

“EVOLUTION OF CONSTITUTIONALISM IN INDIA”

Dissertation submitted to Maharishi University of Information Technology, Noida, School of Law, in partial fulfilment of the requirement for the degree of Master of Laws.



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DECLARATION

This dissertation on “**Evolution of Constitutionalism in India**” embodies and is imperative with the result of my own research work pursued under the supervision of Kamshad Mohsin. I declare that no part of this dissertation has been published or submitted to any other institution for any other purposes. My indebtedness to other works and publications have been duly acknowledged at relevant places.

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CERTIFICATE

This is to certify that this Dissertation titled “**Evolution of Constitutionalism in India**” is written by **Tanvi** bearing enrolment no. **MUIT0223054128**. She is a candidate of Masters of Law Program here at the Maharishi University of Technology, Noida, School of Law. She has conducted all the research work under my supervision and submitted original and bona fide work to our utmost satisfaction, in the final semester for the partial fulfilment of the requirements for the award of the degree of Master of Laws.

SUPERVISOR: Dr. Amita Rathi

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LIST OF ABBREVIATIONS

1. AUWP Accelerated Urban Water Programme
2. AS Aganwadi Scheme
3. BSY Balika Samridhhi Yojana
4. CBD Convention on Biological Diversity
5. AWCRA Development of Women and Children in Rural Areas
6. FWP Food for Work Programme
7. FFPS Freedom Fighters Pension Scheme
8. GCS Growth Center Scheme
9. ICDS Integrated Child Development Scheme
10. JSSK Janani Shishu Suraksha Karyakram
11. JSY Janani Suraksha Yojana
12. JRY Jawahar Rozgar Yojana
13. KSY Kishori Shakti Yojana
14. LPG Liberalisation, Privatisation and Globalisation
15. L& RS Liberation and Rehabilitation Scheme
16. MBS Maternity Benefits Scheme

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CHAPTER 1 INTRODUCTION

As a welfare State, India is committed to the welfare and development. The Preamble to the constitution states,

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

JUSTICE, Social, Economic & Political.

LIBERTY of thoughts, expression, belief, faith and worship; EQUALITY of status and of opportunity and promote among them all;

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

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

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

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

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

and maintained.

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

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

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

It has been maintained and seen through the years in the light of the Constitution that absolute concepts of liberty and equality are very difficult to achieve in a modern welfare state. The enjoyment of these rights

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

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

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

Dias,² in his Jurisprudence, has stated that "Democracy is workable as long as there is a substantial area of shared values and aspirations among the people and where they have the maturity to rise above differences." The Directive Principles impose an obligation of the state to take positive action for creating socio-economic condition in which there will be an egalitarian social order with social and economical justice to all, so that individual liberty will become a cherished value and the dignity of an individual a living reality. Thus the Directive Principles enjoy a very high place in the Constitutional scheme and it is only in the frame work of the socio-economic structure envisaged in the Directive Principles that the fundamental rights are intended to operate. Both are in fact equally important and an effort should be made in harmonizing them by importing the Directive Principles in the construction of the fundamental rights. The harmony should be maintained even by constitutional amendments. The Constitution is founded on the bed rock of the balance between Part III and Part IV, and to tilt the balance by giving supremacy to one over another is to destroy the harmony between the Directive Principles and the fundamental rights which is the essential features of the Constitution.

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

The contrast is akin to the one between the policy and the welfare state. Knowing well that to some section

² Dias, ‘Jurisprudence’, 5th Ed. at p.85.

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

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

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

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

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

welfare approach of our Constitution.

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

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

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

In Indian context, 'Welfare State' denotes establishment of political democracy, provision of social and economic justice and minimizing inequalities in income, status, facilities and opportunities. The concept is

embodied in Part IV of the Indian Constitution, Directive Principal of State Policy. According to the Constitution, it is the duty of the government to follow these principles while making laws and thereby set the path towards a welfare State. The uniqueness about the concept in the Indian context is the Directive Principles containing the instructions to the government to establish a welfare State, is non justiciable and citizens cannot claim it as a right. This is because, India being developing and over populated country and it may not possible for welfare activities of the state reach every citizen of our country.

In later part of the 20th century, the wave of privatization and globalization came into existence in many countries. According to some the market fundamentalists an argument is forwarded that the welfare state is a source of trouble and an anomaly that should be stopped. However some other market fundamentalists and economist argues, that the supremacy of the market which is proclaimed with ideological fervour is a dangerous mistake. It is stressed upon that the role of the state and it's regulating activities to be essential and believes that market mechanisms are unsuitable means for the solution of social problem. It demands some rethinking and reform of various Welfare institutions which is more essential in the developing country like India where disparities exist between different segments of the population and different regions of the country, for shortening these gaps and moving towards a more balanced development of the nation.

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

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

Today the Government, is a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs contracts, licences, quotas, mineral rights etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationship to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of

State and local welfare.³

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

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

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

India could not be truly democratic unless the social revolution has established the just society. Without national unity, little progress could be made towards as a social and economic reform or democracy. Equally, without democracy and reform, India was unlikely either to preserve or to enhance its unity. Judicial system has particular important role to play. In a welfare state, liberty, equality and fraternity as the

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

trinity and social welfare are close companions. They are complimentary and supplementary means to each other to create conditions for self expression and balanced growth so that every citizen becomes responsible and responsive for successful working of democracy.

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

Dr. B.R. Ambedkar, while winding up the debates on the Draft Constitution, stated on the floor of the Constituent Assembly that the real reason and Justification for inclusion of the Directive Principles in the Constitution is that the party in power disregard of its political ideologies, will not sway away by its ideological influence but "should have due regard to the ideal of economic democracy which is the foundation and the aspiration of the Constitution." "Whoever may capture the governmental power will not be free to do what he likes to do in the exercise of the power. He cannot ignore them. He may not have to answer for the breach in a court of law, but he will certainly have to answer for them before the electorate when the next election comes." Dr. Ambedkar further stated that: "We must make our political democracy a social democracy as well. Political democracy, cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. In politics we will be recognising the principles of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one vote one value. If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up".

The question involved bears wider constitutional dimensions Mahatma Gandhiji,⁴ the Father of the Nation, stated that: "Every human being has a right to live and, therefore, to find the wherewithal to feed himself and, where necessary, to clothe and house himself In a well ordered society the securing of one's livelihood should be, and is found to be, the easiest thing in the world. , the test of orderliness in a country is not the number of millionaires it owns, but the absence of starvation among its masses." "Working for economic

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

equality means abolishing the eternal conflict between capital and labour. It means the levelling down of the few rich in whose hands is concentrated the bulk of the nation's wealth on the one hand, and the levelling up of the semi- starved, naked millions on the other A violent and bloody revolution is a certainty one day, unless there is a voluntary abdica- tion of riches and the power that riches give and sharing them for the common good."

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

As quoted by B.K. Roy in his book⁵ quoting Swami Vivekananda, speaking on social and spiritual justice, has said:

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

Robson⁶ has stated: "The ideas underlying the welfare state are derived from many different sources. From the French Revolution came notions of liberty, equality and fraternity. From the utilitarian philosophy of Bentham and his disciples came the idea of the greatest number. From Bismarck and Beveridge came the concepts of social insurance and social security. From the Fabian Socialists came the principles of the public ownership of basic industries and essential services. From Tawney came a renewed emphasis on equality and rejection of avarice as the mainspring of social activity. From the Webbs came proposals for abolishing the causes of poverty and cleaning up the base of society."

"The basic aims of the welfare state are the attainment of a substantial degree of social, economic and

political equalities and to achieve self-expression in his work as a citizen, leisure and social justice". It implies a redistribution of incomes for the achievement of basic standard of living for all.

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

Robert McNamara, President of the World Bank, quoted⁸ "that society has the moral obligation to raise

⁵ B.K. Roy, "Socio- Political Views of Vivekananda", at p. 52.

⁶ Robson , 'Welfare State and Welfare Society' , at p. 11

⁷ Encyclopedia Britannica', Vol.23, p.389,

above the absolute poverty level those who are in absolute poverty."

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

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

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

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

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

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

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

Article 1 assures that "The right to development is an inalienable human right by virtue of which every human person and all peoples are participate in, contribute to, and enjoy economic, social cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

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

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

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

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

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

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

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

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

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

The founding fathers of the Constitution raised three grand goals for India in the Constitution : (i) Achieving a more equitable society through a transformation they called a social revolution; (ii) Preserving and enhancing national unity and integrity; and (iii) Establishing the spirit as well as the institutions of democracy. India could not be truly democratic unless the social revolution has established the just society. Without national unity, little progress could be made towards as a social and economic reform or democracy. Equally, without democracy and reform, India was unlikely either to preserve or to enhance its unity. Judicial system has particular important role to play. In a welfare state, liberty, equality and fraternity as the trinity and social welfare are close companions. They are complimentary and supplementary means to each other to create conditions for self expression and balanced growth so that every citizen becomes responsible and responsive for successful working of democracy.⁸

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

⁸ *Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde*, 1995 SCC, Supl. (2) 549.

Nations, for India was a signatory to it. They were aware that the Universal Declaration of Human Rights contained certain basic and fundamental rights appertaining to all men. They were aware that these rights were born of the philosophical speculations of the Greek and Roman Stoics and nurtured by the jurists of ancient Rome. They were aware that these rights had found expression in a limited form in the accords entered into between the rulers and their powerful nobles, as for instance, the accord of 1188 entered into between King Alfonso IX and the Cortes of Leon, the Magna Carta of 1215 wrested from King John of England by his barons on the Meadow of Runnymede and to which he was compelled to affix his Great Seal on a small island in the Thames in Buckinghamshire - still called Magna Carta Island, and the guarantees which King Andrew II of Hungary was forced to give by his Golden Bull of 1222. They were aware of the international treaties of the midseventeenth century for safeguarding the right of religious freedom and the rights of aliens. They were aware of the full blossoming of the concept of Human Rights in the writings of the "philosophes" such as Voltaire, Rousseau, Diderot, Rayal, d'Alembert and others, and of the concrete expression given to it in the various Declarations of Rights of the American Colonies (particularly Virginia) and in the American Declaration of Independence. They were aware that in 1789, during the early years of the French Revolution, the French National Assembly had in "The Declaration of the Rights of Man and of the Citizen" proclaimed these rights in lofty words and that Revolutionary France had translated them into practice with bloody deeds. They were aware of the treaties entered into between various States in the nineteenth century providing protection for religious and other minorities. They were aware that these rights had at last found universal recognition in the Universal Declaration of Human Rights. They were aware that

the first ten Amendments to the Constitution of the United States of America contained certain rights akin to Human Rights. They knew that the Constitution of Eire contained a chapter headed "Fundamental Rights" and another headed "Directive Principles of State Policy". They were aware that the Constitution of Japan also contained a chapter headed "Rights and Duties of the People". They were aware that the major traditional functions of the State have been the defence of its territory and its inhabitants against external aggression, the maintenance of law and order; the administration of justice, the levying of taxes and the collection of revenue. They were also aware that increasingly, and particularly in modern times, several States have assumed numerous and wide ranging functions, especially in the fields of education, health, social security, control and maintenance of natural resources and natural assets, transport and communication services and operation of certain industries considered basic to the economy and growth of the nation. They were also aware that section 8 of Article 1 of the Constitution of the United States of America contained "a welfare clause" empowering the federal government to enact laws for the overall general welfare of the people. They were aware that countries such as the United States, the United Kingdom

and Germany had passed social welfare legislation.⁹

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

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

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

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

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

⁹ *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*, AIR 1986 SC 1571.

future statues.

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

The Constitution bears the imprint of the philosophy of our National Movement for Swaraj. That philosophy was shaped by two pre-eminent leaders of the Movement- Mahatma Gandhi and Jawaharlal Nehru. Mahatma Gandhi gave to the Movement the philosophy of Ahimsa. Two essential elements of his Ahimsa are : (1) equality; and (2) absence of the desire of self-acquisition (Aparigrah). He declared that "to live above the means befitting a poor country is to live on stolen food."¹⁰

Mahatma Gandhi also said : "I consider it a sin and injustice to use machinery for the purpose of concentration of power and riches in the hands of the few. Today the machinery is used in this way."¹¹

While Mahatma Gandhi laid stress on the ethics of the Movement, Jawaharlal Nehru enriched its economic content. In his presidential address to the Lahore Congress Session of 1929 he said : "The philosophy of socialism has gradually permeated the entire structure of the society the world over and almost the only point in dispute is the phase and methods of advance to its full realisation. India will have to go that way too if she seeks to end her poverty and inequality though she may evolve her own methods and may adopt the ideal to the genius of her race."¹²

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

The philosophy of Mahatma Gandhi was rooted in our ancient tradition; the philosophy of Jawaharlal Nehru was influenced by modern progressive thinking. But the common denominator in their philosophies was humanism. The humanism of the Western Enlightenment comprehended mere political equality, the humanism of Mahatama Gandhi and Jawaharlal Nehru was instinct with social and economic equality. The former made man a political citizen, the latter aims to make him a 'perfect' citizen. This new humanist philosophy became the catalyst of the National Movement for Swaraj. In 1929 the All India Congress

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

¹¹ R.D. Agarwala, 'Economic Aspect of a Welfare State in India', page 32.

¹² Jawaharlal Nehru, 'Discovery of India', Signet Press, 1956, p- 432.

Committee resolved that the great poverty and misery of the Indian people was due also "to the economic structure of the society."

The Karachi Congress resolution, on fundamental rights and economic programme revised in the All India Congress Session of Bombay in 1931 declare that in order to end the exploitation of the masses political freedom must include economic freedom of the starving millions.¹³

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

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

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

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

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

¹³ *Indian National Congress Resolutions on Economic Policy, Programme and Allied Matters*, 1924-1969, p. 3.

The research is doctrinaire in nature. The study is made on the basis of test books and reference book with regard to the subject, along with the whole Constitution touching various topics under Fundamental Rights and Directive Principles and also on the basis legislative initiative, by the governments and the Union and State, government documents, articles, press reports, journals, and various reports of committees and commissions, set up relating to the subject.

1.1 RESEARCH PROBLEM:-

India's distinct historical, cultural, and political background has influenced the development of constitutionalism in that country. The purpose of this study is to examine the course of India's constitutional development and evaluate it in light of comparisons with the US and UK constitutional frameworks. Understanding the variables influencing the adoption, interpretation, and application of constitutional principles in these three different contexts and assessing the consequences for individual rights, governance, and the rule of law constitute the main research challenge. Through an examination of the parallels, divergences, achievements, and obstacles faced during the process of establishing their constitutions in the US, UK, and India, this research aims to shed light on the more general dynamics of constitutionalism in various socio-political contexts.

1.2 OBJECTIVE OF THE STUDY :-

Examining the development of constitutionalism in India with a focus on comparisons with the American and British models has several goals:

1. **Historical Understanding:** To be aware of the historical background and the various forces—such as the colonial legacy, indigenous political movements, and international influences—that influenced the growth of constitutionalism in India.
2. **Comparative Analysis:** To examine the parallels and discrepancies among the American, British, and Indian constitutionalism models, focusing on their governing structures, tenets, and methods.
3. **Legal Frameworks:** To examine the texts and legal frameworks, such as the American Constitution and its amendments, the Indian Constitution, and the British unwritten constitution, that support constitutionalism in each context.
4. **Institutional Structures:** Analyse the roles and practical operations of the executive, legislative, judicial, and other constitutional bodies as well as the institutional frameworks created by each model.
5. **Democratic Values:** To evaluate how each constitutional framework promotes and defends democratic values, human rights, and the rule of law while taking into account aspects like judicial review,

checks and balances, and the division of powers.

1.3 HYPOTHESIS:-

The development of constitutionalism in India has followed a distinct path, shaped by American and British models but also taking into account the sociocultural context of the nation. The end product is a hybrid constitutional framework that strikes a balance between the rights of the individual and the goals of the group, as well as accommodating a variety of identities within a democratic framework.

1.4 RESEARCH QUESTION:-

1. What historical factors influenced the development of constitutionalism in the US, UK, and India?
2. What impact did colonial legacies have on India's constitution-writing process, its ratification, and its comparative analysis with the constitutions of the United States and Britain?
3. How do the main tenets and characteristics of the Indian Constitution compare and contrast with those of the US and the UK?
4. How has constitutional jurisprudence evolved in India, the United Kingdom, and the United States as a result of significant court decisions and interpretations?
5. In India, the UK, and the US, what institutional frameworks are in place to protect the separation of powers, checks and balances, and constitutional principles? How effective are these frameworks in actual use?
6. How do political dynamics, cultural diversity, and societal factors influence the development of constitutional norms and practices in the US, UK, and India?
7. What are the current obstacles to constitutionalism in each of these three nations, and how do they differ in resolving matters like minority rights, federalism, and judicial independence?
8. What can be learned about strengthening constitutional governance and defending the rule of law internationally from the comparative study of constitutionalism in the US, UK, and India?

1.5 RESEARCH METHODOLOGY:-

Using a comparative historical analysis approach, the study will consult secondary literature including books, reports, and scholarly articles in addition to primary sources like legislative documents, constitutional texts, and court rulings. Specific constitutional clauses, court decisions, and institutional setups in the US, UK, and India will all be the subject of comparative case studies. In addition, the evolution and application of constitutionalism in these contexts will be examined for patterns, trends, and deviations using qualitative techniques like content analysis and thematic coding.

