of disabilities arising out of untouchability". For, "practice of untouchability" which does not amount to imposition of disabilities on any person can hardly be a concern of the provision of Art. 17, much less the concern of any person who is least affected by it. So viewed, there seems to be no difference in connotation between the two phrases "practice of untouchability in any form" and "enforcement of disability arising out of untouchability" used in Art. 17 of the Constitution. While the former is intended to convey the idea that practice of untouchability, that is, imposition of disability arising out of untouchability, is forbidden by the Constitution, and, consequently, its practice would amount to violation of the Constitution for which constitutional remedy is available, the latter is intended to enable

the State to enact legislation making the practice of untouchability, that is, imposition of disability arising out of untouchability, a punishable offence.

The next important problem is about the meaning of "untouchability" and the scope of its application. The problem arises mainly due to the absence of definition of "untouchability" either in the Constitution or in the Untouchability Offences Act enacted by Parliament. A single judge of the Mysore High Court made an attempt to define the meaning and scope of 'untouchability' in *Devarajaah v. Padmanna*.[56] In this case an orthodox Jain issued a pamphlet contending that the complainant, a non-Jain had no right to enter or offer worship in Jain temples. Added to that, the pamphlet exhorted the Jains to prevent him from entering and offering prayers and religious services in places of worship belonging to the Jain community. He was prosecuted under the Untouchability Offences Act for encouraging untouchability by instigating the Jains not to have social or religious intercourse with others of the same religion as the complainant. The Magistrate, however, made an order holding that no offence under the Act was disclosed. Whereupon petition was filed before the High Court against the order contending that the tendency of the pamphlet, which advocated exclusion of particular persons from worship, religious service, food, etc., was to promote untouchability in the Jain community. But the High Court, speaking through Justice Srinivasa Rau, held that the acts and conduct referred to in the petition might amount to an instigation to "social boycott" in relation to particular community and since the "social boycott" of persons had not been based solely on the ground of their origin or birth "in a particular class", the alleged acts and conduct did not amount to practice of untouchability.[57]

It is, however, interesting to refer to the reasons adduced by the learned Judge in support of the above decision. He said the word 'untouchability' in Art. 17 "is enclosed in inverted commas. This clearly indicates that the subject matter of that Article is not untouchability in its grammatical sense but

56. A.I.R 1958 Mys 84.
57. *Ibid.*, p. 85.

the practice as it had developed historically in this country."[58] Developing the point further, he stated that the word could only refer "to those regarded as untouchables in the course of historical development. A literal construction of the term would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as their suffering from an epidemic or contagious disease or on account of social observances such as are associated with birth or death or on account of social boycott resulting from caste or other disputes".[59] From this theoretical exposition he reached the conclusion that "the imposition of untouchability has no relation to the causes which relegated certain classes of people beyond the pale of the caste system. Such relegation has always been based on the ground of birth in certain classes".[60] Thus, according to the Mysore High Court, the word "untouchability" has reference to practice of untouchability towards those groups of persons who, in the course of historical development, were relegated "beyond the pale of caste system on grounds of birth". By this phrase the Mysore High Court seems to suggest rather obliquely that the word "untouchability" has reference to groups of persons found outside the four castes (*varnas*) of Sanskrit Law Books.[61]

It is, therefore, necessary to examine whether the narrow construction of the word "untouchability" adopted by the Mysore High Court is in consonance with the letter and spirit of the Constitution and the law enacted thereunder. It is true that the word "untouchability" is neither defined in the Constitution, nor in the Untouchability Offences Act. But absence of definition is not a green signal for a narrow construction of the word. Nor its enclosure within inverted commas is a decisive indication that it is intended to refer only to groups of persons who are traditionally relegated "beyond the pale of caste system", for such enclosure within inverted commas may have been intended to refer not to particular groups of persons,

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 Marc Galanter, "Caste Disabilities and Indian Federalism," *op cit.*, p. 220.

but to particular type of social practice that was in vogue in the Indian society.

