SYLLABUS

Introduction to Governing Principles of Constitution

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Directive Principals of State Policy (Art 36-51), Fundamental Duties (Art 51A) & Introduction to Human Rights:

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4.2 Introduction to Human Rights
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Suggested Reading:

1. Dr. J. N. Pandy
2. M. P. Jain, Indian Constitutional Law
3. H.M. Seervai, Constitutional Law of India
4. B.N. Cardozo, Nature of Judicial Process
5. B.N. Cardozo, Growth of Law
Introduction to Governing Principles of Constitution

Chapter 1.1. Historical Development, features and object of Constitution

Learning Objectives

- To define the Governing Principles of Constitution.
- To explain the Historical development of Indian Constitution.
- To explain the features of Indian Constitutional Law.
- To describe the Main objects of Indian Constitutional Law.

1.1 Introduction to Governing Principles of Constitution

If the division of authority is the basis of civilized administration, a constitution is the greatest device by which such division could be facilitated. Constitutionalism is an attainment of the modern world. But it is a comparatively recent achievement. As such, it has not become fully stabilized.

Meanwhile, every constitution aims to build up a administrational structure based upon certain essential principle. In addition, these principles are more or less well-established. Although some of these principles are common to most constitutions, there are others which vary from constitution to constitution.

Such variations are the creation of the varying circumstances that determine the principles of the constitution. The constitution of India is not an exception to this rule and it has its own essential principles.

We shall, therefore, begin by a study of the essential principles of the Constitution, which form the foundations of democratic administration in India.

A careful study of the Constitution will show that there are at least eight essential principles which are embodied in it and which form the foundation of the political system in India. These are:

1. sovereignty,
2. Socialism,
3. Secularism,
4. Fundamental rights,
1.1.1 Historical development of Indian Constitution

1.1.1.1 Introduction

We know that on 15th August, 1947 the British rule came to an end and after division, the authority was transferred to two sovereign countries, namely, India and Pakistan. On 26th January, 1950, India adopted a Constitution and became a Sovereign, Socialist, Secular, Democratic, Republic.

1.1.1.2 Background of constitution during the British Period

Among the many countries, the Portuguese were the first to visit India. Gradually the Dutch, the French and the British merchants became the rivals of the Portuguese in India. The British came to India in 1600 as traders under the name of the East India Company. After defeating the rivals the British became rulers in India. They followed a policy of conquest, annexation and consolidation in India. Initially, they were busy with trade and commerce only. But, after the death of Aurangzeb in 1707 the British Company took some active interest in the Political matters in India. Their imperialistic approach to rule India became clear after the Battle of Plassey in 1757. In this battle British defeated Siraj-Ud-Daulah, Nawab of Bengal. The Battle of Buxar (1764) and the annexation of Punjab (1849) completed the task of British imperialism in India.

Thus, by the middle of 19th Century most of India was controlled by the British, either directly by the East India Company or through the system of treaties and alliances with the Princely States. During this period certain measures of constitutional reforms were introduced. During the reign of Warren Hastings, the Regulating Act (1773) and Pitts India Act (1784) were passed.

1.1.1.3 Regulating Act (1773): The main provisions of this Act were-
i) The Governor of Bengal was made the Governor General. The first man to be appointed to this post was Warren Hastings.
ii) For the assistance of the Governor General an executive Committee of four members was created.

iii) A Supreme Court was set up at Calcutta, with a Chief Justice and three assistant judges.

iv) The number of the Directors of the Company was fixed at 24.

The Regulating Act initiated the process of centralization in India.

**1.1.1.4 Pitts India Act (1784)**

This Act introduces many significant changes in the Constitutional history of India. The number of members of the Governor General’s Committee was reduced to three and the Commander-in-Chief was to be one of them. A special court was established for better trial of the Company’s officials in England for offences committed by them in India. By this Act, the real power in India passed from the Directors of the Company to the British Indian Parliament.

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

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

**1.1.1.5 The Indian Committee Act of 1909**

The Indian Committee Act of 1909 which is mostly known as Morley-Minto Reforms of 1909 is a significant event in constitutional history of India. The significant provisions of this Act were-

i) Enlargement of the size of the Central and Regional Legislative Committee s. The number of members was raised to 60 in central Legislature and the regional Legislative Committee s were to consist of 30 to
50 members,
ii) Powers and functions of the Central and Regional Committees were also increased,
iii) Provision for the appointment of an Indian member in the Executive Committee of the Governor General
iv) Introduced the system of Communal representation.

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

The Act made many changes in the Regional Government too. A system of Diarchy was introduced in the Provinces. The subjects which were dealt with by the Regional Government were divided into two sets: Transferred and Reserved Subjects. The Governor administered the Reserved Subjects with the help of the Ministers chosen by him from the elected members of the legislature. The Governor General could shift a subject from Transferred to Reserved Part. The Act created two lists of Subjects (departments) and divided them into Central and Regional Governments. The Central List included the subjects such as Defence, Currency, Commerce, Commerce, Communication, Telegraph, Foreign Relations, Customs, Civil and criminal law etc. were given to the Central Government. On the other hand, the Regional List which were of regional interest such as Local-Self Government, Education, Public Works, Agriculture, Public Health, Revenue, Irrigation, water Supplies etc. were given to the regional Government. The Act created a post of a High Commissioner for India. The term of his office was six years. The Act of 1919 was an significant landmark in the constitutional development of India which opened a new era of responsible Government.

**1.1.1.6 Government of India Act of 1935**

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

The Act introduced Diarchy system at the Centre. The Central Subjects were divided into the Reserved and the Transferred subjects. The Act provided Division of powers by creating Central list; Regional List, Concurrent List and also a provision for Residuary Subjects. 59 subjects were included in Central List consisting of Defense, Currency and Coinage, post and Telegraphs, Foreign Affairs etc. Regional List included 54 subjects such as Police, Government of Justice, Education, Agriculture, Industry, Land revenue etc. There were 36 subjects in Concurrent list. These were Newspaper and Printing Press, Marriage and Divorce, registration, Criminal Procedure Code etc. The subjects which were not included in any of the above lists were residuary subjects. They were looked after by the Governor General.

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

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

1.1.1.7 The Cripps Mission

The Second World War started in 1939 and Great Britain was fully involved in this war. In 1942, the Cripps Mission was sent to India from Great Britain under the leadership of Sir Stafford Cripps. The Cripps Mission provided some proposals to Indian people. Some of them are-

i) After the Second World War, dominion status would be granted to India.

ii) For framing a Constitution for India, an elected body would be set up in India, after war.

iii) The Indian states would also participate in the Constitution making body.
iv) The British Government was to accept the Constitution so framed. But a Province or a Princely State may or may not accept it. The Provinces were given a right to finalize their Constitution in consultation with the British Government.

v) The Princely States would have the freedom to join Indian Union.

vi) During the World war and until the new constitution was framed, India would remain under the control of Her Majesty’s Government.

But the Cripps proposals were rejected by almost all the Parties and sections in India on different grounds. The Indian National Congress, Muslim League, Hindu Mahasabha and Sikhs rejected the Cripps Proposal.

1.1.1.8 The Cabinet Mission Plan

The appointment of Cabinet Mission Plan was another significant step approved by the British Government in the process of Constitutional development. The chief proposals of Cabinet Mission Plan were-

i) To form a Union of India consisting of British Provinces and Indian States.

ii) To establish a Constituent Assembly having 389 members.

iii) An interim Government with fourteen representatives of the major Political Parties.

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

Disagreement and conflict between the Congress and Muslim League continued. Now, Lord Mountbatten proposed a plan to Divide India into two parts- India and Pakistan. The Congress and Muslim League accepted the plan. Based on Mountbatten plan, the British Indian Parliament passed the Indian Independence Act on July 18, 1947 and ultimately; in August 15, 1947 India became an independent State. According to the proposals of cabinet Mission Plan, a Constituent Assembly was framed as a representative body. It was accepted that the constituent Assembly would act as the Dominion Legislature until the Constitution was framed and India was administered according to the provisions of the Government of India Act, 1935 with some necessary modifications.