CHAPTER 2 HISTORICAL RETROSPECT

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

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

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

2.1. CONCEPT OF RIGHTS IN ANCIENT INDIA.

Religion has played a very important role in the human civilization. The Upanishads teach us that India has sought in religion not an absolute or finished dogma to believe in, but a method and means to pierce the veil that hides every present meaning and mystery of existence. "The earnestness of the search for truth is one of the delightful and commendable features of the Upanishads".¹⁴

Our earliest literary source is the Rig Veda, part of which were originally composed prior to 1000 BC. The remaining Vedic Literature, The Sama Veda, The Yajur Veda and The Atharva Veda is of later date. The historical reconstruction of Arian Life and institution is based on this literature. The two epics, The Ramayana and The Mahabharata are concerned with events which took place between 1000 and 700 BC. During the earlier Vedic period instructions remained entirely orally. However the method of memorizing was highly systematic. There were no regular legal institution at this stage. Custom was law and the arbiters were the kings and the chief priest, perhaps advised by certain elders of the community. Variety of theft, particularly cattle-stealing, was the commonest offences. Punishment for homisidewas based on wergild, and the usual payment for killing a man was a hundred cows. Capital punishment was a latter idea. Trial by

¹⁴ Robert Ernest Hume "*The Thirteen Principal Upanishads*" at p.30

ordeal was practiced, the culprit having to prove his innocence by placing his tongue on a heated axe-head. In later Vedic sources there are reference to problems relating to land dispute and inheritance. A tendency towards primogeniture can be noticed, but it did not survive. It was also at this stage that caste consideration entered into legal practice, the higher caste became more lightly punished.¹⁵

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

“The source of right is duty. If we all discharge our duties, rights will not be far to seek. If leaving duties unperformed we run after rights, they will escape us like will-o'-the-wisp, the more we pursue them, the farther they will fly”.¹⁶

As specifically declared in Ishopanishad, “Desire to live for hundred years, doing selfless work to wipe other's tears. There is no better way to gain freedom”. The shastric charter of equality was accommodating welfare rights and policies. Rig Veda entailed, “No one is superior or inferior. All are brothers. All should progress collectively”. “Let us protect each other; let us dine together; let us do illustrious needs together”.¹⁷

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

Saraswati Vilasa ordains that the king shall take cognizance of only those offences classified as *aparadhas*. According to Narada, arrest of any person should be under an express or implied authority of the ruler. Unauthorized arrests could be broken without penalty. Kautilya permitted arrest of persons on reasonable suspicion of high crimes. Immunity against self-incrimination was the general principle. The above-mentioned text corresponds explicitly to present days Fundamental Right provided under Article 20 of the Constitution.

Rama Jois opines that after careful examination of the ancient legal and constitutional system, it is evident that India has established a duty based society.¹⁸

Religion was an all-pervasive phenomenon in ancient India. It was believed that multitudes of religion were like the beads adorning the necklace of God; all were equally important because God existed in every

¹⁵ Romila Thapar, *The History of India*, Vol. I, Penguin Books.

¹⁶ Subhash C. Kashyap, *Blueprint of Political Reforms*, Shipra Publications, Delhi, p. 80.

¹⁷ Ishwara Bhatt, *Fundamental Rights: A Study of their interrelationship*, 2004, Eastern Law House, New Delhi, p. 57.

¹⁸ M. Rama Jois, *Seeds of Modern Public Law in Ancient Indian Jurisprudence*, p-1

spirit and force of human welfare.¹⁹

An attitude of objectivity, logic and humanity and an approach of understanding, co-existence and tolerance permeated the secular spirit of ancient Indian thoughts.²⁰

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

There seems to be a controversy as to whether there were lawyer in Ancient India. According to Rocher, There can be no doubt that parties to a law suit in ancient Hindu law had a right to be represented by other party.²¹

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

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

2.1.1. DHARMA.

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

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

¹⁹ Romila Thapar, “*A History of India*”, Vol. 1, 1996 Rep. 1991, Penguin Books, pp. 44-45.

²⁰ Ludu Rocher, ‘*Lawyers in Classic Hindu Law*’, Indian Bar Review, Vol-XIII (3 and 4), 1986, p- 353.

²¹ K.P. Jayswal, ‘*Manu and Yajnavalkya, A comparison and a Contrast, A Treatise on the Basic Hindu Law*’, p-288

purely secular institution. Dharma is that which sustains the society.

V.D. Mahajan,²² in Chapter on "Secularism, its impact on law and life in India" it is stated that personal law is a secular institution and has to be based on rational and secular considerations. This position is consistent with the real, ancient, pristine view of Hindu law. Dharma, according to the old concept, is a purely secular institution. Dharma is that which sustains the society. Dharma is that by which people at large are held together.

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

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

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

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

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

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

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

Therefore, Dharma embraces every type of righteous conduct covering every aspect of life essential for the sustenance and welfare of the individual and the society and includes those rules which guide and enable those who believe in God and heaven to attain moksha (eternal bliss). Rules of Dharma are meant to regulate the individual conduct, in such a way as to restrict the rights, liberty, interest and desires of an individual as

²² "Chief Justice Gajendragadkar" - his life, ideas, papers and addresses" by V.D. Mahajan

regards all matters to the extent necessary in the interest of other individuals, i.e., the society and at the same time making it obligatory for the society to safeguard and protect the individual in all respects through its social and political institutions. Shortly put, Dharma regulates the mutual obligations of individual and the society. Therefore, it was stressed that protection of Dharma was in the interest of both the individual and the society.

A 'State of Dharma' was required to be always maintained for peaceful co-existence and prosperity of all. Though Dharma is a word of wide meaning as to cover the rules concerning all matters such as spiritual, moral and personal as also civil, criminal and constitutional law, it gives the precise meaning depending upon the context in which it is used. When Dharma is used in the context of duties of the individual and powers of the King (the State), it means constitutional law [Rajadharma]. Likewise when it is said that Dharmarajya is necessary for the peace and prosperity of the people and for establishing an egalitarian society, the word Dharma in the context of the word Rajya only means law, and Dharmarajya means Rule of Law and not rule of religion or a theocratic State. Dharma in the context of legal and constitutional history only means Vyavahara-dharma and Rajadharma evolved by the society through the ages which is binding both on the king [the ruler] and the people [the ruled].²³

The concept of 'dharma' has been explained by Justice M. Rama Jois in his book²⁴ as: "Mahabharata contains a discussion of this topic. On being questioned by Yudhistira about the meaning and scope of Dharma, Bhishma stated: It is most difficult to define Dharma. Dharma has been explained to be that which helps the upliftment of living beings. Therefore that which ensures welfare (of living beings) is surely Dharma. The learned rishis have declared that which sustains is Dharma.

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

²³ The Concept of "Dharma" as quoted by the Supreme Court in *Shri A.S. Narayana Deekshitulu v. State Of Andhra Pradesh*, AIR 1996 SC 1765,

²⁴ Justice M. Rama Jois, "*Legal and Constitutional History of India*", Vol. I, at pages 1 to 4

a fixed Code of mechanical rules but a living spirit which grows and moves in response to the development of the society. Even the State in India is a servant of dharma. It was not above morality. Its function is not to alter or annul dharma but only to administer it. Dharma is essential because it promotes individual security and happiness as well as the stability of the social order".

Dr. Shankar Dayal Sharma,²⁵ in his Centenary Speech of Swami Vivekananda in the Parliament of Religions, he emphasised "time-honoured philosophy of oneness and harmony within pluralism, the recognition of, respect for, and acceptance of different paths of logical and intuitive access to Absolute Truth". He reiterated what Swami Vivekananda had said one century ago at Chicago: "We believe not only in universal toleration, but we accept all religions as true" and concluded that "if India is to grow to her full potential as a strong, united, prosperous nation, a nation attuned to the highest moral and ethical values, true to the genius of her cultural and spiritual heritage, we shall all have to strive each day to build harmony, justice and creative endeavour. Indeed, in a very real way, it is our duty so to strive". He exhorted the youth of the country to be the vanguard of that mission.

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

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

In a concurring judgment²⁶ Justice Hansaria aptly pointed out difference between 'religion' and 'dharma' and observed thus: "Our dharma is said to be 'Sanatana' i.e. one which has eternal values, one which is neither time-bound nor space-bound. It is because of this that Rig Veda has referred to the existence "Sanatan Dharmani". The concept of 'dharma', therefore, has been with us for time immemorial."

The word is derived from the root 'Dh.r' which denotes: 'upholding', 'supporting', 'nourishing' and 'sustaining'. It is because of this that in Karna Parva of the Mahabharata, Verse 58 in Chapter 69 says: "Dharma is for the stability of the society, the maintenance of social order and the general well-being and progress of humankind. Whatever conduces to the fulfilment of these objects is Dharma; that is definite."

In Verse 9 of Chapter 5 in the Ashrama Vasika Parva of the Mahabharata, Dhritrashtra states to Yudhisthira:

²⁵ "Dharma - a Legal Discipline" - Select Speeches and Writings of Dr. Shankar Dayal Sharma, the present President of India [Indian Bar Review Vol.XX (3&4) 1993 Special Issue] in his Centenary Speech of Swami Vivekananda in the Parliament of Religions,

²⁶ *A.S. Narayana Deekshitulu v. State of A.P.*, (1996) 9 SCC 548,

"The State can only be preserved by dharma under the rule of law."

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

It is because of the above that if one were to ask "What are the signs and symptoms of dharma?", the answer

is: that which has no room for narrow-mindedness, sectarianism, blind faith, and dogma. The purity of dharma, therefore, cannot be compromised with sectarianism. A sectarian religion is open to a limited group of people whereas dharma embraces all and excludes none. This is the core of our dharma, our psyche."

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

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

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

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

This declaration is similar to the declaration of equality made in the Rigveda. After the establishment of the State, the obligation to protect the right to equality was cast on the Rulers. It was made a part of the Rules of Raja Dharma, the Constitution Law.

Our Constitution-makers, who included some of the most eminent jurists in the country, could not have been ignorant of the teachings of our own ancient jurists, Manu and Parashara, who had pointed out that the laws of each age are different. In support of this view, the late Dr. Ganga Nath Jha, in his treatise on Hindu

Law, has cited the original passages from Manu and Parashara, the English translation run as follows: "The fundamental laws (imposing fundamental duties or conferring fundamental rights) differ from age to age; they are different in the age known as krita from those in the dvaapara age, the fundamental, laws of the kali age are different from all previous ages, the laws of each age conform to the distinctive character of the age (yuga roopa nusaara tah)".

In other words, even our ancient jurists recognised the principle that one generation has no right to down future generations to its own views or laws even on fundamentals. The fundamentals may be different not merely as between one society and another but also as between one generation and another of the same society or nation.²⁷

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

The ideal King, in ancient India, was conceived of primarily as a Judge deciding cases or giving orders to meet specific situations in accordance with the Dharma Shastras. It also appears that the actual exercise of the power to administer justice was often delegated by the King to his judges in ancient India. Indeed, according to some, the theory of separation of powers appears to have been carried so far that the King could only execute the legal sentence passed by the Judge.²⁸

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

²⁷ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461

²⁸ K.P. Jayaswal in "Manu and Yajnavalkya"-A *Basic History of Hindu Law*, 1930 Edn. p. 82

purposes of State, appeared in person in the Court of his own Kazi to answer the claim. The Kazi rose from his seat out of respect for the Caliph who was so displeased with this unbecoming conduct that he dismissed him from office.²⁹

2.1.2. VEDAS OR SHRUTIS.

According to Yajnavalkya, the sources of Hindu Dharma are those enumerated in the following text:- *Shruti smritih sadacharah swasya cha priyamatmanah samyakasankalpajah kamo dharmmoolmidang smrittam.*

The sources of Dharma are described to be (1) the Vedas, (2) the Smritis, (3) the practices of good men, (4) what is acceptable to one's own soul, and (5) the desire produced by a virtuous resolves.

While interpreting the Smritis one difficulty which has to be encountered is the uncertainty about their chronology. Another difficulty felt by many jurists while interpreting them is the existence of conflicting texts, sometimes in the same Smriti. This appears to be on account of the successive changes in the views of society, which may have taken place over several centuries. Very often the prevailing practices and customs at a given point of time might be quite different from those obtaining some centuries before that time. Maxims which have long ceased to correspond with actual life are reproduced in subsequent treatises, either without comment or with a non-natural interpretation. "Extinct usages are detailed without a suggestion that they have become extinct from an idea that it is sacrilegious to omit anything that has once found a place in the Holy Writ. Another inference is also legitimate that while some Smritis modified their rules to provide for later usages and altered conditions of society, other Smritis repeated the previous rules which had become obsolete, side by side with the later rules."³⁰

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

" From the high spiritual flights of the Vedanta philosophy, of which the latest discoveries of science seem like echoes, to the low ideas of idolatry with its multicolour, mythology, the agnosticism of the Buddhists and the atheism of the Jains, each and all have a place in the Hindu's religion. Here it may be said that these laws as laws may be without end, by they must have had a beginning. The Vedas teach us that creation is without beginning or end, Science is said to have proved that the sum total of cosmic energy is always the same. Then, if there was a time when nothing existed where was all these manifested energy."³¹

²⁹ Sir A. Rahim's "Muhammadan Jurisprudence" 1958 p. 21

³⁰ Mayne's Treatise on 'Hindu law and Usage', 1953 Edition, pp 20-21.

³¹ Swami Vivekananda, "Parliament of Religion, Chicago", on 19th September, 1893

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

The last rhyme of the Rig Veda throws light on the Rig Veda concept of dharma laying down "that all

human beings should move together, speak together and their minds be of one accord".³²

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

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

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

From the point of view of content, they are viewed as Karma Kanda (sacrificial portion) and Jnana Kanda which explain the philosophical portion. The major portion of the Vedic literature enunciates the vedic sacrifices or the rituals which inevitably cultivate in the philosophy of the Upanishads. That is why the Upanishads are called Vedantha or culmination of the Vedas.

The essence of the Vedic religion lies in Vedic sacrifices which not only purify the mind and the heart of those who participate in the sacrifices but also reveal the true and unfragmented nature of the Karman (Action). Erroneously, Western scholars explained the Vedic sacrifices in terms of either sympathetic magic or an act of offering the fire to Gods emulating the mundane act of offering gifts. Thus, for them Vedic religion is a primitive religion and Vedic Gods are simply representing insentient departments of Nature; but it is not so. On the contrary, the term used for Vedic Gods is "Deva" which literally means "the shining ones". The adorable ones - bestowing grace on the worshippers. The root

'Div' also means that Devas are the embodiment of unfragmented consciousness, which is ultimately one and non dual. Likewise, the Vedic sacrifice is an act of re- enactment of the cosmic creation; in our mundane life, our life of action is simply a life of fragmented act. This is because of Raga Dvesha whereby the

³² Prof. Om Prakash , "*Religion and Society in Ancient India*" 1985 Edition

perception is limited. The fragmented acts emanate from our deep rooted attraction and hatefulness. The Vedic sacrifice moves towards "Poorna", i.e., plenitude and thus overcoming the problem of fragmented action in our lives. Onwards, the seeker moves towards the knowledge of self or the Brahman. So many Upasanas are taught in the Vedas but not elaborated. The Agamas have elaborated these Upasanas such as Madhu Vidya and Dahra Vidya.

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

Each text of the Agamas has the first portion, called 'Samhita' which contains the four parts namely the Vidya Pada, Driya Pada, Charya Pada and Yoga Pada. Vidya Psada offers an elaborate enunciation of the philosophy, whereas Kriya Pada deals elaborately with the act of worship. Worship is viewed as Samurta Archana. In other words, the Gods are endowed with form the this form of worship culminates into Amurta or Nishkala Archana by which one worships and realizes the formless. These are the steps to be treated upon one after another.

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

The Agamas, thus, are a stream of traditions which have grwon along with the tradition of the Vedas. Many earlier works of Agama literature are fairly ancient in times. They are not anti-Vedic but the worship of God in the form of Idol. In the Vedic tradition, a very limited number of Brahmins were conversant with the ritualistic lore but under Agama they performed rituals visualizing the Deity whom they invoked by Mantras. Vedas deprived others including women and Sudras of the opportunity to participate in the rituals. But Agamas provide opportunity to all to perform worship of the God. Purity, good conduct, devotion and dedication is insisted upon.³³

However Justice B.K. Mukherjea³⁴ observed: "The popular Hindu religion of modern times is not the same as a religion of the Vedas though the latter are still held to be the ultimate source and authority of all those held sacred by Hindus. In course of its development, the Hindu religion did undergo several changes, which reacted on the social system and introduced corresponding changes in the social and religious institution. But whatever changes were brought about by time it cannot be disputed that they were sometimes of a revolutionary character – the fundamental, moral and religious ideas of the Hindu which lie at the route of their religion and charitable institution remained substantially the same and the system that we see around

³³ As quoted by the Supreme Court in *Shri A.S. Narayana Deekshitulu v. State Of Andhra Pradesh*, AIR 1996 SC 1765,

³⁴ Justice B.K. Mukherjea, "*Tagore Law Lectures on Hindu Law of Religious and Charitable Trust*", at page 1

us can be said to be a evolutionary product of the spirit and genus of the belief passing through different ways of their cultural development".

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

In Vedic society woman enjoyed equal status economically, socially and culturally with men. He stated that initiation to education upanayanam was performed in Vedic period to the girls as well as boys. Women studied the Vedas, even composed Vedic rhymes. They participated in public life freely. Vishvavara, Apala,

Lopamudra and Shashayasi are only few examples in the initial Vedic period. Thereafter Ghosha, Maitrai and Gargi occupied place for equality in intellectual excellence and equal status with men. Selfishness and male chau- vanism made woman to gradually degrade and were given no voice even in the settlement of their marriages or so on. She was denied participation in public affairs.

2.1.3. MIMAMSA.

The process of interpretation is as old as language, it says that the rules of interpretation were evolved at a very early stage of Hindu civilization and culture and the same were given by 'Jaimini', the author of Mimamsat Sutras; originally meant for shrutis, they were employed for the interpretation of Smritis as well. It may be mentioned that the Mimansa Rules of Interpretation were our traditional principles of interpretation laid down by Jaimini, whose Sutras were explained by Shabar, Kumarila Bhatta, Prabhakar, etc. These Mimansa Principles were regularly used by our great jurists like Vijnaneshwara (author of Mitakshara), Jimutvahana (author of Dayabhaga), Nanda Pandit, etc. whenever they found any conflict between the various Smritis or any ambiguity, incongruity, or casus omissus therein.