It may be noted that section 12 of the Untouchability Offences Act, 1955, provides that where any of the forbidden practices "is committed in relation to a member of a Scheduled Caste . . . the court shall presume, unless the contrary is proved, that such act was committed on the ground of 'untouchability'." This provision throws some light on the controversial point. It may be remembered that many backward classes and castes listed by the Union Government in accordance with the provisions of Art. 341 under the title "Scheduled Castes" come under the label "sudra caste", which is within "the pale of caste system". This provision of the law, therefore clearly indicates that "untouchability", the practice of which is prohibited, is intended to cover not only acts of untouchability practised in relation to groups of persons which are beyond the pale of caste system but also acts of untouchability practised in relation to castes and groups of persons which are within the pale of caste system.

Besides this, the meaning and scope of "untouchability" may be ascertained from the context and position of Art. 17 in the Constitution. It comes soon after Arts. 15 and 16, which guarantee right to social equality and right to equality in employment opportunities respectively. It is then followed by Art. 18 which abolishes inequality creating titles. Flanked, thus, by Articles which are designed to ensure to all equality in law and in fact, Art. 17 cannot be construed differently without striking a discordant note in the group. From the position it occupies within the group of equality-provisions, it appears to have been intended not only to eradicate a particular evil practice found in the Hindu society but also to eliminate a potent factor of social inequality noticed in the Indian society. Eradication of social evil is undoubtedly an important purpose of the Article, but it is not the sole or primary purpose of the provision. So the primary purpose of the Article seems to be elimination of the factor of social inequality, the presence of which would render the social equality guaranteed in the preceding Articles an unrealisable ideal. So viewed, "untouchability" in Art. 17 refers to acts of discrimination, exclusion, or dis-

tion by one person against another not because of the latter's own conduct or certain physical conditions but because of his caste, group, class, religion, etc., and also because of the assumed superiority of the former. In other words, it is intended to abolish "untouchability" in an all-embracing form, whether it is untouchability between Hindus and Hindus, between Hindus and Mohammedans or between Hindus and Christians. That is to say, it is intended to eradicate from the process of law and from the public sphere all civil disabilities which, but for this provision, could have been imposed on an individual, whether he be a Hindu, Christian or Muslim. In short, it is intended to eliminate the factor of social inequality and thereby to do away with the two classes, superior and inferior classes, existing in the society.

*Abolition of Titles.* Article 18(1) of the Constitution states: "No title not being a military or academic distinction, shall be conferred by the State." Clause (2) of the Article prohibits citizens of India from accepting any title from any foreign State. Clause (3) of the Article forbids aliens, who hold any office of profit or trust under the State, from accepting without the consent of the President any title from any foreign State. But nothing in the Article prevents such aliens from accepting titles from any foreign State after relinquishing the posts they held under the State. The last clause, namely, clause (1) of the Article does not, strictly speaking, deal with matters relating to titles.[62] Thus the Article on the one hand forbids the State from conferring any title, other than military or academic distinctions, on any person in India, and, on the other hand, imposes a duty on citizens not to accept any title from any foreign State and on aliens not to accept any title from any foreign State without the consent of the President. In effect the Article as a whole seeks to forbid high sounding appendage to the name of a person, which in the past often tended to create a class of nobility distinct from the class of commons.

62. Cl. (1) of Art. 18 states: "No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign States."

As pointed out above, Art. 18 prohibits the State from conferring any title on any person. This naturally gives rise to a question whether the prohibition contained in the Article can be enforced against the State by a person by a writ under Art. 32 or Art. 226 of the Constitution. Basu is of the opinion that the prohibition can be imposed "only if it can be predicated that the Article has enacted a right in favour of all persons other than the recipient of the title, for, the remedy under Art. 32 or under Art. 226 is available only for "the enforcement of the rights conferred by this part".[63] Since he is not sure of the nature of the right in Art. 18, he opines that "a writ may be available to a person to prohibit the State from conferring a title upon another person only if the Court takes the view that every person has a right to enforce any of the mandatory provisions of the Constitution, at least those contained in Part III. Otherwise, even some of the provisions in Part III would become non-justiciable like the Directive Principles of State Policy included in Part IV, and the result would be contrary to the scheme underlying the Constitution particularly when Art. 18 is self-executing provision and does not envisage legislation to implement it."[64]

But it may be noted that under Art. 226 the High Court is empowered to issue to any person or authority direction, order or appropriate writ for the enforcement of any of the rights conferred by Part III and "for any other purpose".[65] So, even if Art. 18 is construed to include no right a writ may be available to a person, who is aggrieved by the conferment of title on another person, to enforce the mandatory provision of Art. 18 against the State under the "other purpose" clause of Art. 226.