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

These noted organizations played a vital role to reform the Indian society by removing various religious and social evils. These organizations made great contributions towards Indian nationalism. The spread of western education, role of the press, economic exploitation, racial discrimination against Indians, etc. also made the people politically conscious. The Indian leaders felt a need for an All India organization. Accordingly, in 1885, the first Indian national organization called the Indian National Congress was established. The main role in establishing a British officer played this organization named A.O. Hume. In 1905, S.N. Benerjee, Dada Bhai Naoroji and Gopal Krishna Gokhle guided the Congress who all believed in the moderate policy. Moderate policy meant the policy of resolutions and reforms. The Moderate policy was not accepted by some revolutionary leaders like, Bal Gangadhar Tilak, Lala Lajpat Rai, Bipin Chandra Pal etc. They were known as Extremists or militant nationalists. In the Congress session held in Benaras in 1905, the Extremists rejected the policy of the Moderates. The split between them occurred at Surat in 1907. The British Government adopted a stern policy to suppress the Extremists and most of them were sent to jail. But both the Moderates and Extremists were united at the Lucknow Session in 1916 to strengthen the Congress.

Mrs. Annie Besant, a European woman joined the Congress in 1914 and started the Home Rule Movement. But, later, she was arrested and there was a strong agitation for her release. The British Government passed the Rowlatt Act in 1919 to suppress the Nationalist Movement. This Act was against the self respect of the people. It gave the Government powers to crush liberties, to arrest and detain suspected persons without warrant and to imprison them without any trial. Soon there was a wave of anger throughout the country against this Act.

1.1.1.9.2 Latter Period (Freedom Movement):

Mahatma Gandhi, against the Rowlatt Act, started the Non-Co-operation Movement. Mahatma Gandhi got the political leadership of Congress after the death of Lokmanya Tilak on 1st August 1920. Gandhiji was in South Africa for many years and returned to India in 1915. He got a great response from the
countrymen. On the other hand, the British tried to crush his movement with a heavy hand. On April 13, 1919 people gathered in the Jallianwala Bagh of Punjab to hold a peaceful meeting. General Dyer ordered his soldiers to fire without any warning. About thousand people were killed and several thousand wounded. The Jallianwala Bagh Tragedy was condemned by all sections of people. Rabindra Nath Tagore renounced the knighthood conferred by the British Government. The Khilafat Movement started by Maulana brothers brought Hindu-Muslim unity. In 1927, the Simon Commission was appointed by the British Government to inquire into the working of the 1919 Act. One of the significant recommendations made by this commission was the development of the Constitution of India in the direction of centralism. But the Congress boycotted it. In 1928 the Congress at Calcutta Session appointed Nehru Committee with Motilal Nehru as its Chairman to draft the future Constitution of India. The Congress adopted the Nehru Report and declared that if the report was not accepted by the British Government the Congress would fight to achieve independence by civil disobedience. When the British rejected its demand the Congress declared complete Independence as the chief goal under the President ship of Jawaharlal Nehru.

Mahatma Gandhi started Civil Disobedience Movement in 1930 by violating the Salt Law. He marched from Sabarmati Ashram to Dandi, a small village where a large number of people took part in it. Gandhi preached a message of non-violence and non-co-operation. British adopted a repressive policy of suppressing this movement and also followed a policy of conciliation and called the First Round Table Conference in 1930. But Congress boycotted the Conference. On March 5, 1931 the famous Gandhi-Irwin Pact was signed and the Congress called off the Civil Disobedience Movement and took part in the Second Round Table Conference held in London in 1931. The Conference almost failed and the movement again started when many leaders along with Gandhi were arrested. The British announced —Comunal Award” and gave separate electorates to the Harijans which was protested by the Congress. But the matter was compromised by the Poona Pact (1932) as a result of which joint electorates were maintained for the Scheduled Castes and Hindus. When the British Indian Parliament passed the Government of India Act, 1935, Mahatma Gandhi called off the Civil Disobedience Movement. Under the Act of 1935, elections to the regional legislatures were held in 1937. Congress won eight out of eleven provinces except Punjab, Sindh and Bengal. But the Congress Ministers resigned when the Second World War broke out in 1939. Cripps Mission was proposed by the British in 1942 with a promise to grant Dominion Status to India and a Constitution making body would be set up after the Second World War. As we have stated above, the proposals of Cripps Mission were rejected. The Congress started the Quit India Movement (1942) under the leadership of Gandhi ji and asked the British to quit India. The people of Assam also participated in this movement. Leaders like Gopinath Bordoloi and Siddhinath Sarmah were arrested. In Kamrup, Madan Chandra Barman and Routa Ram Boro were killed by the police. Kanaklata Baruah and Mukunda Kakati were shot dead at Gohpur Police Station. Kushal Konwar was
hanged and many freedom fighters sacrificed their lives to free India. The names of Bhogeswari Phukanani, Nidan Koch etc. deserve a special mention. Contributions of political leaders like Jawaharlal Nehru, Gopinath Bordoloi, Sardar Vallabbhai Patel, Maulana Abul Kalam Azad, Dr. Rajendra Prasad, Dr. S. Radhakrishnan, Lal Bahadur Sastri are always remembered.

1.1.2 Important features of Indian Constitutional Law

The Constitution of India has some important features as compared to other constitutions to the globe. As Dr. B.R. Ambedkar, the Chairman of the Drafting Committee puts it, the framers had tried to accommodate the best features of other constitutions, keeping in view the odd problems and needs of India.

The following are the salient features of the Constitution of India.

1.1.2.1 Longest written constitution

Indian Constitution can be called the largest written constitution in the globe because of its provisions. In its original form, it consisted of 395 Articles and 8 Schedules to which additions have been made through subsequent changes. At present it contains 395 Articles and 12 Schedules, and more than 80 changes.

There are a variety of factors responsible for the lengthy size of the constitution. One major factors was that the framers of the constitution borrowed provisions from several sources and several other constitutions of the globe.

They have followed and reproduced the Government of India Act 1935 in providing matters of governmental detail. Secondly, it was necessary to make provisions for odd problems of India like SC/ST/OBC. Thirdly, provisions were made for elaborate centre-state relations in all aspects of their governmental and other activities. Fourthly, the size of the constitution became bulky, as provisions regarding the state government were also included. Further, a detail list of individual rights, directive principles of state policy and the details of government procedure were laid down to make the Constitution clear and unambiguous for the common citizen. Thus, the Constitution of India became an exhaustive and lengthy one.

1.1.2.2 Partly inflexible and Partly Flexible

The Constitution of India is neither purely inflexible nor purely flexible. There is a harmonious blend of inflexible ity and flexibility. The common law-making process by Indian Parliament can amend some parts of the Constitution. Certain provisions can be amended, only when a Bill for that purpose is passed in each house of Indian Parliament by a majority of the total membership of that house and, by a majority
of not less than two-third of the members of that house present and voting. Then there are certain other provisions, which can be amended by the second method, described above and are ratified by the legislatures of not less than one-half of the states before being presented to the President for his assent. It must also be noted that the power to initiate bills for amendment lies in Indian Parliament alone, and not in the state legislatures.

Pundit Nehru expressed in the Constituent Assembly, "While we want the Constitution to be as solid and permanent as we can make it, there is no permanence in Constitution. There should be certain flexibility. If you make anything inflexible and permanent, you stop the nation’s growth, the growth of a living, vital organic people."

1.1.2.3 A Democratic Republic

India is a democratic republic. It means that sovereignty rests with the people of India. They govern themselves through their representatives elected based on universal adult franchise. The President of India, the highest official of the state is elected for a fixed term. Although, India is a sovereign republic, yet it continues to be a member of the Commonwealth of Nations with the British Monarch as its head. Her membership of the Commonwealth does not compromise her position as a sovereign republic. The commonwealth is an association of free and independent nations. The British Monarch is only a symbolic head of that association.