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

Although the Mimansa principles were created for religious purpose, they were so rational and logical that they subsequently began to be used in law, grammar, logic, philosophy, etc. i.e. they became of universal application.³⁵

³⁵ Prof. Kishori Lal Sarkar, 'The Mimansa Rules of Interpretation' published in the Tagore Law Lecture Series

In the Mimansa system there are three ways of dealing with conflicts.³⁶ Where two texts which are apparently conflicting are capable of being reconciled, then by the Principle of Harmonious Construction (which is called the Samanjasya Principle in Mimansa) they should be reconciled. The Samanjasya Principle has been laid down by Jaimini in Chapter II, Sutra 9 which states : "The inconsistencies asserted are not actually found. The conflicts consist in difference of application. The real intention is not affected by application. Therefore, there is consistency."

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

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

CHAPTER 3

SOCIAL WELFARE AND CONSTITUTIONAL FOUNDATION

³⁶ Shabar Swami, in his "*Commentary on Sutra* ", 14, Chapter III, Book III of Jaimini.

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

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

India represents a mosaic of humanity consisting of diverse religious, linguistic and caste groups. The rationale behind the insistence on fundamental rights has not yet lost its relevance, alas or not. The Congress Session of Karachi adopted in 1931 the Resolution on Fundamental Rights as well as on Economic and Social change. The Sapru Report of 1945 said that the fundamental rights should serve as a "standing warning" to all concerned that: What the Constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civic rights, equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of the ordinary applications of life.³⁷

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

The Preamble to the Constitution enunciates the great objectives and the social goals for the achievement of which the Indian constitution has been established. These objectives are : to secure to all citizens of India social, economic and political justice, to secure to all Indian citizens liberty of thought, expression, belief,

³⁷ *Minerva Mills v. Union of India*, (1980) 3 SCC 625.

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

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

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

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

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

It is significant that though Parts III and IV appear in the Constitution as two distinct fasciculus of articles,

the leaders of our independence movement drew no distinction between the two kinds of State's obligations -- negative and positive.

"Both types of rights had developed as a common demand, products of the national and social revolutions, of their almost inseparable intertwining, and of the character of Indian politics itself."³⁸

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

What is the Constitutionalism of India?

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

Constitution of Indian Republic is not the product of a political revolution but of the research and deliberations of a body of eminent representatives of the people who sought to improve the existing system of administration.³⁹

Thus the Constitutionalism, in brief, is specific limitations on general governmental powers to prevent exercise of arbitrary decision-making. Unlimited powers concentrated in a few hands at the helm of affairs and their exercise would jeopardize the freedom of the people. These powers have to be checked and balanced with equally powerful alternatives in a system, where it will be nearly impossible for dictators to emerge. In one word 'Limited Governance' is the Constitutionalism, which is supposed to reflect in the Constitutional Law of a democratic state. Constitution of India is the Constitutional Law incorporating the Constitutionalism. The listed fundamental rights and guaranteed remedies, creation of judiciary as an impartial arbiter with all independent powers besides broad based legislative check on the executive are the reflections of such constitutionalism. From these essential characters the doctrines of judicial review, rule

³⁸ Granville Austin, *"The Indian Constitution: Cornerstone of a Nation"*, p. 52.

³⁹ DD Basu, *'Introduction to the Constitution of India'*, p. 3, 3rd Edn. 1946.

of law, separation of powers, universal franchise, transparent executive, fundamental right to equality and quality of life emerged and consolidated. At the same time, the rulebook has a responsibility to check anarchy and possibility of people misusing freedom to resort to violent means of overturning the constitutionally governing institutions. That responsibility is undercurrent in the reasonable restrictions placed on the exercise of fundamental rights of the people. The founding fathers of the Constitution made restrictions specific while the rights appear in general terms, paving a way for independent judiciary to expand the scope of freedoms and reading emerging rights into the sacred statements of rights under fundamental rights chapter. At the same time specification of restrictions operate as powerful restraints on the powers of the rulers. The right as the individual power in the hands of people and authority as the ruling power in the hands of institutions cannot go arbitrary and anarchic undermining the democratic peace.

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

Basic Philosophy Mr. Justice H. R. Khanna in his 'Making of Constitution said: "The framing of a Constitution calls for the highest statecraft. Those entrusted with it have to realize the practical needs of the government and have, at the same time, to keep in view the ideals, which have inspired the nation. They have to be men of vision, yet they cannot forget the grass roots".⁴⁰ A Constitution at the same time has to be a living thing, living not for one or two generations but for succeeding generations of men and women. It is for that reason the provisions of the Constitution are couched in general terms, for the great generalities the Constitution have a content and significance that vary from age to age and have, at the same time transcendental continuity about them. A constitution states, or ought to state, not the rules of the passing hour, but the principles for an expanding future.

A Constitution is a rule of book of a nation, codifying rule of law. Constitution is a legal document having a special legal sanctity, which sets out the framework and the principal functions of the organs of the government of a state, and declares the principles governing the operation of those organs.⁴¹ Like every other Constitution, the Indian Constitution also seeks to establish the fundamental organs of government and administration, lays down their structure, composition, powers and principal functions, defines the inter- relationship of one organ with another, and regulates the relationship between the citizen and the state, more particularly the political relationship. The states have reasserted certain principles of

⁴⁰ Justice H. R. Khanna, '*HR, Making of India's Constitution*', pp 1-2.

⁴¹ Wade and Phillips – '*Constitutional Law*', 14th Edn., p- 1

law through written Constitutions. As a democratic Constitution, the Indian masterpiece also reflects the fundamental political values in substantive ways by guaranteeing Fundamental Rights to the citizens, and in procedural ways by providing remedies. It mirrors basic values about who shall govern, and in what direction. Constitution means the structure of a body, organism or organization, or we can also say what constitutes it or what it consists of. Because the nation is one of the biggest in the world with most of varieties of the people and the cultures, India needs an expressly written code of governance, more specifically when the people chose to have different institutes, estates, mechanisms and levels of sovereignty. And thus we have the longest written constitution, which is one of the essential features of democratic federation.

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

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

3.1. CHALLENGES BEFORE THE CONSTITUENT ASSEMBLY

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

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

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

That was not any easy task, may well be judged from the problems with which the framers of the Constitution was faced. Firstly they had to provide a Constitution which would unite the population of over 300 million people. The population was not homogeneous. There were many communities living in this country, and many languages prevalent in different parts of it. There were other kinds of differences also. Provisions also are to be made for backward people and areas, like tribes and tribal areas. The countries of

Europe could not be able to join together or coalesce even in a confederacy, much less under one unitary government. In India, in spite of the size and diversity of the country, we succeeded in framing a Constitution which covered the whole of it.⁴²

Next there was two fold problem of the Indian Princely States. Firstly the British declaration on the lapse of paramountcy had freed the Indian States from the suzerainty of the British Crown. The general control

⁴² Dr Rajendra Prasad, speech in the Constituent Assembly, dated November 26, 1949.

which the Crown had so long exercised over the Indian States came to an end all of a sudden. A central authority which could keep the princes in order thus disappeared. In law it became open to any prince or combination of princes to assume independence and even to enter into negotiations with any foreign power and thus become island of independent territory within the country. In fact such tendency was visible. The White Paper on Indian States, dated March 15, 1950, observed ; ‘ The dangers inherent in the situation were underlined by the attitude of some of the princes who were inclined to sacrifice the national interest of the people on the altar of personal ambition. The events in certain states such as Junagadh and Hyderabad had come as pointers in that direction’ . These States, therefore, were to be brought within the orbit of one Central Authority. Secondly, the patent vulnerability of the smaller States, most of which had no form of popular representation and governed completely autonomously, had to be eliminated. Indian Independence would have no meaning, if the people of the States did not have the same political, social and economical freedoms as enjoyed by the people of the Provinces. A positive and bold approach alone could avert the explosive situation towards which the States were heading. The Constitution solved both these aspects of the States’ problem. The States were brought under one common authority, integrated and formed into Unions of States. Autocracy in every form was completely eliminated from the Unions.⁴³

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

The framers of the Constitution intended to secure the hard-won freedom with integrity and preferred a strong union within a federation, which otherwise appear contradictory. They had in their minds the horrific memories of the two world wars. The horrendous thought of extermination of millions of people in gas chambers revealed in Nuremberg trials, war crimes, crimes against humanity, inhuman and barbaric violence over the civil population during wars and civil strife in partition which left a permanent scar reminded the humanity of the need for human life and dignity. Cruelties and infamies during Nazi regime influenced making of the Constitution. The sole task of the Constituent Assembly was framing of the Constitution for Independent India. The search for providing a legal frame and incorporating important

⁴³ V.N. Shukla, ‘*Constitution of India*’, 10th ed., Eastern Book Company.

systems relevant to India began. The framers looked forward to international documents, progressive democratic constitutions, and constitutional doctrines prevailing in Britain. The concept of a republic is not alien to India, as there are evidences of its existence in ancient times. But a truly democratic republic came into existence, only after India became independent. After centuries of despotic rule, both alien and indigenous, India had the chance of adopting a truly representative democracy, guaranteed by a constitution. Though a lot has been borrowed from the earlier Government of India Act of 1935, the present constitution has a lot of new features. But the reason for adopting the British parliamentary system was because of the familiarity of both the electors and elected of the working of a democratic government.⁴⁴

3.2. CONSTITUENT ASSEMBLY: A SOVEREIGN BODY.

The first meeting of the Constituent Assembly of India, took place in the Constitution Hall, New Delhi, on Monday, the 9th December 1946, at Eleven of the Clock.⁴⁵ The first meeting of India's Constituent Assembly in New Delhi on 9th December 1946, was for many of its 296 members the fulfillment of a long cherished hope. The business before the meeting was purely formal, the swearing in of members and the election of a temporary President to conduct business until the installation of the permanent head. But the meeting symbolized an event of unique significance, namely the commencement of a great task of framing free India's Constitution without outside interference or pressure.⁴⁶ On 11th December, it elected Dr. Rajendra Prasad as its permanent president. The membership of the Constituent Assembly included all eminent Indian leaders. Though the Constituent Assembly consisted of 296 members, the first historical session was attended by only 210 members. Amongst the 210 members who attended the first historical session of the Constituent Assembly, there were 155 high caste Hindus, 30 Schedule Caste representatives, 5 Tribals, 5 Sikhs, 5 Indian Christians, 3 Anglo Indians, 3 Parsis and 4 Muslim members. Though the Constituent Assembly had 80 Muslim members out of total 296 members, their attendance was very poor as because the Muslim league had called upon the Muslim members to boycott the first historical session of Constituent Assembly.

The roots of the formation of the Constituent Assembly and the framing of the Constitution are relevant to understand its philosophy and evolution. The Constituent Assembly was formulated under the Cabinet Mission Plan prior to Independence. The elections to the Constituent Assembly were conducted under the system of separate electorate based on the community. After such an election too, it could not become a sovereign body. Thus its authority was limited in respect of the basic principles and procedure. The British

⁴⁴ H.M. Seervai, *The Constitutional Law of India*, Vol. 1, Fourth Edition.

⁴⁵ *Constituent Assembly Debates*, Book 1, Lok Sabha Secretariat.

⁴⁶ B.Shiva Rao, *The Framing of India's Constitution*, A Study, p 1, Tripathi

Government brought it into existence in their process of conceding less and retaining the most of the authority with itself as counter strategy to the revolutionary raising. The Constituent Assembly was expected to work within the framework of the Cabinet Mission scheme alone. However, these limitations were removed by the Indian Independence Act, 1947 under which it was made free to frame any constitution it pleased. Evolution of the Constitution of India Dr. Rajendra Prasad was elected the permanent Chairman of the Constituent Assembly. It met on December 9, 1946. The Muslim League members were not understanding the reason and not agreeing to any viable proposition.

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

I beg to move:

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

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

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

(4) WHEREIN all power and authority of the Sovereign Independent India, its constituent parts and

organs of government, are derived from the people; and

(5) WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith worship, vocation, association and action, subject to law and public morality; and

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

(7) WHEREBY shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to Justice and the law of civilised nations, and

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

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

We have just come out of the World War and People talk vaguely and rather wildly of new wars to come. At such a moment this New India is taking birth-renascent, vital, fearless. Perhaps it is a suitable moment for this new birth to take place out of this turmoil in the world. But we have to be cleared at this moment,

we, who have this heavy task of constitution building. We have to think of this tremendous prospect of the present and the greater prospect of the future and not get lost in seeking small gains for this group or that. In this Constituent Assembly we are functioning on a world stage and the eyes of the world are upon us and the eyes of our entire past are upon us. Our past is witness to what we are doing here and though the future is still unborn, the future too somehow looks at us, I think, and so, I would beg of this House to consider this Resolution in this mighty prospect of our past, of the turmoil of the present and of the great and unborn future that is going to take place soon. Sir, I beg to move.⁴⁷

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

⁴⁷ 13th December, 1946, 'Constituent Assembly Of India Debates' - Vol-1

This Objectives Resolution which was moved by Pt. Nehru in the Constituent Assembly on December 13, 1946 and was subsequently passed by the Constituent Assembly mentioned that there would be guaranteed to all the people of India, "justice, social, economic, and political; equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action subject to law and public morality". It would, therefore, appear that even in the Objectives Resolution the first position was given to justice, social, economic and political.

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

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

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

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

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

In the making of the Constitution, a very valuable role was played by the Drafting Committee.

The Committee was constituted on 29th August, 1947 with Dr. B.R. Ambedkar as its chairman. The members of this committee included its versatile chairman Dr. Ambedkar, as such legal luminaries as B.L.Mitter, N. Gopalswami Ayyanagar, Alladi Krishnaswami Ayyar, K.M. Munshi, Saiyid Mohd Saadulla, N. Madhab Rao and D.P. Khaitan. After the death of Mr. D.P. Khaitan,

T.T. Krishnamachari was made its member. Dr. B.N. Rau worked as the Chief Constitutional Advisor attached to this Committee. In all it held 11 plenary sessions and discussions were held for 114 days. Rs.6,396,273 were spent in this exercise.

The members of the Constituent assembly were elected on a limited franchise. But they were also elected on adult franchise in the first general elections held in 1952. The draft Constitution was published in January 1948 and the people of India were given 8 months to discuss it and suggest changes. On November 4, 1948, the general discussions on the draft commenced in the Constituent Assembly and continued for five days. Then there was a thorough discussion clause by clause for about 32 days. As many as 7635 amendments were proposed and 2473 were actually discussed before a third reading was given for another 12 days. The Constitution of India was adopted and signed by the Chairman Dr Rajendra Prasad on November 26, 1949. The draft was considered for 114 days and the Constituent Assembly sat for 2 years 11 months and 18 days. Initially some important Articles came into existence, but the entire Constitution came into force from January 26, 1950. There is a criticism that the Constitution would have been adopted by means of a referendum as was done in Ireland. Several old members of the Constituent Assembly were elected to either Parliament or State Assemblies vindicating their contribution to the drafting the Constitution and accepting the principles enshrined therein. Glanville Austin wrote: "With the adoption of the Constitution by the members of the Constituent Assembly on November 26, 1949, India became the largest democracy in the world. By this act of strength and will, Assembly members began what was perhaps the greatest political venture since that originated in Philadelphia in 1787".⁴⁸ Constitution of India is indeed the highest and most valuable contribution of the Constituent Assembly to the Indian Political System.

3.3. THE PREAMBLE- SOVEREIGN DEMOCRATIC REPUBLIC

⁴⁸ Glanville Austin, *The Indian Constitution: Cornerstone of a Nation,*

The Preamble of the Constitution sets out the aims and aspirations of the people of India and these have been translated into the various provisions of the Constitution. The objectives before the Constituent Assembly were to constitute India into sovereign democratic republic and to secure its citizens, justice equality liberty and fraternity. It is worthwhile to note that the Preamble was adopted by the Constituent Assembly after the draft Constitution has been approved.⁴⁹

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

The Preamble was extensively debated in the Constituent Assembly,⁵⁰ and various members had moved in amendments for deletion and addition of various wording of the Preamble that was submitted by the Draft Committee before the Constituent Assembly. Reference to the debates of the Constituent Assembly shows that there was considerable discussion in the said Assembly on the provisions of the Preamble. A number of amendments were moved and were rejected. A motion was thereafter adopted by the Constituent Assembly that "the Preamble stands part of the Constitution." Let us for better understanding have a study of some of the amendments moved in by the Members of the Constituent Assembly.

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

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

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

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

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

⁴⁹ B. Shiva Rao, 'Framing of India's Constitution- A Study', p-32.

⁵⁰ V.N. Shukla, 'Constitution of India', 10th edn., Eastern Book Company.

Federal Republic."

or alternatively

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

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

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

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

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

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

Or

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

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

Maulana Hasrat Mohani: I have been given some sort of promise. Very well, Sir. According to that report the Committee appointed for framing the constitution was given a clear directive that the Constitution should be framed in accordance with the Objectives Resolution

passed by this Assembly. It is quite strange that instead of following the Objectives Resolution, Dr. Ambedkar is passing anything he likes. He wants the Objectives Resolution to be in conformity with his erroneous decision. He has reversed the order and this is what I object to most because it has changed the character of the Constitution. As I pointed out here, what was the object of the Objectives Resolution and the Report. They said that it will be a Federation of sovereign Independent Republics. Mark this plural form "Republics".

CHAPTER 4.

SOCIAL JUSTICE AND FUNDAMENTAL RIGHTS

Social Justice as a concept is based on equal distribution of Justice. Social Justice as a concept

in India is related most specifically with equal distribution of rights without discrimination of gender, caste, creed or economic status. The purpose of social justice is to maintain or to restore equilibrium in the society and to envisage equal treatment of equal persons in equal or essentially equal circumstances. The social solidarity was to be brought about by the concept of social justice. In the Indian Constitution it finds place significantly in the Preamble, Fundamental Rights and Directive Principles of State Policy. The leaders of India's freedom movement visualized that in the new dispensation following political freedom, the people should have the fullest opportunity for advancement in the social and economic spheres and that the state should make suitable provisions for ensuring such process.