Besides, if it is conceded that Art. 18 is intended to assure to all the right to equality in fact by removing the artificial inequality between people created by conferment of titles, and that such "equality in fact" is essential for effective exercise of right of social equality guaranteed by Art. 15, then State's

63. Basu, *op cit*, 4th edn Vol I, p 481
64. *Ibid.*, p 482
65. Art. 226.

conferment of title on any person in defiance of the mandatory provision of Art. 18 would amount to, in effect, infringement of the right to "equality in fact" of other persons who are not recipients of such titles. To such non-recipients of titles a writ may be available to enforce their right to "equality in fact" under Art. 32 or Art. 226 and thereby to enforce prohibition contained in Art. 18 against the State. However, it is premature to say now how the courts would view such a stand.

In 1954, the Government of India introduced decorations (in the form of medals) of four categories, namely, *Bharat Ratna, Padma Vibhushan, Padma Bhushan* and *Padma Sri*, which shall be awarded for distinguished service in various fields, such as art, literature, science, public service, etc.[66] This has given rise to a question whether the action of the Government of India in this respect can be justified under Art. 18.

Basu sums up the argument, for and against it thus: "The Government view is that since these decorations cannot be used as appendage to the names of the recipients, they do not constitute 'title' within the meaning of Art. 18 and do not, accordingly, constitute a violation of the Article. The critics point out that even though they may not be used as titles, the decorations tend to make distinctions according to rank contrary to the Preamble which promises "equality of status". The critics gain strength on this point from the fact that the decorations are divided into several classes, superior and inferior, and that holders of the *Bharat Ratna* have been assigned a ninth place in the "warrant of precedence". The result, according to the critics, is the creation of a rank of persons on the basis of Government recognition, in the same way as the conferment of nobility would have."[67]

There is yet another view, according to which award of "decorations" for exceptional contribution towards art, literature and science, or for distinguished public service constitutes a direct violation of Art. 18 which, on its proper interpretation, prohibits not only award of title but also the award of any "distinction" other than "military or academic distinction" by

66. Basu, *op cit*, 4th edn., Vol I, p 482
67. *Ibid*

the State.[68] The word "distinction" in the Article, it is said, is an exception to the word "title". So interpreted, a title cannot be conferred on any ground whatsoever, but a distinction can be awarded only on the ground of military and academic merit.[69]

It may, however, be said that the above mentioned "decorations" would be invalid only if they amount to "titles" and not otherwise. But their equation with "titles" depends on their actual legal effect. First of all they must be essential legal appendages to the names of persons to whom decorations have been awarded, and the refusal on the part of others to use the appendages to the names of recipients must give rise to a cause of action in tort for the holders of the awards against recalcitrant persons. Secondly, the decorations must have the effect of conferring special and distinct material advantages over the rest of the community and of creating a distinct privileged class or class of nobility in the society. The Government of India made it clear, as pointed out earlier, that these decorations cannot be used as appendages to the names of the recipients. The view of the Government evidently robbed the decorations of their main legal effect. Besides, no material advantages seem to flow from these decorations in favour of the recipients. Even the assignment of ninth place for the holders of *Bharat Ratna* in the warrant of precedence, which is usually meant for indicating the rank of different dignitaries and high officials, is, as pointed out by Basu, in the interests of discipline in the administration.[70] In view of these facts the "decorations" can hardly be equated with "titles". They are, in essence, merit-recognising awards and not class-creating titles and, therefore, they do not offend the mandatory provisions of Art. 18 of the Constitution.

As to the interpretation of the words "titles" and "distinction" in Art. 18, it may be said that the interpretation that the word "distinction" in the Article is an exception to the word "title" is hardly supported by the grammatical construction of

68. *Ibid.*
69. *Ibid.*
70. *Ibid.*

the Article. The Article uses the expression "No title, not being a military or academic distinction." In this expression it is not the word "distinction" alone, but the entire phrase "not being a military or academic distinction" which is an exception to the word "title". What are excepted from the no-title policy are military and academic titles. Thus, the word "distinction" in the Article is used synonymous with "title". So construed, titles other than military or academic titles, cannot be conferred on any person by the State. Since the decorations, as shown earlier, do not amount to titles, they are perfectly valid.