1.1.2.4 Indian Parliamentary System of Government

India has adopted the Indian Parliamentary system as found in Britain. In this system, the executive is responsible to the legislature, and remains in power only as long and it enjoys the confidence of the Indian Parliament. The president of India, who remains in office for five years, is the nominal, titular or constitutional head. The Union Council of Ministers with the Prime Minister as its head is drawn from the elected representatives. It is collectively responsible to the House of People (Lok Sabha), and has to resign as soon as it loses the confidence of that house. The President, the nominal executive shall exercise his powers according to the advice of the Union Council of Ministers, the real executive. In the states also, the government is Indian Parliamentary in nature.

1.1.2.5 A Federation

Article 1 of the Constitution of India says: - "India that is Bharat shall be a Union of States." Though the word 'Federation' is not used, the government is federal. A state is federal when (a) there are two sets of governments and there is distribution of powers between the two, (b) there is a written constitution, which
is the supreme law of the land and (c) there is an independent judiciary to interpret the constitution and settle disputes between the centre and the states. All these features are present in India. There are two sets of government, one at the centre, the other at state level and the distribution of powers between them is quite detailed in our Constitution. The Constitution of India is written and the supreme law of the land. At the apex of single integrated judicial system, stands the Supreme Court which is independent from the control of the executive and the legislature.

But in spite of all these essential features of a federation, Indian Constitution has an unmistakable unitary tendency. While other federations like U.S.A. provide for dual citizenship, the India Constitution provides for single citizenship. There is also a single integrated judiciary for the whole country. The provision of All India Services, like the Indian Governmental Service, the India Police Service, and Indian Forest Service prove another unitary feature. Members of these services are recruited by the Union Public Service Commission on an All-India basis. Because these services are controlled by Union Government, to some extent this constitutes a constraint on the autonomy of states.

A significant unitary feature is the Emergency provisions in the Indian constitution. During the time of emergency, the Union Government becomes most powerful and the Union Indian Parliament acquires the power of making laws for the states. The Governor placed as the constitutional head of the state, acts as the agent of the centre and is intended to safeguard the interests of the centre. These provisions reveal the centralising tendency of our federation.

Prof. K.C. Wheare has rightly remarked that Indian Constitution provides, "a system of government which is quasi-federal, a unitary state with the subsidiary unitary features". The framers of the constitution expressed clearly that there exists the harmony of federalism and the unitarism. Dr. Ambedkar said, "The political system adopted in the Constitution could be both unitary as well as federal according to the requirement of time and circumstances". We can say that India has a "Cooperative federalism" with central guidance and state compliance.

1.1.2.6 Fundamental Rights

"A state is known by the rights it maintains", remarked Prof. H.J. Laski. The constitution of India affirms the basic principle that every individual is entitled to enjoy certain basic rights and part III of the Constitution deals with those rights which are known as fundamental rights. Originally there were seven categories of rights, but now they are six in number. They are (i) Right to equality, (ii) Right to freedom, (iii) Right against exploitation, (iv) Right to freedom of Religion, v) Cultural and Educational rights and vi) Right to constitutional remedies. Right to property (Article-31) originally a fundamental right has been omitted by the 44th Amendment Act. 1978. It is now a legal right.
These fundamental rights are justiciable and the individual can move the higher judiciary, that is the Supreme Court or the High Courts, if there is an encroachment on any of these rights. The right to move to the Supreme Court straight for the enforcement of fundamental rights has been guaranteed under Article 32 (Right to Constitutional Remedies). However, fundamental rights in India are not absolute. Reasonable restrictions can be imposed keeping in view the security-requirements of the state.

1.1.2.7 Directive Principles of State Policy

A novel feature of the Constitution is that it contains a chapter in the Directive Principles of State Policy. These principles are in the nature of directives to the government to implement them for establishing social and economic democracy in the country.

It embodies important principles like adequate means to livelihood, equal pay for both men and women, distribution of wealth so as to subserve the common good, free and compulsory primary education, right to work, public assistance in case of old age, unemployment, sickness and disablement, the organisation of village Panchayats, special care to the economically backward sections of the people etc. Most of these principles could help in making India a welfare state. Though not justiciable. These principles have been stated as; "fundamental in the governance of the country".

1.1.2.8 Fundamental Duties

A new part IV (A) after the Directive Principles of State Policy was incorporated in the constitution by the 42nd Amendment, 1976 for fundamental duties. These duties are:

i) To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;

ii) To cherish and follow the noble ideals, which inspired our national struggle for freedom;

iii) To uphold and protect the sovereignty, unity and integrity of India;

iv) To defend the country and render national service when called upon to do so;

v) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic, regional or sectional diversities, to renounce practices derogatory to the dignity of woman;

vi) to value and preserve the rich heritage of our composite culture;
vii) to protect and improve the natural environments including forests, lakes, rivers and wild life and to have compassion for living creatures;

viii) to develop scientific temper, humanism and the spirit of inquiry and reform;

ix) to safeguard public property and to abjure violence;

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

The purpose of incorporating these duties in the Constitution is just to remind the people that while enjoying their right as citizens, should also perform their duties for rights and duties are correlative.

1.1.2.9 Secular State

A secular state is neither religious nor irreligious, or anti-religious. Rather it is quite neutral in matters of religion. India being a land of many religions, the founding fathers of the Constitution thought it proper to make it a secular state. India is a secular state, because it makes no discrimination between individuals on the basis of religion. Neither it encourages nor discourages any religion. On the contrary, right to freedom of religion is ensured in the Constitution and people belonging to any religious group have the right to profess, practice or propagate any religion they like.

1.1.2.10 An Independent Judiciary

The judiciary occupies an important place in our Constitution and it is also made independent of the legislature and the executive. The Supreme Court of India stands at the apex of single integrated judicial system. It acts as protector of fundamental rights of Indian citizens and guardian of the Constitution. If any law passed by the legislature or action taken by the executive contravenes the provisions of the Constitution, they can be declared as null and void by the Supreme Court. Thus, it has the power of judicial review. But judicial review in India constitutes a middle path between the American judicial supremacy in one hand and British Indian Parliamentary supremacy in the other.

1.1.2.11 Single Citizenship

The Constitution of India recognises only single citizenship. In the United States, there is provision of dual citizenship. In India, we are citizens of India only, not of the respective states to which we belong. This provision would help in promoting unity and integrity of the nation.
1.1.3 Comparison of Indian Constitution with other major Constitutions

1.1.3.1 The difference between Indian Constitution and American Constitution?

1.1.3.1.1 Indian Constitution

1. Indian federation is not the result of an agreement between States.

2. There is only one citizenship for both the States and Union.

3. Each State sends M.P.s to the Indian Parliament depending upon the population of the State.

4. There is no principle of quality between the states.

5. There are three Lists- Union List-(First List); State List (Second List); and Concurrent List – (Third List). The Indian Parliament can legislate only the subjects of the State List and Concurrent List. The States are not sovereign. The Union can encroach upon State's Lists.

6. No State can separate from Indian Territory.

7. The Indian Parliament, i.e. Center has been residuary powers.

8. There is only one Constitution for Union and States.

9. India achieved uniformity in basic civil and criminal laws, except personal laws in some matters.

10. The Indian Union is an indestructible Union of destructible States. The area, identity of a state can be changed by Indian Parliament. The States can be destructible. But the Union can not be changed. The Union is indestructible.

11. The Central Government has been the power to form a new State, to increase the area of any State, to diminish the area of any State; to alter the boundaries of any State; to alter the name of any State; and to form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a partnership the of any State(Article 3)

12. The word —Federal” is not at all used in our Constitution. Simply the framers described —Union”.

13. The Supreme Court has been given very wide powers, including appellate (Civil and criminal) jurisdiction.
14. No referendum is necessary. For the amendment of the Constitution, the people need not give their consent. It is sufficient to get the majority of M.P.s and in certain cases, the majority of the State legislatures.