The fundamentals of the Indian Constitution are contained in the Preamble which secures its citizens, Justice, social, economic and political, Liberty of thought, expression, belief, faith and worship, Equality of status and opportunity, and to promote among them all Fraternity assuring the dignity of the individual and the unity of the nation. The theme of the objectives permeates throughout the entire constitution. It was to give effect to this objective the Fundamental Rights and the Directive Principles of the State policy was enacted in Part III and Part IV of the Constitution, and through them the dignity of the individual was sought to be achieved and maintained. The absolute concept of liberty and equality are very difficult to achieve in modern welfare society. That is why fundamental rights have not been provided in absolute terms. The form in which such rights have been provided is in the form of restrictions which the government is expected to follow in the governance of the country. However, the enjoyment of these rights is subjected to the interest of the people. The State may therefore, encroach on the domain of these rights for the common good or the common interest. The question whether a fundamental right be subjected to restrictions for the common good or public interest will depend upon the conditions and circumstances prevailing at a particular time. The Constitution of India, instead of formulating fundamental rights in absolute terms, and depending upon the judiciary to come to the rescue of the legislature, permits the State to impose directly to impose limitations on the fundamental rights. It is interesting to note that under the Indian Constitution fundamental rights have been provided in different forms. Only a free society can ensure the all-round progress of its members which ultimately helps the advancement of human welfare. Therefore, every

democracy pays special attention to securing this basic objective to the maximum extent without, at the same time, endangering the security of the State itself. The Fundamental Rights envisaged in Part III of the Constitution of India has a tremendous contribution in rendering social justice to the country at large and till date it thrives to maintain its constitutional goal, in guiding legislation aimed at social welfare for the common good and common interest of the people.

The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part III in our Constitution conferring those rights on the people.

'Equality of status and of opportunity' the rubric chiselled in the luminous preamble of our vibrating and pulsating Constitution radiates one of the avowed objectives in our Sovereign, Socialist and Secular Democratic Republic. In every free country which has adopted a system of governance through democratic principles, the people have their fundamental inalienable rights and enjoy the recognition of inherent dignity and of equality analogous to the rights proclaimed in the 'Bill of Rights' in U.S.A., the 'Rights of Man' in the French Constitution of 1791 and 'Declaration of Human Rights' etc. Our Constitution is unquestionably unique in its character and assimilation having its notable aspirations contained in 'Fundamental Rights' in part III through which the illumination of Constitutional rights comes to us not through an artless window glass but refracted with the enhanced intensity and beauty by prismatic interpretation of the Constitutional provisions dealing with equal distribution of justice in the social, political and economic spheres.⁵¹

Personal Liberty is one of the major concomitants of Fundamental Rights without which the rights enshrined in the Constitution will be mere illusory.

All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty. Life bereft of liberty would be without honour and dignity and it

⁵¹ *Indra Sawhney v. Union Of India*, 1992 Supp (3) SCC 212.

would lose all significance and meaning and the life itself would not be worth living. That is why liberty is called the very quintessence of a civilized existence. Origin of liberty' can be traced in the ancient Greek civilization. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 B.C., an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realize itself as fully as possible through the self-realization of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State.⁵²

According to Aristotle, as the state was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his Republic as the best source for the achievement of the self-realization of the people.⁵³

Roscoe Pound, an eminent and one of the greatest American Law Professors aptly observed in his book that whatever, 'liberty' may mean today, the liberty is guaranteed by our bills of rights, is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust that society to individuals.

Blackstone in Commentaries on the Laws of England⁵⁴ aptly observed that personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law.

According to Dicey, a distinguished English author of the Constitutional Law in his treatise on Constitutional Law observed that, personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification.⁵⁵

According to him, it is the negative right of not being subjected to any form of physical

⁵² *Siddharam Satlingappa Mhetre v. State Of Maharashtra*, AIR 2011 SC 312.

⁵³ Roscoe Pound, '*The Development of Constitutional Guarantee of Liberty*'.

⁵⁴ Blackstone- '*Commentaries on the Laws of England*', Vol. I, p.134.

⁵⁵ Dicey on '*Constitutional Law*', 9th Edn., pp.207-08.

restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual, and personal liberty in this sense is the antithesis of physical restraint or coercion.

Eminent English Judge Lord Alfred Denning observed: By personal freedom I mean freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person. It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live.

Eminent former Judge of the Supreme Court, Justice H.R. Khanna in a speech observed that liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body. Right to life and personal liberty under the Constitution.

The Fundamental Rights represent the basic values enriched by the people of this country. The aim behind having elementary right of the individual such as the Right to Life and Liberty is not fulfilled as desired by the framers of the Constitution. It is to preserve and protect certain basic human rights against interference by the state. The inclusion of a Chapter in Constitution is in accordance with the trends of modern democratic thought. The object is to ensure the inviolability of certain essential rights against political vicissitudes. The framers of the Indian Constitution followed the American model in adopting and incorporating the Fundamental Rights for the people of India.

Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a

natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society.

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

4.1. EXPRESS DECLARATION OF RIGHTS.

Article 25- Freedom of conscience and free profession, practice and propagation of religion.⁵⁶

Article 26- Freedom to manage religious affairs.

These two articles embodied in the fundamental rights chapter professes secular constitutionalism of our constitution. It envisages social justice and expressly declares that no citizen in the country shall be deprived of his legitimate due irrespective of what religion he professes.

Religion is undefined by the constitution, is incapable of precise judicial definition either. In the background of the provisions of the constitution and the light shed by judicial precedent, it can at best be said that religion is a matter of faith. It is a matter of belief and doctrine. It concerns the conscience i.e. the spirit of man. It must be capable of overt expressions in work and deed, such as worship or ritual. So religion is a matter of belief and doctrine concerning the human spirit expressed overtly in the form of ritual and worship. Some religions are easily identifiable as religious, some are easily identifiable as not religious. There are many in the penumbral region which instinctively appear to some as religion and to others as not religions. There is no formula of general application. There is no knife-edge test.

Chinnappa Reddy, J. in *S.P.Mittal v Union of India*⁵⁷ attempted to answer the question as What is Religion? "Religion: Everyone has a religion, or at least, a view or a window on religion, be he a bigot or simple believer, philosopher or pedestrian, atheist or agnostic. Religion, like 'democracy' and 'equality' is an elusive expression, which everyone understands according to his pre-conceptions. What is religion to some is pure dogma to others and what is religion to others is pure superstition to some others. Karl Marx in his contribution to the Critique of Hegel's Philosophy of Law described religion as the 'Opium of the people'. He said further "Basically religion is a very convenient sanctuary for bourgeois thought to flee to in times of stress. Bertrand Russell, in his essay 'Why I am not Christian', said, "Religion is based, I think, primarily and mainly upon fear." It is partly the terror of the unknown and partly, as I have said, the wish to feel that you have a kind of elder brother, who will stand by you in all your troubles and disputes. Fear is the basis of the whole thing- fear of the mysterious, fear of defeat, fear of death. Fear is the parent of cruelty, and, therefore, it is no wonder if cruelty and religion have gone hand in hand. As a worshipper at the altar of peace, I find it difficult to reconcile myself to religion, which throughout the

⁵⁶ V.N. Sukla, *Constitution of India*, Tenth edition, Eastern Book Company.

⁵⁷ (1983)1 SCC 51

ages, has justified war calling it a Dharma Uddha, a Jihad or a Crusade. I believe that by getting mixed up with religion, ethics has lost 'much of its point, much of its purpose and a major portion of its spontaneity'. I apprehend I share the views of those who have neither faith nor belief in religion and who consider religion as entirely unscientific and irrational. Chanting of prayer appears to me to be mere jingoism and observance of ritual, plain superstition. But my views about religion. My prejudices and my predilections, if they be such, are entirely irrelevant. So are the views of the credulous, the fanatic, the bigot and the zealot.

So also the views of the faithful, the devout, the Acharya, the Moulvi, the Padre and the Bhikshu each of whom may claim his as the only true or revealed religion. For our present purpose, we are concerned with what the people of the Socialist, Secular, Democratic Republic of India, who have given each of its citizens Freedom of conscience and the right to freely profess, practise and propogate religion and who have given every religious denomination the right to freely manage its religious affairs, mean by the expressions 'religion' and 'religious denomination'."

The Supreme Court in *S.R. Bommai v. Union of India* has graciously explained the concept of secularism in our Constitution as follow, "India can rightly be described as the world's most heterogeneous society. It is a country with a rich heritage. Several races have converged in this sub-continent. They brought with them their own cultures, languages, religions and customs. These diversities threw up their own problems but the early leadership showed wisdom and sagacity in tackling them by preaching the philosophy of accommodation and tolerance. This is the message which saints and sufis spread in olden days and which Mahatma Gandhi and other leaders of modem times advocated to maintain national unity and integrity. The British policy of divide and rule, aggravated by separate electorates based on religion, had added a new dimension of mixing religion with politics which had to be countered and which could be countered only if the people realised the need for national unity and integrity. It was with the weapons of secularism and non-violence that Mahatma Gandhi fought the battle for independence against the mighty colonial rulers".

As early as 1908, Gandhiji wrote in Hind Swaraj: 'India cannot cease to be one nation, because people belonging to different religions live in it. In no part of the world are one nationality and one religion synonymous terms nor has it ever been so in India.'

Gandhiji was ably assisted by leaders like Pandit Jawaharlal Nehru, Maulana Abul Kalam

Azad and others in the task of fighting a peaceful battle for securing independence by uniting the people of India against separatist forces.

In 1945 Pandit Nehru wrote : 'I am convinced that the future government of free India must be secular in the sense that government will not associate itself directly with any religious faith but will give freedom to all

religious functions." And this was followed up by Gandhiji when in 1946 he wrote in Harijan 'I swear by my religion. I will die for it. But it is my personal affair. The State has nothing to do with it. The State will look after your secular welfare, health, communication, foreign relations, currency and so on, but not my religion. That is everybody's personal concern.'

The great statesman-philosopher Dr Radhakrishnan said 'When India is said to be a secular State, it does not mean that we reject reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the State assumes divine prerogatives. Though faith in the Supreme is the basic principle of the Indian tradition, the Indian State will not identify itself with or be controlled by any particular religion. We hold that no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges in national life or international relations for that would be a violation of the basic principles of democracy and contrary to the best interests of religion and Government. This view of religious impartiality, of comprehension and forbearance, has a prophetic role to play within the national and international life. No group of citizens shall arrogate to itself rights and privileges which it denies to others. No person should suffer any form of disability or discrimination because of his religion but all alike should be free to share to the fullest degree in the common life. This is the basic principle involved in the separation of Church and State."

The Supreme Court in *Keshvanand Bharti v. State of Kerala*⁵⁸ had held that secularism is already accepted as the basic feature of the Constitution. Notwithstanding the fact that the words 'Socialist' and 'Secular' were added in the Preamble of the Constitution in 1976 by the 42nd Amendment, the concept of Secularism was very much embedded in our constitutional philosophy. The term 'Secular' has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition and perhaps best left undefined. By this amendment what was implicit was made explicit. The Preamble itself spoke of liberty of

⁵⁸ (1973) 4 SCC 225

thought, expression, belief, faith and worship. While granting this liberty the Preamble promised equality of status and opportunity. It also spoke of promoting fraternity, thereby assuring the dignity of the individual and the unity and integrity of the nation. While granting to its citizens liberty of belief, faith and worship, the Constitution abhorred discrimination on grounds of religion, etc., but permitted special treatment for Scheduled Castes and Tribes, vide Articles 15 and 16. Article 25 next provided, subject to public order, morality and health, that all persons shall be entitled to freedom of conscience and the right to profess, practice and propagate religion. Article 26 grants to every religious denomination or any section thereof, the right to establish and maintain institutions for religious purposes and to manage its own affairs in matters of religion. These two articles clearly confer a right to freedom of religion.

We are concerned with what these expressions are designed to mean in Articles 25 and 26 of the

Constitution. Any Freedom or Right involving the conscience must naturally receive a wide interpretation and the expression 'religion' and 'religious denomination' must therefore, be interpreted in no narrow, stifling sense but in a liberal, expansive way. Etymology is of no avail. Religion is derived from 'religare' which means "to bind". Etymologically, therefore, every bond between two people is a religion, but that is not true. To say so is only to indulge in etymological deception. Quite obviously, religion is much more than a mere bond uniting people. Quite obviously, again, religion is not to be confined to the traditional, established, well-known or popular religions like Hinduism, Mahomedanism, Buddhism and Christianity. There may be and, indeed, there are, in this vast country, several religions, less known or even unknown except in the remote corners or in the small pockets of the land where they may be practised. A religion may not be wide-spread. It may have little following. It may not have even a name, as indeed most tribal religions do not have. We may only describe them by adding the suffix 'ism' to the name of the founder-teacher, the tribe, the area or the deity. But, all this is unsatisfactory. We are not arriving at any definition of religion. We are only making peripheral journeys and not getting any near.⁵⁹

In ancient times in Gurukuls, emphasis used to be primarily on building the character of a student. Today, right from the schools up to the professional colleges, emphasis is on acquiring techniques and not values. We seem to have forgotten that skills acquired on

⁵⁹ *Aruna Roy v. Union of India*, AIR 2002 SC 3176.

computers tend to become outdated after sometime but values remain for ever. In other words, present day education is nothing but an information transmission process. Our educational system aims at only information based knowledge and the holistic views turning the student into a perfect human being and a useful member of society has been completely set aside. Swami Vivekananda aptly said, "Education is not the amount of information that is put in your brain and runs riot there, undigested, all your life. We must have life-building. Man making, character-making, assimilation of ideas. If education is identical with information, libraries are the greatest sages of the world and encyclopedias are rishis."

Truth (Satya), Righteous Conduct (Dharma), Peace (Shanti), Love (Prema) and Non-violence (Ahinsa) are the core universal values which can be identified as the foundation stone on which the value-based education programme can be built up. These five are indeed universal values and respectively represent the five domains of human personality, intellectual, physical, emotional, psychological and spiritual. They also are correspondingly co-related with the five major objectives of education, namely, knowledge, skill, balance, vision and identity. Religion was an all- pervasive phenomenon in ancient India. It was believed that multitudes of religion were like the beads adorning the necklace of God; all were equally important because God existed in every spirit and force of human welfare. An attitude of objectivity, logic and humanity and an approach of understanding, co-existence and tolerance permeated the secular spirit of ancient Indian thoughts. A distinctive openness is exhibited in Rig Veda which stated, "Truth is one, the learned may describe it variously". It is also enjoined, "Behave with others as you would with yourself. Look upon all the living beings as yours friends, for all of them resides one soul. All are but a part of universal soul". The Mauryan Emperor Ashoka, a Buddhist convert, took a very active step for spread of Buddhism without forceful conversion or persecution. The Satvahanas, Kushanas and the Gupta rulers paid equal patronage to all religions. The emphasis on dhyana in Hindu religion during Gupta period brought Hinduism, Jainism and Buddhism closer. In the South, the Chalukyas, Rastrakutas, Cholas and Hoysala rulers liberally patronised all the religions without discrimination.⁶⁰

A clear inference can be drawn from the above evidences that even the ancient text advocated the existence of freedom of religion which is guaranteed right under Article. 25, and Article 26, of the Indian Constitution.

⁶⁰ Romila Thapar, "A History of India", vol. 1, 1996 Rep. 1991, Penguin Books

Article 25 and Article 26 should be read together. The right guaranteed by Article 25 is an individual right as distinguished from the rights of an organized body like the religious denomination or any section thereof dealt with by Article 26. Both these Articles protect matters of religious doctrine or belief as well as acts done in pursuance of religion, rituals observances, ceremonies and modes of worship. These Articles embody the principles of religious tolerance that has been the characteristic feature of the Indian Civilization from the start of history, the instance and periods when these features were absent being merely temporary aberrations. Beside they serve to emphasize the secular nature of Indian democracy which the founding fathers considered should be the very basis of the Constitution.⁶¹ Article 25(1) guarantees to every person, and not merely to the citizens of India, the freedom of conscience and the right freely to profess, practice and propagate religion. Freedom of conscience connotes a person's right to entertain beliefs and doctrines concerning matters, which are regarded by him to be conducive to his spiritual well-being.⁶² Clause (2)(b) of Article 25 deals with two exceptions: (i) law providing for social welfare and social reforms, and (ii) the throwing open of all 'Hindu religious institution of a public character' to 'all classes and sections of Hindus'. It has been held by the Bombay High Court that an Act to prevent bigamous marriages was not violative to the religious freedom since it fell under clause 2(b). Likewise the provisions of the Hindu Marriage Act, 1956, are protected under sub-clause (b) of Article 25(2). Prohibition of evil practices such as 'sati' or the system of 'devdasi' could be justified under these clause.

In the case of *Adithayan v. The Travancore Devaswom Board*⁶³ the question that came for consideration before the Supreme Court was whether the appointment of a person, who is not a Malayala Brahmin, as "Santhikaran" or Poojari (Priest) of the Temple in question Kongorpilly Neerikode Siva Temple at Alangad

Village in Ernakulam District, Kerala State, is violative of the constitutional and statutory rights of the appellant. A proper and effective answer to the same would involve several vital issues of great constitutional, social and public importance, having, to certain extent, religious overtones also. The Hon'ble Court held "there is no justification to insist that a Brahman or Malayala Brahman in this case, alone can perform the rites and rituals in the

⁶¹ Per Ayyangar, J. in *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*, AIR 1962 SC 853

⁶² *Ratilal Panachand Gandhi v. State of Bombay*, AIR 1954 SC 388.

⁶³ (2002)8 SCC 106.

Temple, as part of the rights and freedom guaranteed under Article 25 of the Constitution and further claim that any deviation would tantamount to violation of any such guarantee under the Constitution. There can be no claim based upon Article 26 so far as the Temple under our consideration is concerned. Apart from this principle enunciated above, as long any one well versed and properly trained and qualified to perform the puja in a manner conducive and appropriate to the worship of the particular deity, is appointed as Santhikaran de hors his pedigree based on caste, no valid or

legally justifiable grievance can be made in a Court of Law". Reflecting its idea on social justice it further went on to opine, "Any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by Courts in the country".