The second important question, which the Article gives rise to, is related to the duty imposed on the citizens not to accept title from any foreign State. The question is whether there is any restraint in the Constitution to deter a citizen from accepting title from a foreign State. Does acceptance of title from a foreign State by a citizen in violation of the provision of the Article attract any legal consequences? In other words, whether non-acceptance of titles is a justiciable right and what can be done against a recalcitrant citizen in this case. When a similar question was raised in the Constituent Assembly, Dr. Ambedkar said that it would be perfectly open under the Constitution for Parliament under it residuary powers to make a law prescribing what should be done to a citizen who did accept a title contrary to the provisions of this Article. Then he added: "The non-acceptance of titles is a condition of continued citizenship; it is not a right, it is a duty imposed upon the individual that if he continues to be the citizen of this country then he must abide by certain conditions, one of the conditions is that he must not accept a title because it would be open for Parliament, when it provides by law, as to what should be done to persons who abrogate (violate) the provisions of this Article . . One of the penalties may be that he may lose the right of citizenship."[71]

But it is doubtful whether Parliament is competent under the Constitution to provide for the termination of citizenship, especially citizenship by descent, of persons for violation of the provisions of Art. 18. "Citizenship by descent" is a creature of

[71] C.A.D., Vol. VII, p. 709.

the Constitution and not a result of Parliamentary enactment. In other words, a citizen is a citizen by descent by virtue of constitutional provision[72] and not by virtue of any legislation passed by Parliament. That being the position it is difficult to see how the citizenship of an individual, who is a citizen by descent, can be terminated under any pretext by a method short of constitutional amendment.

It may, however, be noted that such extreme step by Parliament is not necessary in view of the fact that the Constitution itself contains sufficient provisions to restrain any such recalcitrant citizen. Under the Constitution a citizen has to take an oath prescribed by the Constitution before he offers himself as a candidate in the general election either for a seat in Parliament or State Legislature,[73] or, if he is an elected candidate, before he takes seat in Parliament[74] or State Legislature,[75] or, if he is elected to the office of President[76] or of Vice President[77] or appointed as a Governor,[78] judge of the Supreme Court,[79] judge of a High Court,[80] Minister for the Union,[81] Minister for the State[82] or Comptroller and Auditor-General,[83] before he assumes the office. One common feature of the oaths prescribed in the Constitution is that the citizen in all these cases should declare that he would 'bear true faith and allegiance to the Constitution'.[84] Therefore, if a citizen violates the provision of Art. 18 by accepting title from a foreign country he is incapable of taking the oath and of affirming his allegiance to the

72. Art. 5
73. Arts. 84(a) and 173(a)
74. Art. 99
75. Art. 188
76. Art. 60. It may be noted that the oath prescribed here differs slightly from the oaths prescribed in Schedule III of the Constitution.
77. Art. 69.
78. Art. 159. It may be noted that oath prescribed under the Article slightly differs from those prescribed in Schedule III of the Constitution.
79. Art. 124(6)
80. Art. 219
81. Art. 75 (4).
82. Art. 164 (3)
83. Art. 148 (2)
84. See Third Schedule of the Constitution.

Constitution. Consequently, he by his own act of defiance against the provisions of Art. 18 renders himself ineligible to contest any election or to offer himself to any post in India, which under the Constitution requires taking of the prescribed oath.

Besides, since a member of Parliament or State Legislature cannot accept title from a foreign State without violating his oath of allegiance to the Constitution, on acceptance of such title he becomes disqualified to be a member of Legislature and automatically ceases to be a member of it. The same argument applies *mutatis mutandis* to holder of any office mentioned in the Constitution. These built-in restraints in the Constitution are sufficient deterrent to any citizen who dares to violate Art. 18. He can derogate from the duty imposed on him by Art. 18 only at the risk of stripping himself of the essential attributes and advantages of citizenship.