1.1.3.1.2 **American Constitution**

1. American Federation is the result of an agreement between States.

2. There are dual citizenships- one Federal Citizenship- another State Citizenship.

3. Each State sends equal number of representatives to the Senate.

4. There is principle of equality between the States, irrespective of its population, extent etc.

5. There is a clear division of legislative powers among Federal and Units. The Union and as well as each Unit is sovereign in its sphere. The Union is sovereign in their respective State legislative fields. Strictly one cannot trench upon the other’s area of power. Each is confined to its own sphere.

6. The State, if wants, can separate itself with the Federal, being the relation is based only the ‘Agreement’.

7. The States have residuary powers.

8. There are two Constitutions-

9. There are different civil and criminal laws, differing from State to State.

10. Union is based only the agreement. Any State can separate at any time. When the States are separated, there will be no Union at all. Hence, it is called that the American Union is an indestructible Union of indestructible States.

11. The American Federal Government has been no such power.

12. The word—"Federal” is used in the Constitution very often, and still now it is used very frequently.

13. The Supreme Court of American has not been given such type of appellate jurisdiction.

14. For the amendment of Federal Constitution, a referendum must be conducted. Amendment to the Constitution can be made only with the consent of the people.
1.1.3.1.3 British Constitution

- Indian Parliamentary form of government
- The idea of single citizenship
- The idea of the Rule of law
- Institution of Speaker and his role
- Lawmaking procedure
- Procedure established by Law u/a 13

1.1.4 Main objects of Indian Constitutional Law

The underlying principles of the Constitution were laid down by Jawaharlal Nehru in his Objectives Resolution:

- India is an Independent, Sovereign, Republic;
- India shall be a Union of erstwhile British Indian territories, Indian States, and other parts outside British India and Indian States as are willing to be a part of the Union;
- Territories forming the Union shall be autonomous units and exercise all powers and functions of the Government and administration, except those assigned to or vested in the Union;
- All powers and authority of sovereign and independent India and its constitution shall flow from the people;
- All people of India shall be guaranteed and secured social, economic and political justice; equality of status and opportunities before law; and fundamental freedoms - of talk, expression, belief, faith, worship, vocation, association and action - subject to law and public morality;
- The minorities, backward and tribal areas, depressed and other backward classes, shall be provided adequate safeguards;
- The territorial integrity of the Republic and its sovereign rights on land, sea and air shall be maintained according to justice and law of civilized nations;
- The land would make full and willing contribution to the promotion of world peace and welfare of mankind.

Review Questions
1. Define the Governing Principles of Constitution?
2. Explain the Historical development of Indian Constitution?
3. Explain the features of Indian Constitutional Law?
4. Explain the Main objects of Indian Constitutional Law?
Discussion Questions

Discuss the Comparison of Indian Constitution with other major Constitutions?
Chapter 1.2- Federalism

Learning Objectives

- To define the federalism.
- To explain the federalism in India.
- To explain the Division of powers between Center and State.
- To describe the Impact of coalition Govt. in Center.

1.2.1 What is a federal Govt.?

A federal system is both a political and philosophical concept that describes how power is given to governments. Federal systems may vary widely in application, but all feature a central government with specific powers over the whole union. There are many countries in the modern world that operate using a federal government, including India, Australia, Germany, Brazil, the United States, and Canada.

Federal governments are often controversial for a primary reason: although many agree a central government is essential to the running of a large, diverse nation, how much power the government is unclear. In the United States, for instance, there is a running controversy over state versus federal rights that has been going since the constitution was made. The European Union, or EU, has faced similar argument since its creation in the 1990s. Many are uncomfortable with the amount of power given to federal governments, which often are comprised of appointed officials as well as those elected by votes.

In general, a federal system allows powers that concern the whole nation to be granted to the federal government. For instance, in most countries with a federal system, only the national government can declare war on another country. State power is more focused on issues that directly affect its residents only; Nevada, for example, cannot dictate what laws Montana enacts. Confusion often arises over the designation of an issue to national or state government levels.

The United States is considered the oldest federal nation, but it was a matter of considerable debate amongst the founding fathers. Anti-Federalists such as Thomas Jefferson and Patrick Henry argued that a powerful central government would only replace the monarchy system and allow for considerable curbing of the liberty the young country was forcefully seeking. During the Civil War, Federalism in America faced another test, when several states seceded from the Union and were only brought back through open warfare. Many experts cite the Civil War as a defining moment in terms of Federalism, suggesting that the national government made it at last clear that the country would be unified under a federal government at any cost.
Other countries have had more peaceful transitions into a federal system. Switzerland, the world's second-oldest federalist country, faced little controversy in establishing their direct democracy system. In Brazil, the federal system was enacted by royal decree in the 1890s following a military coup, but has since been met with re-approval by each successive government.

Federalism is a constantly evolving system with rules and adjustments particular to each country that adopts it. It often requires a consistent dialogue between local, state, and national governing bodies, which many experts suggest is a necessary and beneficial relationship. Unlike the ancient monarchy and autocrat systems, a federal government rarely suggests that it is made perfect and unquestionable by a higher power, as was the case for thousands of years in many countries. Instead, it propels a constant stream of arguments and changes that adjust over time, with the hopes of continually creating, in the words of the first federalist constitution, "a more perfect union."

1.2.2 Federal Principles & Conditions for federation

Here is a list of reasons for a federal order rather than separate states or secession.

- Federations may foster peace, in the senses of preventing wars and preventing fears of war, in several ways. States can join a (con)federation to become jointly powerful enough to dissuade external aggressors, and/or to prevent aggressive and preemptive wars among themselves. The European federalists Altieri Spinelli, Ernesto Rossi and Eugenio Colorni argued the latter in the 1941 Ventotene Manifesto: Only a European federation could prevent war between totalitarian, aggressive states. Such arguments assume, of course, that the (con)federation will not become more aggressive than each state separately, a point Mill argued.

- Federations can promote *economic prosperity* by removing internal barriers to trade, through economies of scale, by establishing and maintaining inter-member unit trade agreements, or by becoming a sufficiently large global player to affect international trade regimes (for the latter regarding the EU, cf. Keohane and Nye 2001, 260).

- Federal arrangements may protect individuals against political authorities by constraining state sovereignty, placing some powers with the center. By entrusting the center with authority to intervene in member units, the federal arrangements can protect minorities' human rights against member unit authorities (Federalist, Watts 1999). Such arguments assume, of course, that abuse by the center is less likely.

- Federations can facilitate some objectives of sovereign states, such as credible commitments, certain kinds of coordination, and control over externalities, by transferring some
powers to a common body. Since cooperation in some areas can ‘spill over’ and create demands for further coordination in other sectors, federations often exhibit creeping centralization.

- Federal arrangements may enhance the political influence of formerly sovereign governments, both by facilitating coordination, and particularly for small states—by giving these member units influence or even veto over policy making, rather than remaining mere policy takers.

- Federal political orders can be preferred as the appropriate form of nested organizations, for instance in ‘organic’ conceptions of the political and social order. The federation may promote cooperation, justice or other values among and within member units as well as among and within their constituent units, for instance by monitoring, legislating, enforcing or funding agreements, human rights, immunity from interference, or development. Starting with the family, each larger unit responsible for facilitating the flourishing of member units and securing common goods beyond their reach without a common authority. Such arguments have been offered by such otherwise divergent authors as Althusius, the Catholic traditions of subsidiarity as expressed by popes Leo XIII (1891) and Pius XI (1931), and Proudhon.

1.2.2.1 Reasons for preferring federal orders over a unitary state

Here is a list of reasons for preferring federal orders over a unitary state:

- Federal arrangements may protect against central authorities by securing immunity and non-domination for minority groups or nations. Constitutional allocation of powers to a member unit protects individuals from the center, while interlocking arrangements provide influence on central decisions via member unit bodies (Madison, Hume, Goodin 1996). Member units may thus check central authorities and prevent undue action contrary to the will of minorities: ―A great democracy must either sacrifice self-government to unity or preserve it by federalism. The coexistence of several nations under the same State is a test, as well as the best security of its freedom … The combination of different nations in one State is as necessary a condition of civilized life as the combination of men in society‖ (Acton 1907, 277).