In *A.S. Narayana Deekshitulu v. State of A.P.*⁶⁴ explaining the concept of religion in context of secularism the Apex Court held "that the word 'religion' used in Articles 25 and 26 of the Constitution is personal to the person having faith and belief in the religion. The religion is that which binds a man with his Cosmos, his Creator or super force. Essentially, religion is a matter of personal faith and belief or personal relations of an individual with what he regards as Cosmos, his Maker or his Creator which, he believes, regulates the existence of insentient beings and the forces of the universe. Religion is not necessarily theistic. A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. Right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right but is subject to legislation by the State limiting or regulating any activity - economic, financial, political or secular which are associated with the religious belief, faith, practice or custom. They are subject to reform as social welfare by appropriate legislation by the State. Though religious practices and performances of acts in pursuance of religious belief are, as much as, a part of religion, as faith or belief in a particular doctrine, that by itself is not conclusive or decisive. What are essential parts of religion or religious belief or matters of religion and religious practice is essentially a question of fact to be considered in the context in which the question

⁶⁴ (1996) 9 SCC 548.

has arisen and the evidence - factual or legislative presented in that context is required to be examined and a decision reached. In secularising the matters of religion which are not essentially and integrally parts of religion, secularism, therefore consciously denounces all forms of supernaturalism or superstitious beliefs or actions and acts which are not essentially or integrally matters of religion or religious belief or faith or religious practice. Non-religious or anti-religious practices are anti-thesis to secularism which seeks to contribute in some degree to the process of secularisation of the matters of religion or religious practices. A balance, therefore, has to be struck between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs or religious practices guaranteed under the Constitution”.

In a country like ours where discrimination on the ground of caste or religion is a taboo, taking lives of persons belonging to another caste or religion is bound to have a dangerous and reactive effect on the society at large. It strikes at the very root of the orderly society which the founding fathers of our Constitution dreamt of. Our concept of secularism is that the State will have no religion. The State shall treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual right of religion, faith and worship.⁶⁵

The right to freedom of religion assured by Article 25 and Article 26 is expressly made subject to public order, morality and health. Therefore, it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order. These two Articles in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order. In *Ramji Lal Modi v. State of U.P.*⁶⁶ the Apex Court opined that it was absurd to suggest that insult to religion as an offence could have no bearing on public order so as to attract cl. (2) Of Art. 19 in view of the provisions of Arts.25 and 26 of the Constitution which, while guaranteeing freedom of religion, expressly made it subject to public order.

We have no doubt that it is in this sense. that the word 'propagate' has been used in Article 25 (1), for what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be

⁶⁵ *Dara Singh v. Republic Of India*, (2011) 2 SCC 490.

⁶⁶ AIR 1957 SC 620

remembered that Article 25 (1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience"

guaranteed to all the citizens of the country alike.⁶⁷

In *The Commissioner, Hindu Religions Endowments Madras v. Sri Lakshmindra Thirtha Swamiar*⁶⁸ dealing with various aspects of Article 26 of the Constitution the Apex Court observed as follows: "The other thing that remains to be considered in regard to Article 26 is, what is the scope of clause (b) of the article which speaks of management of its own affairs in matters of religion? "The language undoubtedly suggests that there could be other affairs of a religious denomination or a section thereof which are not matters of religion and to which the guarantee given by this clause would not apply.

It will be seen that besides the right to manage its own affairs in matters of religion, which is given by clause (b), the next two clauses of article 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of a religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which clause (b) of the article applies freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down. Under Article 26(b), therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. Of course, the scale of expenses to be incurred in connection with these religious observations would be a matter of administration of property belonging to the

⁶⁷ *Stainislaus v. State of M.P.*, (1977)1 SCC 677

⁶⁸ AIR 1954 SC 282

religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature; or it could not be the injunction of any religion to destroy The institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under article 26(b) it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under clause (d) of Article 26."

The Supreme Court in *Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Assn*,⁶⁹ held that the Court may issue directions in respect of controlling noise pollution even if such noise was a direct result of and was connected with religious activities. It was further held:- "Undisputedly, no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice amplifiers or beating of drums. In our view, in a civilized society in the name of religion, activities which disturb old or infirm persons, students or children having their sleep in the early hours or during daytime or other persons carrying on other activities cannot be permitted. It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without there being any unnecessary disturbance by the neighbours. Similarly, the old and the infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick, people afflicted with psychic disturbances as well as children up to 6 years of age are considered to be very sensible (sic sensitive) to noise. Their rights are also required to be honoured.

In *Re. Noise Pollution* entertaining a writ petition raising issues of wide ranging dimensions relating to noise pollution and the implications thereof, the Supreme Court on taking cognizance of the matters as public interest litigation, vide its order directed the implementation of the Laws for Restricting Voice of Loudspeakers and High Volume Producing Sound Systems".

⁶⁹ AIR 2000 SC 2773

Article 29- Protection of interest of minorities.

Article 30- Rights of minorities to establish and administer educational institutions.

Clause (1) of Article 29 gives protection of every section of the citizens having a distinct language, script or culture by guaranteeing a right to conserve the same. The right under this article is absolute. Clause (2) of Article 29 relates to admission into educational institutions which are maintained or aided by the State funds.

In *State of Bombay v. Bombay Education Society*,⁷⁰ the Hon'ble Supreme Court observes as follows: "No citizen shall be denied admission in such institutions on the ground only of religion, race, caste, language or any of them. It will be recalled that Article 15 also prohibits discrimination against citizen on ground of religion etc. But the scope of the two articles is different. Firstly Article 15(1) protects all citizens against the state whereas the protection under Article 29(2) extends to the State or any body who denies the right conferred by it. Secondly Article 15 protects all citizens against discrimination generally, but Article 29(2) is a protection against a particular species of wrong, namely denial of admission into educational institutions maintained or aided by the State".

In *State of Madras v. Champakam Dorairajan*,⁷¹ the Hon'ble Supreme Court has held that the right to admission into an educational institution is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens.

In *re The Kerala Education Bill*,⁷² Article 30(1) of the Constitution which deals with the right of minorities to establish and administer educational institutions, came for consideration. The Kerala Educational Bill, 1957, which had been passed by the Kerala Legislative Assembly was reserved by the Governor for consideration by the President. The contention of the State of Kerala was that the minority communities may exercise their fundamental right under Article 30(1) by establishing educational institutions of their choice wherever they like and administer the same in their own way and need not seek recognition from the Government, but that if the minority communities desire to have state recognition they must submit to the terms imposed, as conditions precedent to recognition, on every educational institution. The claim of the educational institutions of the minority communities, on the other hand was that their fundamental right under Art. 30(1) is absolute and could not be

⁷⁰ AIR 1954 SC 561.

⁷¹ AIR 1951 SC 226.

⁷² AIR 1958 SC 956

subjected to any restriction whatever. This Court, however, did not accept the extreme views propounded by the parties on either side but tried to reconcile the two.

It observed: Article 29(1) gives protection to any section of citizens residing in the territory of India having a distinct language, script or culture of its own right to conserve the same the distinct languages, script or culture of a minority community can best be conserved by and through educational institutions, for it is by education that their culture can be inculcated into the impressionable mind of the children of their community. It is through educational institutions that the language and script of the minority community can be preserved, improved and strengthened. It is, therefore, that Article 30(1) confers on all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. The minorities, quite understandably, regard it as essential that the education of their children should be in accordance with the teachings of their religion, and they hold, quite honestly, that such an education cannot be obtained in ordinary schools designed for all the members of the public but can only be secured in schools conducted under the influence and guidance of people well versed in the tenets of their religion and in the traditions of their culture.

The minorities evidently desire that education should be imparted to the children of their community in an atmosphere congenial to the growth of their culture. Our Constitution makers recognised the validity of their claim and to allay their fears conferred on them the fundamental rights referred to above. But the conservation of the distinct languages, script or culture is not the only object of choice of the minority communities. They also desire that scholars of their educational institutions should go out in the world well and sufficiently equipped with the qualifications necessary for a useful career in life. But according to the Education Code now in operation to which it is permissible to refer for ascertaining the effect of the impugned provisions on existing state of affairs, the scholars of recognised schools are not permitted to avail themselves of the opportunities for higher education in the University and are not eligible for entering the public services. Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfill the real objects of their choice and the rights under Article 30(1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to their educational institutions."

In *Sidhaibhai Sabhai v. State of Bombay*⁷³ dealing with Article 30(1) of the Constitution, the Apex Court held: "The right established by Article 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedom guaranteed by Article 19, it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institutions, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Article 30(1) will be but a "teasing illusion", a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective an educational institution. Such regulation must satisfy a dual test-the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it."

In *State of Bombay v. Bombay Education Society*⁷⁴ the Apex Court has held that the right to establish an educational institution under Art. 30(1) is not confined to the purposes specified in Art. 29(1). In *D.A.V. College, v. State of Punjab*,⁷⁵ Reddy, J., speaking on behalf of the Court, observed that Article 29(1) is wider than article 30(1), in that, while any section of the citizens including the minorities can invoke the rights guaranteed under article 29(1), the right guaranteed under article 30(1) is only available to the minorities based on religion or language. He then went on to say that a reading of these two articles together would lead to the conclusion that a religious or linguistic minority has the right to establish and administer educational institutions; of its choice for effectively conserving its distinctive language, scriptor culture, which right, however, is subject to the regulatory power of the State for maintaining and facilitating the excellence of its standards and that while this is so, these two articles are not inter-linked nor do they permit of their being always read together.

⁷³ AIR 1963 SC 540.

⁷⁴ AIR 1954 SC 561.

⁷⁵ (1971)2 SCC 269

In a land mark judgment⁷⁶ the Supreme Court has held that there, is no fundamental right to affiliation. But recognition or affiliation is necessary for a meaningful exercise of the right to establish and administer educational institutions. The Court opined that "Affiliation of minority institutions is intended to ensure the growth and excellence of their children and other students in the academic field. Affiliation mainly pertains to the academic and educational character of the institution. Therefore, measures which will regulate the courses of study, the qualifications and appointment of teachers, the conditions of employment of teachers, the health and hygiene of students, facilities for libraries and laboratories are all comprised in matters germane to affiliation of minority institutions. These regulatory measures for affiliation are for uniformity, efficiency and excellence in educational courses and do not violate any fundamental right of the minority institutions under Article 30." The Court further opined, that it will be wrong to read Art. 30 (1) as restricting the right of minorities to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities. If the scope of Article 30(1) is to establish and administer educational institutions to conserve language, script or culture of minorities, it will render Article 30 redundant. If the rights under Articles 29(1) and 30(1) are the same then the consequences will be that any section of citizens, not necessarily linguistic or religious minorities, will have the right to establish and administer educational institutions of their choice. The scope of Article 30 rests on linguistic or religious minorities and no other section of citizens of India has such a right. If the scope of Article 30(1) is made an extension of the right under Article 29(1) as the right to establish and administer educational institutions for giving religious construction or for imparting education in their religious teachings or tenets, the fundamental right of minorities to establish and administer educational institutions of their choice will be taken away.

The Apex Court in the case of *Frank Anthony Public School Employees' Association v. Union of India*⁷⁷ took the view that from the decided cases, it is clear, that there is a general and broad consensus about the content and dimension of the Fundamental Right guaranteed by Article 30(1) of the Constitution. The right guaranteed to religious and linguistic minorities by Article 30(1) is two fold, to establish and to administer educational institutions of their choice. The key to the Article lies in the words "of their own choice". These words indicate

⁷⁶ *Ahmedabad St. Xavier's College Society v. State of Gujarat*, (1974)1 SCC 717.

⁷⁷ (1986)4 SCC 707.

that the extent of the right is to be determined, not with reference to any concept of State necessity and general societal interest but with reference to the educational institutions themselves, that is, with reference to the goal of making the institutions "effective vehicles of education for the minority community or other persons who resort to them". It follows that regulatory measures which are designed towards the achievement of the goal of making the minority educational institutions effective instruments for

imparting education cannot be considered to impinge upon the right guaranteed by Article 30(1) of the Constitution. The question in each case is whether the particular measure, in the ultimate analysis, designed to achieve such goal, without of course nullifying any part of the right of management in substantial measure. It further held that it cannot for a moment be suggested that surrender of the right under Article 30(1) is the price which the aided minority institutions have to pay to obtain aid from the Government.

In *St. Stephen's College v. University of Delhi*⁷⁸ that Supreme Court held that the minorities whether based on religion or language have the right to establish and administer educational institutions of their choice. The administration of educational institutions of their choice under Article 30(1) means 'management of the affairs of the institutions. This management must be free from control so that the founder or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. But the standard of education are not a part of the management as such. The standard concerns the body politic and is governed by considerations of the advancement of the country and its people. Such regulations do not bear directly upon management although they may indirectly of affect it. The state, therefore has the right to regulate the standard of education and allied matters. Minority institutions cannot be permitted to fall below the standards of excellence expected of educational institutions. They cannot decline to follow the general pattern of education under the guise of exclusive right of management. While the management must be left to them, they may be compelled to keep in step with others. There is a wealth of authority on these principles.

A Coram of 11 Judges, not a common feature in the Supreme Court of India, sat to hear and decide *T.M.A.Pai Foundation v. State of Karnataka*⁷⁹ (hereinafter 'Pai Foundation', for short). It was expected that the authoritative pronouncement by a Bench of such strength on

⁷⁸ (1992)1 SCC 558.

⁷⁹ (2002) 8 SCC 481

the issues arising before it would draw a final curtain on those controversies. The subsequent events tell a different story. A learned academician observes that the 11-Judge Bench decision in *Pai Foundation* is a partial response to some of the challenges posed by the impact of Liberalisation, Privatisation and Globalisation (LPG); but the question whether that is a satisfactory response, is indeed debatable. It was further pointed out that 'the decision raises more questions than it has answered'. The principles laid down by the majority in *Pai Foundation* are so broadly formulated that they provide sufficient leeway to subsequent courts in applying those principles while the lack of clarity in the judgment allows judicial creativity".

The prophecy had come true and while the ink on the opinions in *Pai Foundation* was yet to dry, the High Courts were flooded with writ petitions, calling for settlements of several issues which were not yet resolved or which propped on floor, post *Pai Foundation*. A number of Special Leave Petitions against interim orders passed by High Courts and a few writ petitions came to be filed directly in this Court. A Constitution Bench sat to interpret the 11-Judge Bench decision in *Pai Foundation* which it did vide its judgment dated 14.8.2003 in the case of *Islamic Academy of Education v. State of Karnataka*,⁸⁰ "Islamic Academy" for short). The 11 learned Judges constituting the Bench in *Pai Foundation* delivered five opinions. The majority opinion on behalf of 6 Judges was delivered by B.N. Kirpal, CJ. Khare, J (as His Lordship then was) delivered a separate but concurring opinion, supporting the majority. Quadri, J, Ruma Pal, J and Variava, J (for himself and Bhan, J) delivered three separate opinions partly dissenting from the majority. *Islamic Academy* too handed over two opinions. The majority opinion for 4 learned Judges has been delivered by V.N. Khare, CJ. S.B. Sinha, J, has delivered a separate opinion. The events following *Islamic Academy* judgment show that some of the main questions have remained unsettled even after the exercise undertaken by the Constitution Bench in *Islamic Academy* in clarification of the 11-Judge Bench decision in *Pai Foundation*.

A few of those unsettled questions as also some aspects of clarification were called for settlement by the Bench of 7 Judges in *P.A. Inamdar v. State of Maharashtra*⁸¹ wherein amongst other the Court sought to find the inter-relationship between Articles 19(1)(g), 29(2) and 30(1). It opined that the right to establish an educational institution, for charity or for

⁸⁰ (2003) 6 SCC 697.

⁸¹ (2004) 8 SCC 139.

profit, being an occupation, is protected by Article 19(1) (g). Notwithstanding the fact that the right of a minority to establish and administer an educational institution would be protected by Article 19(1)(g) yet the Founding Fathers of the Constitution felt the need of enacting Article 30. The reasons are too obvious to require elaboration. Article 30(1) is intended to instill confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institution of their choice. Article 30(1) though styled as a right, is more in the nature of protection for minorities. But for Article 30, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under Clause (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious or linguistic minorities are concerned, educational institutions of their choice will enjoy protection from such legislation. However, such institutions cannot be discriminated against by the State solely on account of their being minority institutions. The minorities being numerically less qua non-minorities, may not be able to protect their religion or language and such cultural values and their educational institutions will be protected under Article 30, at the stage of law making. However, merely because Article 30(1) has been enacted, minority educational institutions do not become immune from the operation of regulatory measure because the right to administer does not include the right to mal-administer. To what extent the State regulation can go, is the issue. The real purpose sought to be achieved by Article 30 is to give minorities some additional protection. Once aided, the autonomy conferred by the protection of Article 30(1) on the minority educational institution is diluted as provisions of Article 29(2) will be attracted. Certain conditions in the nature of regulations can legitimately accompany the State aid.

It is for the first time in *Pai Foundation's case* that the question of application of Article 30 to minority professional colleges arose. All earlier judgments of this court were only concerning education in schools and colleges other than those imparting professional education. For the first time in *Pai Foundation*, the court held that running an educational institution is an 'occupation' and Article 19(1) (g) guarantees it as a fundamental right.

With regard to the ambit of the constitutional guarantee of protection of educational rights of minorities under Article 30, it can be understood that both religious and linguistic minority, as held in *Pai Foundation*, are to be determined at the State level. On this understanding of the concept of 'minority', Article 30 has to be harmoniously construed with Article 19(1)(g)

and in the light of the Directive Principles of the State Policy contained in the Articles 38, 41 and 46. Rights of minorities cannot be placed higher than the general welfare of the students and their right to take up professional education on the basis of their merit. The real purpose of Article 30 is to prevent discrimination against members of the minority community and to place them on an equal footing with non-minority. Reverse discrimination was not the intention of Article 30. If running of educational institutions cannot be said to be at a higher plane than the right to carry on any other business, reasonable restriction similar to those placed on the right to carry on business can be placed on educational institutions conducting professional courses. For the purpose of these restrictions both minorities and non- minorities can be treated at par and there would not be any violation of Article 30(1), which guarantees only protection against oppression and discrimination of the minority from the majority. Activities of education being essentially charitable in nature, the educational institutions both of non-minority and minority character can be regulated and controlled so that they do not indulge in selling seats of learning to make money. They can be allowed to generate such funds as would be reasonably required to run the institute and for its further growth.