- More specifically, federal arrangements can accommodate minority nations who aspire to self determination and the preservation of their culture, language or religion. Such autonomy and immunity arrangements are clearly preferable to the political conflicts that might result from such groups' attempts at secession. Central authorities may respond with human rights abuses, civil wars or ethnic cleansing to prevent such secessionist movements.
Federal orders may increase the opportunities for citizen participation in public decision-making; through deliberation and offices in both member unit and central bodies that ensures character formation through political participation among more citizens (Mill 1861, ch. 15).

Federations may facilitate efficient preference maximization more generally, as formalized in the literature on economic and fiscal federalism—though many such arguments support decentralization rather than federalism proper. Research on fiscal federalism addresses the optimal allocation of authority, typically recommending central redistribution but local provision of public goods. Federal arrangements may allow more optimal matching of the authority to create public goods to specific affected subsets of the populations. If individuals' preferences vary systematically by territory according to external or internal parameters such as geography or shared tastes and values, federal—or decentralized—arrangements that allow local variation may be well suited for several reasons. Local decisions prevent overload of centralised decision-making, and local decision-makers may also have a better grasp of affected preferences and alternatives, making for better service than would be provided by a central government that tends to ignore local preference variations (Smith 1776, 680). Granting powers to population subsets that share preferences regarding public services may also increase efficiency by allowing these subsets to create such internalities and club goods at costs borne only by them (Musgrave 1959, 179–80, Olson 1969, Oates' 1972 Decentralization Theorem).

Federal arrangements can also shelter territorially based groups with preferences that diverge from the majority population, such as ethnic or cultural minorities, so that they are not subject to majority decisions severely or systematically contrary to their preferences. Non-unitary arrangements may thus minimize coercion and be responsive to as many citizens as possible (Mill 1861 ch. 15, Elazar 1968; Lijphart 1999). Such considerations of economic efficiency and majority decisions may favor federal solutions, with only indivisibilities, economies of scale, externalities, and strategic requirements ... acceptable as efficiency arguments in favor of allocating powers to higher levels of government” (Padou-Schioppa 1995, 155).

Federal arrangements may not only protect existing clusters of individuals with shared values or preferences, but may also promote mobility and hence territorial clustering of individuals with similar preferences. Member unit autonomy to experiment may foster competition for individuals who are free to move where their preferences are best met. Such mobility towards member units with like-minded individuals may add to the benefits of local autonomy over the provision of public services—absent economies of scale and externalities (Tiebout 1956, Buchanan 2001)—though the result may be that those with costly needs and who are less mobile are left worse off.
1.2.2.2 Issues of Constitutional and Institutional Design

Federal political orders require attention to several constitutional and other institutional issues, some of which raise peculiar and intriguing issues of normative political theory (Watts 1998; Norman 2006).

- Composition: How to determine the boundaries of the member units, e.g., along geographical, ethnic or cultural lines; whether establishment of new member units from old should require constitutional changes, whether to allow secession and if so how, etc.
- Distribution of Power: The allocation of legislative, executive, judicial and constitution-amending power between the member units and the central institutions. In asymmetric arrangements some of these may differ among member units.
- Power Sharing: The form of influence by member units in central decision-making bodies within the interlocking political systems.

These tasks must be resolved taking due account of several important considerations noted below.

1.2.2.3 Sources of Stability

As political orders go, federal political arrangements pose peculiar problems concerning stability and trust. Federations tend to drift toward disintegration in the form of secession, or toward centralization in the direction of a unitary state.

Such instability should come as no surprise given the tensions typically giving rise to federal political orders in the first place, such as tensions between majority and minority national communities in multinational federations. Federal political orders are therefore often marked by a high level of ‘constitutional politics’. The details of their constitutions and other institutions may affect these conflicts and their outcomes in drastic ways. Political parties often disagree on constitutional issues regarding the appropriate areas of member unit autonomy, the forms of cooperation and how to prevent fragmentation. Such sampling bias among states that federalize to hold together makes it difficult to assess claims that federal responses perpetuate cleavages and fuel rather than quell secessionist movements. Some nevertheless argue that democratic, interlocking federations alleviate such tendencies (Simeon 1998, Simeon and Conway 2001, Linz 1997; cf. McKay 2001, Filippov, Ordeshook and Shvetsova 2004).

Many authors note that the challenges of stability must be addressed not only by institutional design, but also by ensuring that citizens have an ‘overarching loyalty’ to the federation as whole in addition to loyalty toward their own member unit (Franck 1968, Linz 1997). The legitimate bases, content and division of such a public dual allegiance are central topics of political philosophies of federalism (Norman...
1995a, Choudhry 2001). Some accept (limited) appeals to considerations such as shared history, practices, culture, or ethnicity for delineating member units and placing certain powers with them, even if such "communitarian" features are regarded as more problematic bases for (unitary) political orders (Kymlicka 1995, Habermas 1996, 500). The appropriate consideration that voters and their member unit politicians should give to the interests of others in the federation in interlocking arrangements must be clarified if the notion of citizen of two commonwealths is to be coherent and durable.

1.2.2.4 Division of Power

Another and related central philosophical topic is the critical assessment of alleged grounds for federal arrangements in general, and the division of power between member units and central bodies in particular, indicated in the preceding sections. Recent contributions include Knop et al. 1995, Kymlicka 2001, Kymlicka and Norman 2000, Nicolaidis and Howse 2001, Norman 2006. Among the important issues, especially due to the risks of instability, are:

- How the powers should be allocated, given that they should be used—but may be abused—by political entrepreneurs at several levels to affect their claims. The concerns about stability require careful attention to the impact of these powers on the ability to create and maintain "dual loyalties" among the citizenry.
- How to ensure that neither member units nor the central authorities overstep their jurisdiction. As Mill noted, "The power to decide between them in any case of dispute should not reside in either of the governments, or in any functionary subject to it, but in an umpire independent of both." (1861) Such a court must be sufficiently independent, yet not utterly unaccountable. Many scholars seem to detect a centralising tendency among such courts (Watts 1998).
- How to maintain sufficient democratic control over central bodies when these are composed by representatives of the executive branch of member units? The chains of accountability may be too long for adequate responsiveness. This is part of the core concerns about a "democratic deficit" in the European Union (Watts 1998, Føllesdal and Hix 2006).
- Who shall have the authority to revise the constitutionally embedded division of power? Some hold that a significant shift in national sovereignty occurs when such changes may occur without the unanimity characteristic of treaties.

The "Principle of Subsidiarity" has often been used to guide the decisions about allocation of power. This principle has recently received attention owing to its inclusion in European Union treaties. It holds that authority should rest with the member units unless allocating them to a central unit would ensure higher comparative efficiency or effectiveness in achieving certain goals. This principle can be specified in
several ways, for instance concerning which units are included, which goals are to be achieved, and who has the authority to apply it. The principle has multiple pedigrees, and came to recent political prominence largely through its role in quelling fears of centralization in Europe—a contested role which the principle has not quite filled (Fleiner and Schmitt 1996, Burgess and Gagnon 1993, Føllesdal 1998).

1.2.2.5 Distributive Justice

Regarding distributive justice, federal political orders must manage tensions between ensuring member unit autonomy and securing the requisite redistribution within and among the member units. Indeed, the Federalists regarded federal arrangements as an important safeguard against “the equal division of property” (Federalist 10). The political scientists Linz and Stepan may be seen as finding support for the Federalists’ hypothesis: Compared to unitary states in the OECD, the ‘coming together’ federations tend to have higher child poverty rate in solo mother households and a higher percentage of population over-sixty living in poverty. Linz and Stepan explain this inequality as stemming from the ‘demos constraining’ arrangements of these federations, seeking to protect individuals and member units from central authorities, combined with a weak party system. By comparison, the Constitution of Germany (not a ‘coming together’ federation) explicitly requires equalization of living conditions among the member units (Art. 72.2) Normative arguments may also support some distributive significance of federal arrangements, for instance owing to legitimate trade-offs between member unit autonomy and redistributive claims among member units (Follesdal 2001). A central normative issue is to what extent a shared culture and bonds among citizens within a historically sovereign state reduce the claims on redistribution among the member units.

1.2.2.6 Democratic Theory

Federalism raises several challenges to democratic theory, especially as developed for unitary states. Federal arrangements are often more complex, thereby challenging standards of transparency and accountability. The restricted political agendas of each center of authority also require defense (Dahl 1983; Braybrooke 1983). One of several particular issues concern the standing of member units (for further issues, cf., Norman 2006, 144–150).

The power that member units wield in federations often restricts or violates majority rule, in ways that merit careful scrutiny. Democratic theory has long been concerned with how to prevent domination of minorities, and many federal political orders do so by granting member units some influence over common decisions. Federal political orders typically influence individuals’ political influence by skewing their voting weight in favor of citizens of small member units, or by granting member unit representatives veto rights on central decisions. Minorities thus exercise control in apparent violation of principles of
political equality and one-person-one-vote—more so when member units are of different size. These features raise fundamental normative questions concerning why member units should matter for the allocation of political power among individuals who live in different member units.

1.2.2.7 Politics of Recognition

Many federal political orders accommodate minority groups in two ways discussed above: both through a division of power, and by granting them influence over common decisions. These measures of identity politics can be valuable ways to give public acknowledgment and recognition to groups and their members, sometimes on the very basis of previous domination. But identity politics also create challenges (Gutman 1994), especially in federal arrangements that face greater risks of instability and must maintain citizens' dual political loyalties. Self-government arrangements may threaten the federal political order: "demands for self-government reflect a desire to weaken the bonds with the larger community and, indeed, question its very nature, authority and permanence" (Kymlicka and Norman 1994, 375). The emphasis on "recognition and institutionalization of difference could undermine the conditions that make a sense of common identification and thus mutuality possible" (Carens 2000, 193).

Federations are often thought to be sui generis, one-of-a-kind deviations from the ideal-type unitary sovereign state familiar from the Westphalian world order. Indeed, every federation may well be federal in its very own way, and not easy to summarize and assess as an ideal-type political order. Yet the phenomenon of non-unitary sovereignty is not new, and federal accommodation of differences may well be better than the alternatives. When and why this is so has long been the subject of philosophical, theoretical and normative analysis and reflection. Such public arguments may themselves contribute to develop the overarching loyalty required among citizens of stable, legitimate federations, who must understand themselves as members of two commonwealths.

1.2.3 Patterns of federal Govt – USA and India

1.2.3.1 Federalism in the United States

Federalism in the United States is the evolving relationship between U.S. state governments and the federal government of the United States. Since the founding of the country, and particularly with the end of the American Civil War, power shifted away from the states and towards the national government.
1.2.3.1 Federalism in the 1790s

Federalism was the most influential political movement arising out of discontent with the Articles of Confederation, which focused on limiting the authority of the federal government. For example, the Articles allowed the Continental Congress the power to sign treaties or declare war, but it was essentially powerless to do so because all major decisions required a unanimous vote.

The movement was greatly strengthened by the reaction to Shays' Rebellion of 1786–1787, which was an armed uprising of yeoman farmers in western Massachusetts. The rebellion was fueled by a poor economy that was created, in part, by the inability of the federal government to deal effectively with the debt from the American Revolution. Moreover, the federal government had proven incapable of raising an army to quell the rebellion, so that Massachusetts had been forced to raise its own.

In 1787, fifty-five delegates met at a Constitutional convention in Philadelphia and generated ideas of a bicameral legislature (United States Congress), balanced representation of small and large states (Great Compromise), and checks and balances. James Madison stated in a long pre-convention memorandum to delegates that because "one could hardly expect the state legislatures to take enlightened views on national affairs", stronger central government was necessary. This convention almost immediately dropped its original mandate and instead set about constructing a new Constitution of the United States. Once the convention concluded and released the Constitution for public consumption, the Federalist movement became focused on getting the Constitution ratified.

The most forceful defense of the new Constitution was The Federalist Papers, a compilation of 85 anonymous essays published in New York City to convince the people of the state to vote for ratification. These articles, written by Alexander Hamilton and James Madison, with some contributed by John Jay, examined the benefits of the new, proposed Constitution, and analyzed the political theory and function behind the various articles of the Constitution. The Federalist Papers remains one of the most important documents in American political science.

Those opposed to the new Constitution became known as the "Anti-Federalists". They generally were local rather than cosmopolitan in perspective, oriented to plantations and farms rather than commerce or finance, and wanted strong state governments and a weak national government. The Anti-Federalist critique soon centered on the absence of a Bill of Rights, which Federalists promised to provide.

Because George Washington lent his prestige to the Constitution and because of the ingenuity and organizational skills of its proponents, the Constitution was ratified by all the states. The outgoing Congress under the Articles of Confederation scheduled elections for the new government, and set March
4, 1789 as the date that the new government would take power. In 1789, Congress submitted twelve articles of amendment to the states. Ten of these articles, written by Madison, achieved passage on December 15, 1791 and became the Bill of Rights. The Tenth Amendment set the guidelines for federalism in the United States.

1.2.3.1.2 Federalist Party

As soon as the first Federalist movement dissipated, a second one sprang up to take its place. This one was based on the policies of Alexander Hamilton and his allies for a stronger national government, a loose construction of the Constitution, and a mercantile (rather than agricultural) economy. As time progressed, the factions which adhered to these policies organized themselves into the nation's first political party, the Federalist Party, and the movement's focus and fortunes began to track those of the party it spawned.

While the Federalist movement of the 1780s and the Federalist Party were distinct entities, they were related in more than just a common name. The Democratic-Republican Party, the opposition to the Federalist Party, emphasized the fear that a strong national government was a threat to the liberties of the people. They stressed that the national debt created by the new government would bankrupt the country, and that federal bondholders were paid from taxes paid by honest farmers and workingmen. These themes resonated with the Anti-Federalists, the opposition to the Federalist movement of the 1780s. As Norman Risjord has documented for Virginia, of the supporters of the Constitution in 1788, 69% joined the Federalist party, while nearly all (94%) of the opponents joined the Republicans. 71% of Thomas Jefferson's supporters in Virginia were former anti-federalists who continued to fear centralized government, while only 29% had been proponents of the Constitution a few years before. In short, nearly all of the opponents of the Federalist movement became opponents of the Federalist Party.

The movement reached its zenith with the election of an overtly Federalist President, John Adams. However, with the defeat of Adams in the election of 1800 and the death of Hamilton, the Federalist Party began a long decline from which it never recovered. What finally finished off the Federalist party was the Hartford Convention of 1814, in which five New England states gathered to discuss several constitutional amendments necessary to protect New England's interests in regards to the blockade of their ports by the British during the War of 1812. The threat of secession was also proposed during these secret meetings. Three delegates were sent to Washington, DC to negotiate New England's terms only to discover the signing of the Treaty of Ghent, ending the war with the British. The Federalists were then seen by many as traitors to the union.
1.2.3.1.3 Federalism under the Marshall Court

The United States Supreme Court under Chief Justice John Marshall played an important role in defining the power of the federal and state governments during the early 19th century. As the U.S. Constitution does not specifically define many dividing lines between the layers of government, the Supreme Court settled the issue in New York. The question was answered particularly in the cases, *McCulloch v. Maryland* and *Gibbons v. Ogden*, which broadly expanded the power of the national government.

1.2.3.1.4 Dual Federalism

Despite Chief Justice Marshall's strong push for the federal government, the court of his successor, Roger B. Taney (1835–1863), decided cases that favored equally strong national and state governments. The basic philosophy during this time was that the U.S. Government ought to be limited to its enumerated powers and that all others belonged to the states. Both the sixteenth and the seventeenth amendment bolstered the power of the national government, and divided state and federal power.