In the case of *P.A. Inamdar*,⁸² this Court held that there shall be no reservations in private unaided colleges and that in that regard there shall be no difference between the minority and non-minority institutions. However, by the Constitution (Ninety- third Amendment) Act, 2005, Article 15 is amended. It is given Article 15(5). The result is that *P.A. Inamdar*⁸³ has been overruled on two counts: (a) whereas this Court in

P.A. Inamdar had stated that there shall be no reservation in private unaided colleges, the Amendment decreed that there shall be reservations; (b) whereas this Court in *P.A. Inamdar* had said that there shall be no difference between the unaided minority and non-minority institutions, the Amendment decreed that there shall be a difference.

In *Ashok Kumar Thakur v. Union of India* the question arose before the Supreme Court was that does the 93rd Amendment violate the Basic Structure of the Constitution by imposing reservation on unaided institutions? Answering in the affirmative the Court opined, Yes, it does. Imposing reservation on unaided institutions violates the Basic Structure by stripping citizens of their fundamental right under Article 19(1)(g) to carry on an occupation. *T.M.A. Pai* and *Inamdar* affirmed that the establishment and running of an educational institution

⁸² (2010) 8 SCC 49.

⁸³ (2008) 6 SCC 1.

falls under the right to an occupation. The right to select students on the basis of merit is an essential feature of the right to establish and run an unaided institution. Reservation is an unreasonable restriction that infringes this right by destroying the autonomy and essence of an unaided institution. The effect of the 93rd Amendment is such that Article 19 is abrogated, leaving the Basic Structure altered. To restore the Basic Structure, the Court opined that I sever the 93rd Amendment's reference to "unaided" institutions.

The Supreme Court *Sindhi Education Society v. Govt. (NCT Of Delhi)*,⁸⁴ in deciding the question as to whether Rule 64(1)(b) of the Delhi School Education Rules 1973 and the orders/instructions issued thereunder would, if made applicable to an aided minority educational institution, violate the fundamental right guaranteed under Article 30(1) of the Constitution and are the respondents herein entitled to a declaration and consequential directions to that effect held that "State actions should be *actio quaelibet it sua via* and every discharge of its duties, functions and governance should also be within the constitutional framework. This principle equally applies to the Government while acting in the field of reservation as well. It would not be possible for the Courts to permit the State to impinge upon or violate directly or indirectly the constitutional rights and protections granted to various classes including the minorities. Thus, the State may not be well within its constitutional duty to compel the linguistic minority institution to accept a policy decision, enforcement of which will infringe their fundamental right and/or protection. On the contrary, the minority can validly question such a decision of the State in law. The service in an aided linguistic minority school cannot be construed as 'a service under the State' even with the aid of Article 12 of the Constitution. Resultantly, we have no hesitation in coming to the conclusion that Rule 64(1)(b) cannot be enforced against the linguistic minority school."

The Supreme Court referring to its earlier judgment in *T. Varghese George v. Kora K. George*⁸⁵ held that the right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-à-vis the majority. The right to establish and administer educational institution does not include the right to mal-administer. Article 32 provides every citizen the right to constitutional remedies.

⁸⁴ 'Constituent Assemble Debates', Vol. IX, p.953

⁸⁵ 1950 SCR 594.

A right without a remedy does not have much substance. The Fundamental Rights guaranteed by the constitution would have been worth nothing had the Constitution not provided an effective mechanism for their enforcement. The significance of jurisdiction conferred by Article 32 is described by Dr. B.R. Ambedkar in the Constituent Assembly as follows: “If you as me to name one Article in the Constitution that is most important, I would definitely say Article 32. “This is the most important article without which this Constitution would be a nullity”. Further he has described as “the very soul of the Constitution and the very heart of it”.

Thus, it can be said that Art. 32 mainly preserves the principle of constitutionalism by limiting the government against any arbitrary act. This right arms the citizen to bring into the notice of the Apex Court social inequalities and hence serves a vehicle to impart social justice by restricting the government of any arbitrary act. Instance are numerous when the Apex Court has taken note of the rampant injustice and ill treatment of poor and downtrodden citizen and have called upon the States to undo the wrong and impart social justice to its people. Where a person or class of persons to whom legal injury is caused or legal wrong is done is by reason of poverty, disability or socially or economically disadvantaged position not able to approach the Court for judicial redress, any member of the public acting bonafide and not out of any extraneous motivation may move the Court for judicial redress of the legal injury or wrong suffered by such person or class of persons and the judicial process may be set in motion by any public spirited individual or institution even by addressing a letter to the court. Where judicial redress is sought of a legal injury or legal wrong suffered by a person or class of persons who by reason of poverty, disability or socially or economically disadvantaged position are unable to approach the court and the court is moved for this purpose by a member of a public by addressing a letter drawing the attention of the court to such legal injury or legal wrong, court would cast aside all technical rules of procedure and entertain the letter as a writ Petition on the judicial side and take action upon it.

In *Romesh Thappar v. State of Madras*,⁸⁶ the Apex Court held that under the Constitution the Supreme Court is constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights, although such applications are made to the Court in the first instance without resort to a High Court having concurrent jurisdiction in

⁸⁶ AIR 1984 SC

the matter. The fundamental right to move this Court can therefore be appropriately be described as the cornerstone of democracy edifice raised by the Constitution. In the words of Dr. Ambedkar "If I was asked to name any particular article in the Constitution as the most important, an article without which this Constitution would be a nullity-I would refer not to any article except this one. It is the very soul of the Constitution and the very heart of it."

The Apex Court in *State of Madras v. V.G. Rao* opined as follows "Our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts undercover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights ", as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set up are out to seek clashes with the legislatures in the country.

In *Bandhua Mukti Morcha v. Union of India* a writ petition under Article 32 of the Constitution has been filed by way of public interest litigation seeking issue of a writ of mandamus directing the Government to take steps to stop employment of children in Carpet Industry in the State of Utter Pradesh; to appoint a Committee to investigate into their conditions of employment; and to issue such welfare directives as are appropriate for total prohibition on employment of children below 14 years and directing the respondent to give them facilities like education, health, sanitation, nutritious food, etc. The Hon'ble Supreme Court has held "Child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to the humanity. Mankind has best hold of itself. The parents themselves live for them. They embody the joy of life in them and

in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood - socially, economically, physically and mentally - the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and goods citizenry.

The founding fathers of the Constitution, therefore, have bestowed the importance of the role of the child in its best for development. Dr. Bhim Rao Ambedkar, was for a head of his time in his wisdom projected these rights in the Directive Principles including the children as beneficiaries. Their deprivation has deleterious effect on the efficacy of the democracy and the rule of law. The Apex Court while issuing directives expressed “We are of the view that a direction needs to be given that the Government of India would convene a meeting of the concerned Ministers of the respective State Governments and their Principal Secretaries holding concerned Department, to evolve the principles of policies for progressive elimination of employment of the children below the age of 14 years in all employments governed by the respective enactments mentioned in M.C. Mehta's case⁸⁷ to evolve such steps consistent with the scheme laid down in

M.C. Mehta's case, to provide (1) compulsory education to all children either by the industries itself or in co- ordination with it by the State Government to the children employed in the factories, mine or any other industry, organised or unorganised labour with such timings as is convenient to impart compulsory educations, facilities for secondary, vocational profession and higher education;

(2) apart from education, periodical health check-up; (3) nutrient food etc.; (4) entrust the responsibilities for implementation of the principles. Periodical reports of the progress made in that behalf be submitted to the Registry of this Court. The Central Government is directed to convene the meeting within two months from the date of receipt of the order. After evolving the principles, a copy thereof is directed to be forwarded to the Registry of this Court.

⁸⁷ *M.C. Mehta v. State of Tamil Nadu*, (1996) 6 SCC 756.

In *Sheela Barse v. Union of India*⁸⁸ the petitioner filed an application before the Supreme Court praying that the respondents-States be directed: (a) to release all children detained in the jails in the respondent-States ;

(b) to furnish 'complete information respecting all children detained in the States and the circumstances and the legal facts of such detention and the number of available juvenile courts and children homes; (c) to appoint district judges of the districts to visit jails, sub-jails and lock-ups to identify and release children in such illegal detention; (d) to requisition immediately necessary buildings and provide infrastructure and make immediate interim arrangements for 'places of housing' of children sought directions to the respective States, Legal Aid Boards, District Legal Aid Committees through the appointment of 'duty counsel' to ensure protection of the right of the children etc.

The Hon'ble Court held"⁸⁹ It is absolutely essential, and this is something which we wish to impress upon the State Governments with all the earnestness at our command, that they must set up Juvenile Courts, one in each districts and there must be a special cadre of Magistrates who must be suitably trained for dealing with cases against children”.

There is no doubt that the right to move this Court conferred on the citizens of this country by Article 32 is

itself a guaranteed right-and it holds the same place of pride in the Constitution as do the other provisions in respect of the citizens' fundamental rights. The fundamental rights guaranteed by Part III which have been made justiciable, form the most outstanding and distinguishing feature of the Indian Constitution. It is true that the said rights are not absolute and they have to be adjusted in relation to the interests of the general public. But as the scheme of Article 19 illustrates the difficult task of determining the propriety or the validity of adjustments made either legislatively or by executive action between the fundamental rights and the demands of socioeconomic welfare has been ultimately left in charge of the High Courts and the Supreme Court by the Constitution. It is in the light of this position that the Constitution makers thought it advisable to treat the citizens' right to move this Court for the enforcement of their fundamental rights as being a fundamental right by itself. The fundamental right to move this Court can, therefore be appropriately described as the corner-stone of the democratic edifice raised by the Constitution.

⁸⁸ (1988)4 SCC 226.

⁸⁹ V.N.Shukla, *Constitution of India*, Tenth Edition, Eastern Book Company.

In *M.C. Mehta v. Union of India*⁹⁰ by way of public interest litigation a spirited citizen raised some seminal questions concerning the true scope and ambit of Article. 21 and 32 of the Constitution, the principles and norms for determining the liability of large enterprises engaged in manufacture and sale of hazardous products, the basis on which damages in case of such liability should be quantified and whether such large enterprises should be allowed to continue to function in thickly populated areas and if they are permitted so to function, what measures must be taken for the purpose of reducing to a minimum the hazard to the workmen and the community living in the neighbourhood.

The Constitution makers thought it advisable to treat the citizens' right to move this Court for the enforcement of their fundamental rights as being a fundamental right by itself. The fundamental right to move this Court can, therefore be appropriately described as the corner-stone of the democratic edifice raised by the Constitution. A truly democratic Constitution recognizes not only certain important natural rights which are the attributes of a free citizen, but also sets up adequate machinery for protection against invasion of those rights. Our Constitution has in Chapter III enumerated certain fundamental rights such as equality before the law, with the concomitant guarantee against discrimination, right of freedom of speech, assembly, association, movement and residence, and to practice any profession or to carry on occupation, trade or business, freedom of conscience and the right to practice and propagate religion, freedom to manage religious affairs and cultural and educational 'rights. After enunciating the rights some in terms positive, some in negative, exercisable absolutely or subject to reasonable restrictions the Constitution has rendered all laws inconsistent therewith if preexisting, or made in contravention, thereof if enacted after the commencement of the Constitution, void to the extent of the inconsistency or contravention. For relief against infringement of these rights by action legislative or executive by the State, recourse may undoubtedly be had to the ordinary Courts by institution of civil proceedings for appropriate relief. But the Constitution has conferred upon the High Courts and the Supreme Court power to issue writs for the protection of those fundamental rights, and the Constitution has guaranteed by Article 32(1) the right to move this Court for enforcement of those rights. The right to move this Court for enforcement of the fundamental rights is therefore itself made a fundamental right. Law which is repugnant

⁹⁰ AIR 1984 SC 1086

to the effective exercise of the right to move this Court in enforcement of the rights described in Chapter III therefore to the extent of inconsistency or contravention would be void. Is it that the exercise of the right is to be so unfettered, that any law which imposes any restriction in any form whatever against the exercise of that right direct or indirect must be regarded as void.

In *Munna v. State of U.P.*⁹¹ writ petitions were filed alleging on the basis of a news report in the Indian Express dated 2nd December, 1981 that one Mr. Madhu Mehta had visited the Kanpur Central Jail incognito and found several juvenile undertrial prisoners lodged there even though there was a Children's Home in Kanpur, and that these juvenile prisoners were being sexually exploited by adult prisoners. The inhibition against sending a child to jail does not depend upon any proof that he is a child under the age of 16 years but as soon as it appears that a person arrested is apparently under the age of 16 years this inhibition is attracted. The Court expressed its concern for protection of under trial children and held that the reason for this inhibition lies in the court solitude which the law entertains for juveniles below the age of 16 years. The law is very much concerned to see that juvenile do not come into contact with hardened criminals and their chances of reformation are not blighted by contact with criminal offenders. The law throws a cloak of protection round juveniles and seeks to isolate them from criminal offenders, because the emphasis placed by the law is not on incarceration but on reformation. How anxious is the law to protect young children from contamination with hardened criminals is also apparent.

On the basis of a news item that migrant workmen employed in the Salal Hydro Electric Project were being denied the benefits of various labour laws, the Peoples' Union for Democratic Rights addressed a letter to an Hon'ble Judge of the Court requesting that the same be treated as a writ Petition and justice be done to the workmen. The Court taking note of the issue in *Labourers, Salal Hydro Project v. State of J.K.*⁹² directed to faithfully enforce the labour laws in the interest of the deprived workmen, it held that the Central Government must also strictly enforce the requirement that payment of wages particularly to workmen employed either directly or through khatedars by the 'piece wagers' or sub-contractors is made in the presence of an authorised representative appointed by the National Hydro Electric Power Corporation or the Central Government and wages are paid directly to the workmen

⁹¹ AIR 1982 SC 806

⁹² (1983) 2 SCC 181

without the intervention of khatedars and free from any deductions whatsoever, except those authorised by law. It is not enough merely to go periodically and examine the muster rolls or muster sheets showing payment of wages, because even where wages are paid through khatedars and deductions are made, the muster rolls or muster sheets would invariably show payment of full wages and would not reject the correct position.

The Central Government must ensure, and that is the direction we give, that every payment of wages, whether it be normal wages or over-time wages, shall be made directly to the workmen, without any deductions in the presence of an authorised representative of the National Hydro Electric Power Corporation or the Central Government. When payment of overtime wages is made to the workmen, the Central Government must ask its authorised representative to check up with reference to the overtime work done by the workmen, whether they are receiving the full amount of over-time wages due to them or any part of it is being taken away by the khatedars. This evil can to a large extent be eliminated if payment of over-time wages is made directly to the workmen instead of routing it through the khatedars, it further held under Article 24 of the Constitution no child below the age of 14 years can be employed in 'construction work' which has been declared to be a hazardous employment in the *Asiad Workers'* case. This constitutional prohibition must be enforced.

The children of construction workers living at or near the project site should be given facilities for schooling and this may be done either by the Central Government itself or if the Central Government entrusts the project work or any part thereof to a contractor, necessary provisions to this effect may be made in the contract with the contractor. There can be no doubt that the minimum rates of wages fixed by the Central Government include the element of weekly day of rest and that no extra wages are legally payable to the workmen for the weekly off days. The complaint made is not that extra wages are not being paid for the weekly off days but that weekly paid off days are not being given to the workmen, meaning thereby that the workmen are required to work even on their weekly paid off days. These complaints have to be remedied by the Central Government by taking appropriate action and the only way in which this can be done effectively is by carrying out periodically detailed inspections. The Central Government will at once proceed to identify inter-state migrant workmen employed in the project work and adopt necessary measures for ensuring to them the benefits and advantages provided under the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979. It will also take immediate steps for

ensuring that canteen, rest rooms and washing facilities are provided by the contractors and piece-wagers' or sub- contractors to the workmen employed by them.

CHAPTER 5

SOCIAL JUSTICE DIRECTIVES AND CONSTITUTIONALISM

India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realized only in and through the individuals.

“In an ideal Constitution, the overall social objective is one that allows for state intervention when it produces some net social benefit, without leaving any individuals worse off than they were before the state acted”.

This social objective is achieved by the limits prescribed on the government implies the principle of constitutionalism meaning limited govt.

A written Constitution, independent judiciary with powers of judicial review, the doctrine of rule of law, free elections to legislature, accountable and transparent democratic government, Fundamental Rights of the people, federalism, de-centralization of powers are some of the principles and norms which promote Constitutionalism in a country. Preamble to the Indian

Constitution lays down principles for the promotion of constitutionalism.⁹³

Constitutionalism recognizes the need government but insists upon limitation being placed upon governmental powers. Limited govt. is the central point of constitutionalism. It is the anti-thesis of arbitrary powers. The underlying difference between the 'Constitutionalism' and Constitution' is that a Constitution ought not merely to confer powers on the various organs of the Government but also seek to restrain those powers.⁹⁴

"A good and virtuous constitutionalism having moral foundation protects not only fundamental freedoms but also creates a bridge between conflicting interests and becomes a harbinger to the social needs and produced good legislators and good citizens. The constitutional Courts as sentinel on the qui vive, therefore, function objectively and dispassionately to correct imbalances and keep check on every wing of the State without trespassing upon the field assigned or powers conferred upon the other wings and at the same time maintain a delicate balance on even keel".⁹⁵

It is necessary to consider at this juncture the meaning of the "socialism" envisaged in the Preamble of the Constitution. Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution. The Fundamental Rights and the Directive Principles are the means, as two wheels of the chariot, to achieve the above object of democratic socialism. The word "socialist" used in the Preamble must be read from the goals Articles 14, 15, 16, 17, 21, 23, 38, 39, 46 and all other cognate Articles seek to establish, to reduce inequalities in income and status and to provide equality of opportunity and facilities. Social justice enjoins the Court to uphold government's endeavour to remove economic inequalities, to provide decent standard of living to the poor and to protect the interest of the weaker sections of the society so as to assimilate all the sections of the society in the secular integrated socialist Bharat with dignity of person and equality of status to all. Justice is an attribute of human conduct. Law, as a social engineering, is to remedy existing imbalances, as a vehicle to establish an egalitarian social order in a Socialist Secular Bharat Republic. The Upanishad says that, "let all be happy and healthy, let all be blessed with happiness and let non be unhappy". Bhagwatgeeta preaches through Yudhishtira that, "I do

⁹³ Richard A. Epstein, *"The Protection of Liberty, Property and Equality"*, Oxford University Press, London, p. 342.

⁹⁴ Giovanni Sartori, *"Constitutionalism: A Preliminary Discussion"*, (1962) 56 Am. Pol. SC Rev. 853.

⁹⁵ Dr. L.M. Singhvi, *"Constitution of India"*, 2nd Ed., Vol. 1, Modern Law Publications, New Delhi, p. 24.

not long for kingdom, heaven or rebirth, but I wish to alleviate the suffer-ings of the unfortunate'. Prof. Friedlander in his "*Introduction of Social Welfare*" at page 6 states that social welfare is the organized system of social service and institutions are designed to aid individuals and groups to attain specified standard of life and health and personal and social relationship which permit them to develop their full capacities and to promote their well-being in harmony with the needs of their families and the community. Welfare State is a rubicon between unbridled individualism and communism. All human rights are derived from the dignity of the person and his inherent worth. Fundamental Rights and Directive Principles of the Constitution have fused in them as fundamental human rights as indivisible and inter- dependent. The Constitution has charged the State to provide facilities and opportunities among the people and groups of people to remove social and economic inequality and to improve equality of status. Article 39(b) enjoins the State to direct its policy towards securing distribution of the ownership and control of the material resources of the community as best to subserve the common good. The founding fathers with hind sight, engrafted with prognosis, not only inalienable human rights as part of the Constitution but also charged the State as its policy to remove obstacles, disabilities and inequalities for human development and positive actions to provide opportunities and facilities to develop human dignity and equality of status and of opportunity for social and economic democracy. Economic and social equality is a facet of liberty without which meaningful life would be hollow and mirage. Social and economic democracy is the foundation on which political democracy would be a way of life in the Indian polity. Law as a social engineering is to create just social order removing inequalities in social and economic life, socio-economic disabilities with which poor people are languishing by providing positive opportunities and facilities to individuals and groups of people.⁹⁶

Rawls in his "*Theory of Justice*"⁹⁷ stated that : "From the beginning I have stressed that justice as fairness applies to the basic structure of society. It is a conception for ranking social forms viewed as closed systems. Some decision concerning these background arrangements is fundamental and cannot be avoided. In fact, the cumulative effect of social and economic legislation is to specify the basic structure. Moreover, the social system shapes the wants and aspirations that its citizens come to have. It determines in part the sort of persons they want

⁹⁶ *Samtha v. State of A.P.*, (1997) 8 SCC 191.

⁹⁷ Rawls, "*Theory of Justice*" p.259.

to be as well as the sort of persons they are. Thus an economic system is not only an institutional device for satisfying existing wants and needs but a way of creating and fashioning wants in the future. How men work together now to satisfy their present desires affects the desires they will have later on, the kind of persons they will be. These matters are, of course, perfectly obvious and have always been recognised.

SOCIALISM IN INDIAN CONSTITUTION

The framers of the Constitution were very much conscious and aware of the widespread inequalities and disparities in the social fabric of the country as also of the gulf between rich and poor and this is the reason why the goal of justice - social, political and economic was given the place of pre-eminence in the Preamble. The concept of equality enshrined in Part III and Part IV of the Constitution has two different dimensions. It embodies the principle of non-discrimination Articles 14, 15(1), (2) and 16(2). At the same time it obligates the State to take affirmative action for ensuring that unequals (downtrodden, oppressed and have-nots) in the society are brought at a level where they can compete with others (haves of the society) (Articles 15(3), (4), (5), 16(4), (4A), (4B), 39, 39A and 41).⁹⁸

Dr. B.R. Ambedkar, in his closing speech in the *Constituent Assembly* on November 25, 1949, had lucidly elucidated thus :

"What does social democracy mean? It means way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty, would kill individual initiative - we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plan, we have a society in which there are some who have immense wealth as against many who live in abject poverty". We cannot afford to have equality in political life and inequality in economic life. How long shall we continue to live this life of contradiction? How long shall we continue to deny equality in our social and

⁹⁸ *Union of India v. Pushpa Rani*, (2008) 9 SCC 242.

economic life? We must remove this contradiction at the earliest possible moment or else those who suffered from inequality will blow up the structure of political democracy which this Assembly has laboriously built up."⁹⁹

The core constitutional objective of "social and economic democracy" in other words, just social order, cannot be established without removing the inequalities in income and making endeavour to eliminate inequalities in status through the rule of law. The mandate for social and economic retransformation requires that the material resources or their ownership and control should be so distributed as to subserve the common good. A new social order, therefore, would emerge, out of the old unequal or hierarchical social order. The legislative or executive measures, therefore, should be necessary for the reconstruction of the unequal social order by corrective and distributive justice through the rule of law.

The Supreme Court in *Minerva Mills Ltd. v. Union of India*,¹⁰⁰ the Constitution Bench had held that the edifice of our Constitution is built upon the concept crystallised in the Preamble. We "the People" resolved to constitute ourselves a socialist State which carries with it the obligation to secure to the people, justice - social, economic and political. We, therefore, put Part IV into our Constitution containing Directive Principles of State Policy which specifies the socialistic role to be achieved.

Speaking for the majority, Chandrachud, C.J. observed as under : "This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice-social, economic and political. We, therefore, put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved." At a later stage it was observed that the fundamental rights are not an end in themselves but are the means to an end, the end is specified in part IV.

Bhagwati, J. in his minority judgment after extracting a portion of the speech of the then Prime Minister Jawahar Lal Nehru, while participating in a discussion on the Constitution (First Amendment) Bill, observed that the Directive Principles are intended to bring about a socio-economic revolution and to create a new socio-economic order where there will be

⁹⁹ B. Shiva Rao's, *The Framing of India's Constitution : Select Documents*, Vol. IV, p. 944.

¹⁰⁰ (1981) 1 SCR 206.

social and economic justice for all and everyone, not only a fortunate few but the teeming millions of India, would be able to participate in the fruits of freedom and development and exercise the fundamental rights. It, therefore, appears to be well established that while interpreting or examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other.

In *D.S. Nakara v. Union of India*, another Constitution Bench had dealt with the object to amend the Preamble by the Constitution (42nd Amendment) Act and pointed out that the concept of Socialist Republic was to achieve socio-economic revolution to end poverty, ignorance and disease and inequality of opportunity. It was pointed out that socialism is a much misunderstood word. Values determine contemporary socialism - pure and simple. The principal aim of socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people especially to provide security from cradle to grave. The less equipped person shall be assured a decent minimum standard of life and exploitation in any form shall be prohibited. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder. The Preamble directs the centers of power, Legislature, Executive and Judiciary - to strive to set up from a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society under rule of law though it is a long march, but during the journey to the fulfilment of goal every State action including interpretation whenever taken, must be directed and must be so interpreted as to take -the society towards establishing egalitarian socialist State, the goal. It was, therefore, held that "it, therefore, appears to be well established that while interpreting or examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other."

The Court further expressed that the Preamble, the flood light illuminating the path to be pursued by the State to set up a Sovereign Socialist Secular Democratic Republic. Expression 'socialist' was intentionally introduced in the Preamble by the Constitution (Forty-Second Amendment) Act, 1976. In the objects and reasons for amendment amongst other things, ushering in of socio-economic revolution was promised.

The clarion call may be extracted: "The question of amending the Constitution for removing

the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity, has been engaging the active attention of Government and the public for some time. It is, therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism to make the directive principles more comprehensive."

What does a Socialist Republic imply? Socialism is a much misunderstood word. Values determine contemporary socialism pure and simple. But it is not necessary at this stage to go into all its ramifications. The principal aim of a socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxism and Gandhism leaning heavily towards Gandhian socialism. During the formative years, socialism aims at providing all opportunities for pursuing the educational activity. For want of wherewithal or financial equipment the opportunity to be fully educated shall not be denied. Ordinarily, therefore, a socialist State provides for free education from primary to Ph. D. but the pursuit must be by those who have the necessary intelligence quotient and not as in our society where a brainy young man coming from a poor family will not be able to prosecute the education for want of wherewithal while the ill-equipped son or daughter of a well-to-do father will enter the portals of higher education and contribute to national wastage. After the education is completed, socialism aims at equality in pursuit of excellence in the chosen avocation without let or hindrance of caste, colour, sex or religion and with full opportunity to reach the top not thwarted by any considerations of status, social or otherwise. But even here the less equipped person shall be assured a decent minimum standard of life and exploitation in any form shall be eschewed. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder. Then comes the old age in the life of everyone, be he a monarch or a Mahatma, a worker or a pariah. The old age overtakes each one, death being the fulfilment of life providing freedom from bondage. But there socialism aims at providing an economic security to those who have rendered unto society what they were capable of doing when they were fully equipped with their mental and physical prowess. In the fall of life the State shall ensure to the citizens a reasonably decent standard of life, medical aid, freedom from want, freedom from fear and the enjoyable leisure, relieving the

boredom and the humility of dependence in old age. This is what Article 41 aims when it enjoins the State to secure public assistance in old age, sickness and disablement. It was such a socialist State which the Preamble directs the centres of power Legislative Executive and Judiciary-to strive to set up. From a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society is a long march but during this journey to the fulfillment of goal every State action whenever taken must be directed, and must be so interpreted, as to take the society one step towards the goal.

Pt. Jawaharlal Nehru, while participating in the discussion on the Constitution (First Amendment) Bill, had stated that the Directive Principles are intended to bring about a socio-economic revolution and to create a new socio- economic order where there will be social and economic justice for all and for everyone, not only to fortunate few but also the teeming millions of Indians who would be able to participate in the fruits of freedom and development and exercise the fundamental rights.¹⁰¹

Dr. Ambedkar, while introducing the Preamble of the Constitution for discussion by the Constituent Assembly, had stated that the purpose of the Preamble is to constitute "a new society in India based on justice, liberty and equality". The Constituent Assembly debates do indicate that the Directive Principles intended to provide life blood to social, economic and political justice to all people. Some of the members like Mahavir Tyagi, Professor K.T. Shah, Dr. Saxena Etc. pleaded for incorporation of socialism as part of the Preamble but Dr. Ambedkar the father of the Constitution, while rejecting the amendment, made it clear that the socio-economic justice provided in the Directive Principles and the Fundamental Rights given in Chapter III would meet the above objective without expressly declaring India as a socialist State in the Constitution. Alladi Krishnaswamy Ayyer supported Dr. Ambedkar and had stated that "the constitution, while it does not commit the country to any particular form of economic structure of social adjustment, gives ample scope for the future legislature and the future Parliament to evolve any economic order and undertake any legislation they choose in public interest". Pandit Jawaharlal Nehru in his speech also emphasised the need to enter into a new social order in which "there would be valid growth in the standard of living of all the people of India with equitable distribution of wealth and equality of opportunity and status of all".¹⁰²

¹⁰¹ *Samtha v. State of A.P.*, (1997) 8 SCC 191.

¹⁰² *Constituent Assembly Debates*, November 1948 at pages 230 to 357.

Justice is not synonymous with equality, equality is one aspect of it. Justice is not something which can be captured in a formula once and for all. It is a process, a complex and shifting balance between many factors including equality. Justice is never given, it is always a task to be achieved. Justice is just allocation of advantages and disadvantages, preventing the abuse of power, preventing the abuse of liberty by providing facilities and opportunities to the poor and disadvantaged and deprived social segments for a just decision of disputes adapting to change.

Mahatma Gandhiji, the father of the nation, had stated that "true economics never militates against the highest ethical standard, just as all true ethics to be worth its name must at the same time be also good economics. An economies that inculcates Mammon worship, and enables the strong to amass wealth at the expense of the weak, is a false and dismal science. It spells death. True economics, on the other hand, stands for social justice, it promotes the good of all equally, including the weakest, and is indispensable for decent life."¹⁰³

Dr. V.K.R.V. Rao, one of the eminent economists of India, in his "*Indian Socialism Retrospect and prospect*" has stated that a socialist society has not only to bring about equitable distribution but also to maximize production. It has to solve problems of unemployment, low income and mass poverty and bring about a significant improvement in the national standards of living. At page 47, he has stated that socialism, therefore, requires deliberate and purposive action on the part of the State in regard to both production and distribution and the fields covered are not only savings, investment, human skills and use of science and technology, but also changes in property relations, taxation, public expenditure, education and the social services. A socialist society is not just a give-away society nor is it only concerned with distribution of income. It must bring about full employment as also an increase in productivity.¹⁰⁴

A socialistic society involves a planned economy which takes note of time and space considerations in the distribution and pricing of output. It would be necessary for both the efficient working of socialist enterprises and the prevention of unplanned and anarchical expansion of private enterprises. The Indian conception of socialism with democracy with human dignity is by creation of opportunities for the development of each individual and not

¹⁰³ '*Harijans*' dated October 9,1937

¹⁰⁴ *Samtha v. State of A.P.*, (1997) 8 SCC 191

the destruction of the individual. It is not for the merging of the individual in the society. The Indian socialist society wants the development of each individual but requires this development to be such that it leads to the upliftment of the society as a whole. Fundamental duties in Chapter VI-A of the Constitution to bear meaningful content, facilities and opportunity on equal footing is the fundamental condition of a socialist society. The more the talent from backward classes and areas get recognition and support, the more socialist will be the society. Public sector and private sector should harmoniously work. The Indian approach to socialism would be derived from Indian spiritual traditions. Buddhism, Jainism, Vedantic and Bhakti Hinduism, Sikhism, Islam and Christianity have all contributed to this heritage rooted to respect for human dignity and human equality. While imposing restrictions on the right to private property even to the extent of abolishing it where necessary in the social and public interest, it permits private enterprise in economic activity and makes for a mixed economy rather than a completely socialised economy. It abhors violence and class war and heirarchical class structure and pins its faith on non-violence, sacrifice, and dedication to the service of the poor and as a natural consequence, its implementation is envisaged through Parliamentary democracy planned economy and the rule of law rather than through a violent revolution or a dictatorship in any form. Indian socialism, therefore, is different from Marxist or scientific socialism.

To achieve the goal set down in the Preamble, the Directive Principles and fundamental rights, the Constitution envisaged planned economy. The Planning Commission has been given the constitutional status for the above purpose. The Third Five Year Plan document extracts the basic features of the socialist pattern of society thus : "Essentially, this means that the basic criterion for determining lines of advance must not be private profit, but social gain, and that the pattern of development and the structure of socio-economic relations should be so planned that they result not only in appreciable increase in national income and employment but also in greater equality in incomes and wealth. The benefits of economic development must accrue more and more to the relatively less privileged classes of society, and there should be progressive reduction of the concentration of incomes, wealth and economic power. The socialist pattern of society is not to be regarded as some fixed or rigid pattern. It is not rooted in any doctrine or dogma. It is neither necessary nor desirable that the economy should become a monolithic type of organisation offering little play for experimentation either as to forms or as to modes of functioning. Nor should expansion of

the public sector mean centralization of decision making and of exercise of authority. The accent of the socialist pattern of society is on the attainment of positive goals, the raising of living standards, the enlargement of opportunities for all, the promotion of enterprise among the disadvantaged classes and the creation of a sense of partnership among all sections of the community. These positive goals provide the criteria for basic decisions. The directive principles of State policy in the Constitution have indicated the approach in broad terms; the socialist pattern of society is a more concretised expression of this approach. Economic policy and institutional changes have to be planned in a manner that would secure economic advance along democratic and egalitarian lines." Mr. G.D.H. Cole, one of the leading socialist of United Kindom, in his speech¹⁰⁵ has stated that socialism is a movement aiming at greater social and economic equality and using extended State action as one of its methods, perhaps the most distinctive but certainly not the only one needed to be taken into account. The affairs of the community shall be so administered as to further the common interests of ordinary men and women by giving to everyone, as far as possible, an equal opportunity to live a satisfactory and contended existence, coupled with a belief that such opportunity is incompatible with the essentially unequal private ownership of the means of production. It requires not merely collective control of the uses to which these are to be put, but also their collective ownership and disinterested administration for the common benefit. This basic idea of socialism involves not only the socialisation of the essential instruments of production, in the widest sense, but also the abolition of private incomes which allow some men to live without rendering or having rendered any kind of useful service to their fellowmen and also the sweeping away of forms of educational preference and monopoly which divide men into social classes. It involves, in effect whatever is needful for the establishment of what socialists call a 'classless society' and in pursuance of this aim its votaries necessarily look for support primarily, though not exclusively, to the working classes, who form the main body of the less privileged under the existing social order. Socialists seek to reduce economic and social inequalities not only in order to remove unearned sources of superior position and influence, but also in order to narrow the gaps between men to such as are compatible with all men being near enough together in ways of living to be in substance equals in their mutual intercourse.

¹⁰⁵ G.D.H. Cole, *The Growth of Socialism*", 'Law and Opinion in England in the 20th Century' at page 79-80.

In *Excel Wear Etc. v. Union of India* the Constitution Bench had held that the concept of socialism or socialist state has undergone changes from time to time from country to country and from thinker to thinker. But some basic concept still holds the field. The doctrinaire approach to the problem of socialism be eschewed and the pragmatic one should be adapted. So long as the private ownership of an industry is recognised and governs an overwhelmingly large proportions of an economic structure, it is not possible to say that principles of socialism and social justice can be pushed to such an extreme so as to ignore completely or to a very large extent the interest of another section of the public, namely, the private ownership of the undertaking. In other words, the object of intermediation should be co-existence and flourishing of mixed economy. With the rise of the philosophy of Socialism, the doctrine of State ownership has been often discussed by political and economic thinkers. Broadly speaking, this discussion discloses a difference in approach. To the socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the rationalist, nationalization or State ownership is a matter of expediency dominated by considerations of economic efficiency and increased output only production. This latter view supported nationalisation only when it appeared clear that State ownership would be more efficient, more economical and more productive. The former approach was not very much influenced by these considerations, and treated it a matter of principle that all important and nation-building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic. The first proceeds on the general ground that all national wealth and means of producing it should come under national control, whilst the second supports nationalisation only on grounds of efficiency and increased output.