1.2.3.1.5 Between Dual Federalism and the New Deal

Following the Taney court and the rise of Dual federalism, the division of labor between federal, state, and local governments was relatively unchanged for over a century. Political scientist Theodore J. Lowi summarized the system in place during those years in *The End of the Republican Era*

Nevertheless, the modern federal apparatus owes its origins to changes that occurred during the period between 1861 and 1933. While banks had long been incorporated and regulated by the states, the National Bank Acts of 1863 and 1864 saw Congress establish a network of national banks that had their reserve requirements set by officials in Washington. During World War I, a system of federal banks devoted to aiding farmers was established, and a network of federal banks designed to promote home ownership came into existence in the last year of Herbert Hoover's administration. Congress used its power over interstate commerce to regulate the rates of interstate (and eventually intrastate) railroads and even regulated their stock issues and labor relations, going so far as to enact a law regulating pay rates for railroad workers on the eve of World War I. During the 1920s, Congress enacted laws bestowing collective bargaining rights on employees of interstate railroads and some observers dared to predict it would eventually bestow collective bargaining rights on persons working in all industries. Congress also used the commerce power to enact morals legislation, such as the Mann Act of 1907 barring the transfer of women across state lines for immoral purposes, even as the commerce power remained limited to interstate transportation—it did not extend to what were viewed as intrastate activities such as manufacturing and mining.
As early as 1913, there was talk of regulating stock exchanges, and the Capital Issues Committee formed to control access to credit during World War I recommended federal regulation of all stock issues and exchanges shortly before it ceased operating in 1921. With the Morrill Land-Grant Acts Congress used land sale revenues to make grants to the states for colleges during the Civil War on the theory that land sale revenues could be devoted to subjects beyond those listed in Article I, Section 8 of the Constitution. On several occasions during the 1880s, one house of Congress or the other passed bills providing land sale revenues to the states for the purpose of aiding primary schools. During the first years of twentieth century, the endeavors funded with federal grants multiplied, and Congress began using general revenues to fund them—thus utilizing the general welfare clause's broad spending power, even though it had been discredited for almost a century (Hamilton's view that a broad spending power could be derived from the clause had been all but abandoned by 1840).

During Herbert Hoover's administration, grants went to the states for the purpose of funding poor relief. The Supreme Court began applying the Bill of Rights to the states during the 1920s even though the Fourteenth Amendment had not been represented as subjecting the states to its provisions during the debates that preceded ratification of it. The 1920s also saw Washington expand its role in domestic law enforcement. Disaster relief for areas affected by floods or crop failures dated from 1874, and these appropriations began to multiply during the administration of Woodrow Wilson (1913-1921). By 1933, the precedents necessary for the federal government to exercise broad regulatory power over all economic activity and spend for any purpose it saw fit were almost all in place. Virtually all that remained was for the will to be mustered in Congress and for the Supreme Court to acquiesce.

1.2.3.2 Indian Federalism

Part XI of the Indian constitution defines the power distribution between the federal government (the Centre) and the States in India. This part is divided between legislative and administrative powers. The legislative section is divided into three lists: Union list, States list and Concurrent list. Unlike the federal governments of the United States, Switzerland or Australia, residual powers remain with the Centre, as with the Canadian federal government.

Federalism in India has a strong bias towards the Union Government. Some unique features of federalism in India are:

- There is no equality of state representation. Representation in the Indian Parliament can vary widely from one state to another depending on a number of factors including demography and total land area.
- No double citizenship, i.e. no separate citizenship for country and state.
- The consent of a state is not required by the Indian Parliament to alter its boundaries.
- No state, except Jammu and Kashmir, can draw its own Constitution.
- No state has the right to secede.
- No division of public services.

**Legislative powers**

The power of the states and the Centre are defined by the constitution and the legislative powers are divided into three lists. i.e.

1.2.3.2.1 **Union List**

Union list consists of 99 items (previously 97 items) on which the Indian Parliament has exclusive power to legislate with including: defence, armed forces, arms and ammunition, atomic energy, foreign affairs, war and peace, citizenship, extradition, railways, shipping and navigation, airways, posts and telegraphs, telephones, wireless and broadcasting, currency, foreign trade, inter-state trade and commerce, banking, insurance, control of industries, regulation and development of mines, mineral and oil resources, elections, audit of Government accounts, constitution and organisation of the Supreme Court, High Courts and union public service commission, income tax, custom duties and export duties, duties of excise, corporation tax, taxes on capital value of assets, estate duty, terminal taxes.

1.2.3.2.2 **State List**

State list consists of 61 items (previously 66 items). Uniformity is desirable but not essential on items in this list: maintaining law and order, police forces, healthcare, transport, land policies, electricity in state, village administration, etc. The state legislature has exclusive power to make laws on these subjects. But in certain circumstances, the Indian Parliament can also make laws on subjects mentioned in the State list. Then the Indian Parliament has to pass a resolution with 2/3rd majority that it is expedient to legislate on this state list in the national interest.

Though states have exclusive powers to legislate with regards to items on the State list, articles 249, 250, 252, and 253 state situations in which the federal government can legislate on these items.

1.2.3.2.3 **Concurrent List**

Concurrent list consists of 52 items (previously 47 items). Uniformity is desirable but not essential on items in this list: Marriage and divorce, transfer of property other than agricultural land, education, contracts, bankruptcy and insolvency, trustees and trusts, civil procedure, contempt of court, adulteration
of foodstuffs, drugs and poisons, economic and social planning, trade unions, labour welfare, electricity, newspapers, books and printing press, stamp duties.

1.2.3.2.4 Administrative powers

The Union and states have independent executive staffs fully controlled by their respective governments and executive power of the states and the Centre are extended on issues they are empowered to legislate.

1.2.3.2.5 Union control over states

According to the Article 356 of the Constitution of India, states must exercise their executive power in compliance with the laws made by the Central government. Article 357 calls upon every state not to impede on the executive power of the Union within the states. Articles 352 to 360 contain provisions which empower the Centre to take over the executive of the states on issues of national security or on the breakdown of constitutional machinery. Governors are appointed by the Central government to oversee states. The president can dissolve the state assembly under the recommendation of the council of ministers by invoking Article 356 if and when states fail to comply with directives given by the Centre.

The Constitution provides that, except in a few cases, union law trumps state law. If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Indian Parliament which Indian Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, the law made by Indian Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void. There is an exception to this in cases "where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Indian Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State. Provided that nothing in this clause shall prevent Indian Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

1.2.4 Application of principle of federalism in India

A constitution is the legal document in which various governing principles are established, functions and procedural aspects of the government are specified under which different organs of the government work. Constitution is the supreme law of the land which is ascertained by Kelsen as the —Grund Norm” in his
American Constitution is the pioneer of all the federal constitutions followed by the Canadian and Australian constitution respectively. It may be traced that the Federal principal was adopted in the Government of India Act 1935 and the same was reinserted in the draft constitution by the Constitution Assembly.

Dr. B. R. Amedkar feels it convenient to describe Indian constitution as both Federal and Unitary. He opines that it works as a federal constitution under the normal condition and as Unitary during the war or crisis. Federal Principle: The principle may be understood as, the method of dividing powers, so that the general and regional governments are each within a sphere of co-ordinate and independent; and not subordinate to each other - Professor Wheare. The existence of co-ordinate authorities independent of each other is the gift of the federal principal where as the supreme sovereign power is vested with the only central organ which ultimately controls the state in a unitary form of government. Federalism is not static but a dynamic concept. It is always in the process of evolution and constant adjustments. It is also recognized that federalism is one of the basic features of the Constitution in Kesavananda Bharathi’s case.

1.2.4.1 Federal Features:

- There must be a written and rigid Constitution. Constitution being the supreme law of the land, it must be rigid so as to uphold its supremacy.

- Written constitution is essential if federal government is to work well.

- Distribution of powers, between the central Government and State governments is the most essential and ordained feature of a federal constitution. The distribution must be such that both the governments should exist in a co ordinate and independent in their own spheres.

- Independent and impartial judiciary is to uphold the supremacy of the constitution by interpreting the various provisions and settling the disputes between the laws made by the governments and the Constitution.