In *State of Kamataka v. Shri Ranganatha Reddy*, a Bench of nine Judges of this Court considered nationalisation of the contract carriages. In that behalf, it was held that one of the principal aims of socialism is the distribution of the material resources of the community in such a way as to subserve the common good. This principle is embodied under Article 39(b) of the Constitution as one of the essential directive principles of State polity. Therein, this Court laid stress on the word 'distribute' as used in Article 39(b) being a keyword of the provision emphasising that The key word is distribution and the genius of the Article, if we may say so., cannot but be given full play as it fulfils the basic purpose of restructuring the economic order. Each word in this Article has a strategic role and the whole Article is a social

mission. It embraces the entire material resources of the community. Its task is to distribute such resources, its goal is to undertake distribution as best to subserve the common good. It reorganises by such distribution the ownership and control." Article 39(b) fulfils the basic purpose of restructuring the economic order and undertakes to distribute the entire material resources of the community, as best to subserve the common good. To exclude ownership of private resources from its coils, is to cipherise its very purpose of redistribution the socialist way. Article 39(b) is ample enough to rope in buses, as motor vehicles, are part of the material resources of the operators. Socially conscious economists will find little difficulty in treating nationalisation of transport as a distributive progress for the good of the community. The Court observed that the State symbolises, represents and acts for the good of society. Its concerns are the ways of meeting the wants of the community, directly or otherwise, and the public sector in our constitutional system, is a strategic tool in 'the national plan for transformation from stark Poverty to social justice, transcending administrative and judicial allergies. Serious constitutional problems cannot be studied in a socio economic vacuum, since socio-cultural changes are the source of new values. Our emphasis is on abandoning formal legalistic or sterile logomachy in assessing the vires of statutes regulating vital economic areas, and adopting instead, a dynamic, goal- based approach to problems of constitutionality. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. The Constitution ensouls such a value system in Parts III and IV and elsewhere, and the dialectics of social justice should not be missed if their synthesis is to influence State action and Court pronouncement. Illusory compensation, nexus doctrine and 'distributed to subserve the common good, should not reduce lofty constitutional considerations into hollow concepts.

The social philosophy of the Constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere, ensouls such a value system and the debate in this case puts precisely this soul in peril. Friedman has said in his *'Legal Theory and Social Evolution'*. 'The lawyer cannot afford to isolate himself from the social process. His independence can never be more than relative, and it is only a clear awareness of the political, social and constitutional foundations of, his function in general as well as of particular legal problems that enables him to find the proper balance between Stability and progress.'" Our thesis is that the dialectics of social justice should not

be missed if the synthesis of Part III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socioeconomic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process of the new equity-loaded legality. A judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension in his complex duties. The credal essence of the Constitution consists in its Preamble, Articles 38, 39(b) and (c), 31 and the bunch of Articles 31A, 31B and 31C. Our emphasis is on abandoning formal legalistics or sterile logomachy in assessing the vires of statutes regulating vital economic areas, and adopting instead a dynamic, goal-based approach to problems of constitutionality. It is right that the rule of law enshrined in our Constitution must and does reckon with the roaring current of change which shifts our social values and shrivels our feudal roots, invades our lives and fashions our destiny. The key issues argued at learned length in these appeals cannot suffer 'judicial separation' from the paramount principles in the Preamble and in Article 39(b) and (c). So we have to view the impugned provisions from the vantage point of socio-legal perception. The semantic sin of dubious legislating drafting before entering the thorny thicket of debate on the questions arising in this batch of appeals a cautionary word may be uttered, without disrespect, about the unwitting punishment of the community by our legislative draftsmen whose borrowed skills of Westminster vintage and hurried bills without sufficient study of their economic project, occasionally result in incomprehensibility and incongruity of the law for the lay and the legal. In a country where the people are, by and large, illiterate, where a social revolution is being pushed through by enormous volume and variety of legislation and where new economic adventures requiring unorthodox jural techniques are necessitous, if legal drafting is to be equal to the challenge of change, a radicalisation of its methodology and philosophy and an ability for the legislative manpower to express themselves in streamlined, simple, project oriented fashion is essential. In the hope that a role conscious court communicates to a responsive Cabinet, we make this observation.

In *Sanjeev Coke Manufacturing Company v. Bharat Coking Coal Ltd.* another Constitution Bench reiterated the above view; while considering Article 39(b) of the Constitution, at page 1020, this Court had held that the broad egalitarian principle of economic justice was implicit in every directive principle and, therefore, a law designed to promote a directive principle, even if it came into conflict with the formalistic and doctrinaire view of equality before the

law, would most certainly advance the broader egalitarian principle and desirable constitutional goal of social and economic justice for all. If the law was aimed at the broader egalitarianism of the Directive Principles, Article 31C protected the law from needless, unending and rancorous debate on the question whether the law contravened Article 14's concept of the equality before the law.

CHAPTER 6

CONCLUSION

The Preamble of the Constitution sets out the aims and aspirations of the people of India and these have been translated into the various provisions of the Constitution. As a welfare State, India is committed to the welfare and development. For a welfare state to thrive and to maintain its constitutional goal, legislation aimed at social welfare is cardinal for the common good and common interest of the people. Directive Principles impose an obligation of the state to take positive action for creating socio-economic condition in which there will be an egalitarian social order with social and economical justice to all, so that individual liberty will become a cherished value and the dignity of an individual a living reality. Thus the Directive Principles enjoy a very high place in the Constitutional scheme and it is only in the frame work of the socio-economic structure envisaged in the Directive Principles that the fundamental rights are intended to operate. Further The Constitution declares the Fundamental Rights of a citizen and lays down that all laws made abridging or taking away such rights shall be void.

In our study we have been able to find out that unquestionably the Constitution of India is a social document. A study of the philosophy of the Constitution does safely indicate that the intention of the makers of the Constitution was to make the document a social document and that the Constitution still remains to be a social document.

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

Rightly the constitution makers had decided to incorporate Fundamental Rights in the Constitution because of several reasons, such as, consciousness of the massive minority problem in India, memories of the protracted struggle against the despotic British Rule, acknowledgement of the Gandhian ideals, the climate of international opinion and the American experience.

But it can be seen from the past history that inclusion of Fundamental Rights under the Indian

Constitution was also a reasonable step towards the natural apprehension of any such autocratic rule and arbitrariness in future and to prevent it. In other words, to limit the government acts.

The courts are also playing a crucial role in guaranteeing these rights to the people besides broadening them with changing circumstances and conditions and making them even more efficient for protection against any arbitrary act on the part of the govt. or any individual.

It is very well noted that under the Indian Constitution Fundamental Rights have been provided in different forms. Only a free society can ensure the all-round progress of its members which ultimately helps the advancement of human welfare. Therefore, every democracy pays special attention to securing this basic objective to the maximum extent without, at the same time, endangering the security of the State itself. The Fundamental Rights envisaged in Part III of the Constitution of India has a tremendous contribution in rendering social justice to the country at large and till date it thrives to maintain its constitutional goal, in guiding legislation aimed at social welfare for the common good and common interest of the people.

Part III of the Constitution dealing with the Fundamental Right Chapter has played a pivotal role in ensuring the principle that the right to Fundamental Right is a necessary concomitant to social justice or else such rights would be rendered illusory.

From the study one thing is crystal clear that the edifice of our Constitution is built upon the concepts crystallized in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice, social, economic and political. We therefore, put Part IV into our Constitution containing Directive Principles of State Policy which specify the socialistic goal to be achieved. Legislation is always based on the quintessence of the public opinion. India after attaining independence by a series of social welfare legislations based on the mandate of our Constitution proved that law could be active and dynamic. No longer was the State seen as standing to one side of the society and performing the role of a night watchman, but as a manager of social and economic interests.

It is argued that since the directive principles are not enforceable by any court, they are not laws, much less constitutional laws and therefore their non-observance by the State does not entail legal consequences. For the same reason a law giving effect to the directive principle has to observe all the constitutional limitations such as fundamental rights and in case it violates these limitations, it must be held unconstitutional. The idea seems to have changed during the course of time, and over last few years one can on evaluating the judgment of the Supreme Court find that the Directive Principles have been given much more importance.

It is noticed that the amendments made to the Constitution in order to implement the Directive Principles have also encouraged the Courts to enforce those directives as any other Constitutional Rights though it is not a Fundamental Right.

We from the study can definitely conclude that almost all the Directives have now become executable by the Courts except a few, despite the express bar under Article 37 and thus can safely come to an inference holding that the Directive Principles are the means to achieve the goal of the preambular promise.

The reality of inequality, and its possible solution, is manifest in the Preamble, followed by the Fundamental Rights and Directive Principles. The Preamble makes explicit, the resolve to create a “socialist and democratic republic” in order to secure political justice, equality, liberty and dignity. The principle assertion being that in order to obliterate social injustice, upholding the dignity of the human personality is paramount. The Indian Constitution, as a social document, seeks to foster this by striving to create the requisite social, cultural, political and economic conditions that are required to attain this noble goal.

Equality before law connotes absence of any discrimination in law. The concept of equal protection required the State to mete out differential treatment to persons in different situations in order to establish an equilibrium amongst all.

The basic rule as from the study reveals that equals should be treated equally and un-equals must be treated unequally. It is observed that this doctrine of equality is one of the corner- stone of our Constitution as the same is to be duly implemented.

The constitutional goal is the establishment of a socialist democracy in which justice- economic, social and political is secure and all men are equal and have equal opportunity, and we can safely argue that equality embodies social justice.

For a welfare state to thrive and to maintain its constitutional goal, legislation aimed at social welfare is cardinal for the common good and common interest of the people. Directive Principles of State Policy, and Fundamental rights together constitute the ‘conscience’ of the Constitution, and represents the basic rights inherent in human beings in this country.

The courts are continuously playing a crucial role in guaranteeing these rights to the people besides broadening them with changing circumstances and conditions and making them even more efficient for protection against any arbitrary act on the part of the govt. or any individual.

On the study of the cases before the Supreme Court with regard to issues of social welfare it is observed that the Supreme Court has played the role of the sentinel on the qui vive, and survivor

on call. It has on almost all occasion have reminded the State that it is constitutionally obligated to enforce the fundamental rights of all the citizens of the country and to protect them from exploitation and to provide guidance and direction for facilities and opportunities to them for securing socio-economic justice, empowerment, securing life and liberty to make all enjoy the fundamental rights ensured to them under the Constitution.

In this study we have seen that the Supreme Court has given many of the Directives the status of Fundamental Right and other Constitutional or Statutory rights, by giving wide possible interpretations to the Fundamental Rights or any other Constitutional or Statutory rights in the light of the Directive Principles.

Furthermore, the Courts, in many occasions, in appropriate cases, issued many directions/guidelines and laid down policies to give effect to the directive principles either directly or indirectly in order to remove the grievances which have been caused by non implementation of the Directives.

It can be safely said that the present directives is in furtherance of the Constitutional goals for establishment of political democracy, and to ensure social and economic justice and minimizing inequalities in income, status, facilities and opportunities for the establishment of an egalitarian social order in Secular Socialist Democratic Bharat Republic.

Globalization, Liberalization and Privatization are the inevitable consequence of the development all around the globe. It is eminent that the global economy will search for new markets to sell their products. However it has to be understood that a Welfare State has certain criteria that needs to remain static or there is a threat that the basic fabric of nation would be put to jeopardy. The Globalization, Liberalization and Privatization should be suitably adapted to the existing global condition as well as the peculiar situation of the Indian conditions in order to lead toward overall prosperity of mankind.

India is a multi-cultural pluralistic society with tremendous diversity. There are a large number of religions, castes, languages, ethnic groups, cultures, etc. in our country.

Concept of socialism or a socialist state has undergone changes from time to time from country to country and from thinkers to thinkers. But some basic concept still holds the field.

Undoubtably in the beginning of the new economic era doubts were serious about the working of a Welfare State when provisions of social welfare legislations were being curbed to befit liberalization. Labour laws in the country had started taking the bites in the guise of economic liberalization.

But in recent times we can observe that the Supreme Court and the High Courts have played an important role to remind the State the Constitutional objectives and have tried to suggest the State to create a balance between development and the constitutional goals by evolving the concept amongst others of sustainable development.

It has been held in many decisions of the Supreme Court had reminded the State of its preambular promise and have stressed that the constitutional provision be interpreted, by taking the Preamble as the guiding star and the Directive Principles of State policy as the book of interpretation. It is very encouraging to observe that in some case the Supreme Court has often reminded the State that the preamble embodies the hopes and aspiration of the people and Directive Principles set out the proximate grounds in the governance of the country. Over adventurism in cases of enforcing global economic policy can lead to disaster in the country like India.

The Hon'ble Supreme Court of India has in a large number of cases held that a beneficial piece of legislation or welfare statues should receive a liberal and wider interpretation and not a narrow and technical one.

In today's time it seems that some of the policies of government are not in conformity with the obligations of a welfare state. It has been seen that the government at times have taken a pro-corporate stand, by neglecting the plight of the people, in the guise of the glit and glamour of globalization. It is to be reminded that the state cannot derogate its stand from its constitutional responsibilities of creating an egalitarian society and providing social and economic justice by simply making a competitors market. It has to be remembered that people are not just means to achieve higher economic growth, but they are ends in themselves and that in every policy of government the people should be at the centre of it as beneficiaries.

Enforcement of global economic policy needs to be debated extensively and in some cases some rethinking is necessary in the developing country like India where disparities exist between different segments of the population and different regions of the country. It is necessary for shortening gaps between rich and the poor and there is an urgency in moving towards a more balanced development of the nation.

We have in our study observed that Constitutionalism recognizes the need for government with powers but at the same time insists that limitation be placed on those powers. The antithesis of constitutionalism is despotism. It envisages checks and balances by restraining the powers of governmental organs by not making them uncontrolled and arbitrary. The study clearly opines

that Fundamental Rights of the people, Directive Principles of State Policy, Federalism, decentralization of powers are some of the principles and norms promotes Constitutionalism in the country. Preamble to the Indian Constitution lays down principles for the promotion of constitutionalism. One can safely declare that socialism is the constitutionalism of the Constitution of India. It has been observed that the doctrine of basic structure propounded by the Supreme Court is one of the most dynamic doctrine that has been propounded in the working of this modern Constitution. It envisages the principle of check and balance which is the constitutionalism of the Constitution. This dynamic doctrine of basic structure of the Constitution has always been applied to whenever there is a threat to the constitutionalism of the Constitution. However from the study we can safely conclude that as of now there is no such threat that demands a change in the Constitution. We feel safe with the dynamic activist approach of the Supreme Court of our country and remain optimist that WE THE PEOPLE will live up to the expectation of our founding fathers and remain to be a social welfare state.

As a research student and based upon the study I would propose to put forward some suggestions to the legislatures and all the law makers.

The state is constitutionally obliged to take care of the needs of society, and to maintain the social, economic and political justice hence it must change its policies along with the changing needs of people keeping the welfare of the people at the centre.

There needs to be a constructive policy to fill the gap between the rich and poor so that the people at the bottom level of the pyramid is brought into the loop of the developmental process, and we be successful in building an inclusive society.

The bureaucracy still seems to have retained colonial characters and it the mindset in the working of the bureaucracy that needs some refreshment. The bureaucracy has to be well versed with the rights of the people. It is beyond comprehension as to why a citizen will have to approach the Courts for enforcement of their rights.

Judicial reforms should be implemented with immediate effect to clear millions of cases which are pending in various courts all over the country.

There is a need for police reforms and the legislature should participate intelligently to make sure that the welfare state of ours does not turn into a police state.

Social welfare schemes launched by the government need strict monitoring and it is to be seen that the intended beneficiaries get the benefit and the perpetrators of frauds should be severely punished. Avenue of new social welfare schemes benefitting and affecting the mass poor and

creating employment opportunity and removing economic backwardness should also be taken up on priority basic.

Criminalization of politics is an evil in a democracy and unless urgent steps are required to be taken to counter it.

Political and administrative corruption is a sad reality of Indian administration and this cancer should be removed from the body politic of Indian democracy on an emergency basis.

The state must focus to eliminate poverty and inequality among the different sects of society. Necessary and urgent steps are needed to be taken to reduce the actual number of persons below poverty line.

The state must ensure that the benefits of globalization are not confined to some particular sections of the society and there must be some law regarding corporate responsibilities.

Since India still largely remains to be dependent on agriculture, there is a need to focus on the development of agriculture. The government must increase the public expenditure in agriculture and more funds must be devoted towards the area of research in agriculture as like in the area of production of better quality seeds.

There has to be some corporate environment responsibility as we in our study have seen that environmental damage has mostly affected poor people because they lack sufficient resources to avoid the impact of pollution. The government must have strict environmental laws and there should be a proper administrative set up to monitor and see that all industries fulfill the requisite environmental clearance norms. Polluters Pays principle should be applied strictly in case of breach and the State should be strict in ensuing proper compensation to the affected.

There is a very urgent need for the enhancement on the spending on healthcare. The problem of malnourished children in India is to be addressed on an urgent basic. Government hospitals need to be well equipped with necessary infrastructure and medicine. Continuous effective steps needs to be taken to lift the child mortality rate.

Female feticide should be declared as a grievous crime. Women empowerment programmes needs to be taken up on priority basic.

There is a very urgent need for the enhancement on the spending on education and increase the enrolment rate in schools and college.

The need of hour is to ensure the proper and balanced implementation of policies so as to make social justice an effective vehicle of social progress.

All the three organs, namely, the Legislative, the Executive and the Judiciary should work

collectively to ensure civil, political, social, economic and cultural rights to the citizens and to further ensure to protect and preserve human dignity by assimilating the poor, the depressed and deprived in the national main stream for ultimate equitable society and democratic way of life to create unity, fraternity among 'WE THE PEOPLE' in an integrated Bharat.

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