In order to be called federal it is not necessary that a Constitution should adopt federal principle completely. It is enough if the federal principle is the pre-dominant principle in the constitution. The mere presence of Unitary features in a constitution which may make the Constitution ‘quasi federal’ in law, does not prevent the Constitution from being pre-dominantly federal in practice. (H. M. Seervai). Professor Whear described India as neither Federal nor Unitary but ‘Quasi Federal’. Indian Constitution came into existence on 26th January 1950 adopting the federal principle pre dominant. The doctrine of
pre dominance as ascertained by HM Seervai does not hold good as the degree of pre dominance is negligible compared to that of other Federal Constitutions.

According to M. C Setalva, ” the constitution of India having been drawn in mid 20th Century presents a modified form of federation suitable to the special requirements of the Indian society. ” Article 1 of the Constitution describes as a Union of States. Dr B. R. Ambedkar justifies it to be advantageous to describe India to be a union of States, though it is federal in nature. Accordingly, during the crisis it shall be Unitary in nature. Prof. Alexandrowitz says that India is supposed to have quasi federation mainly because of the articles 3, 249, 352 to 360 and 371.

It may be aptly be stated that he supports Lord Ambedkar’s view. Power to alter the boundaries: Article 3 empowers the Indian Parliament to alter the boundaries of states even without the consent of the states which dilutes the federal principle. State of West Bengal in its memorandum submitted to the President of India compares article 3 to be a damocle sword hanging over the heads of the states. HM Seervai defends the power of the Indian Parliament to alter the boundaries of the states that ” by extra constitutional agitations the states have forced Indian Parliament to alter the boundaries of States”

In practice, therefore the federal principle has not been violated. ” But, Seervai agrees that the power vested in the Indian Parliament was a serious departure from the federal principle. History reveals that there has been no answer or rationale basis for such a serious departure. Distribution of powers:

Distribution of powers is one of the pre requisites of a federation of states. The object for which federal state is formed involves a division of authority between the national government and the separate states- Prof. A. V. Dicey.

Indian Parliament can legislate with respect to a matter under the State List a) in the national interest(Art. 249) or b) if a proclamation of emergency is in force (A250). The provisions resolving inconsistency between central and state laws is also weighed in favour of the centre (A251 and 254)-AG Noorani. Gwyer C. J. observed that the conferment of residuary power upon the centre has been done following the Canadian constitution. The U. S and the Australian constitutions which are the indisputably federal confer the residuary power on the states.

The non congress opposition parties conferences [held in 1986-87] resolved to demand for the conferment of residuary power on the states as a measure to strengthen the federal principle.

• Under the present provisions of our Indian Constitution the States are entitled to a share of the centers revenues derived from only a few taxes principally income tax and excise duties ( @ 45% approximately)
• Finance Commission constituted under Article 352 as the balance wheel of the Indian Federal financial relationship

• Article 365 dilutes the Federal Principle by imposing President’s Rule in the State which fails to comply with or direction of the Center. Seervai defends the power as it is open for judicial review. But it may be noted that the imposition of President’s Rule effects the independence of the States. However, practically speaking when once a democratically constituted government is de throned through such imposition of President’s Rule it is not only un-democratic but it costs burden on the exchequer of the State for conducting re-elections. The judicial review is a time consuming process and sometimes, by the time the decision is given the tenure of office of the government may expire. Therefore, conferment of such blanket power on the Center is undesirable as its effects the democratic process and dilutes the Federal Principle.

• President is competent proclaim Emergency in any part or whole of the country under Article 352 if he is satisfied that grave emergency exists. The 44th Amendment to the Constitution replaced the words, ”internal disturbance” and inserted ”armed rebellion”. The proclamation of Emergency in 1975 by the unilateral decision of the then Prime Minister of India Mrs Indira Gandhi, led to the Amendment of the Constitution and the power has been much misused during the emergency.

• In Rajasthan v Union of India the Supreme Court has re iterated its dictum in West Bengal v. Union that the extent of Federalism is largely watered down by the needs of progress and development of the country.

• State of West Bengal submitted a memorandum suggesting certain changes in our Constitution to strengthen the Federal principle.

Indian Parliament’s power to alter the boundaries of a state under Article 3 should be subject to the State’s approval. Residuary power under Article 248 of the Constitution should be conferred upon the States. Deletion of Article 249 and Article 356 to 360 would likely to strengthen the federal Principle.

• It is unfortunate to note that there has not been proper utilization of Article 263 of the Constitution. This is high time to re constitute the Inter State Council as an autonomous, independent and high powered. It must be entrusted with the responsibility to deal with all the issues between the center and the states. Finance Commission and Planning commission should be made independent autonomous authorities and the appointments shall be made in consultation with the States. Adequate autonomy must be facilitated to the States through the conferment of power on the States and by suitably amending Articles 3, 249 and 346 respectively. Conferment of residuary power on the States is also desirable. Governors shall be
appointed by the Interstate council. Disputes if any between the Center and the States shall be expeditiously decided through constitution of Special Constitutional Benches.

1.2.5 Division of powers between Center and State

Distribution of power between the Centre and states has been provided for in the Constitution of India for the smooth running of the Government. According to the Administrative divisions, India has 28 states and 7 union territories. Each of these regional administrative divisions has an elected government headed by a chief minister. A Governor is appointed by the Indian President, as the representative head of the federal authority in each state. The form of government in India is the quasi-federal form, with federal structure and strong unitary spirit. In the federal form of government, Divisions in Indian Administration occurs; the power is divided between a central authority and constitutional political units such as the states and the provinces. The two levels of government are interdependent and share sovereignty. The federal system also provides that the constitution is the supreme power of the land.

Based on the distribution of powers between the Central Government and the State Government there are three lists - Union list, State list and Concurrent list (powers entertained by both centre and state).

1.2.5.1 Union List

The Union list consists of subjects on which the central government or the Indian Indian Parliament can make laws. These subjects included in the list are of national importance. These include subjects such as defence, foreign affairs, atomic energy, banking, post and telegraph. The central government has the power of making laws on these subjects at all times also during emergencies. There are 97 subjects on which the central government can make law.

1.2.5.2 State List

The State list contains 66 subjects of local or state importance. The state governments have the authority to make laws on these subjects. These subjects include police, local governments, trade, commerce and agriculture. However, during national and state emergency, the power to make laws on these subjects is transferred to the Indian Parliament.

1.2.5.3 Concurrent list

The Concurrent list has 47 subjects on which both the Indian Parliament and the state legislatures can make laws. These subjects include criminal and civil procedure, marriage and divorce, education, economic planning and trade unions. Yet, in case of conflict between a law made by the central government and a law made by the state legislatures, the law made by the central government will prevail.
There are certain changes regarding the authority of making laws. Education was shifted from the state list to the concurrent list by the 42nd Amendment Act of 1976.

Apart from the powers mentioned in these lists, there is also a list of miscellaneous functions called residuary powers. These are not mentioned in any of the three lists and the right to make laws on these subjects is called residuary power. The central government has been given rights to legislate on these subjects.

It needs to be mentioned here that though there is the presence of a federal structure and a clear division of powers along with an independent judiciary, yet there is a strong bias towards making the Central Government more powerful than the state governments. The polity of India can turn into a complete unitary character during emergency on the ground of failure of the constitutional machinery and during such a situation the Union Government becomes all powerful.

### 1.2.6 Residuary power compare with USA

Distribution of powers between the Union and the States is perhaps the most important feature of the federal Constitutions, so that chaos and conflict between the two competing jurisdiction can be avoided. Though the federal principle has been adopted by other countries from the American precedent, each country has introduced variation of its own, as a result of which the world of federalism today consists of different types of federal Constitutions, - none being an exact replica of the other. Even in the United States, owing to activist judicial interpretation as well as constitutional practice, federalism has assumed a shape which the founding fathers could little envisage. Nevertheless, the essentials of American federalism are the same after two centuries, namely, a legally enforceable division of powers between two governments, - federal and regional – by the written Constitution and the authority of the Courts to interpret, apply and enforce that constitutional distribution of powers.

As in other matters, the pattern of distribution of legislative powers is not the same under the different Federal Constitutions. But there is a general test which is broadly adopted by the different constitutions, namely, those matters of national concern must be handed over to the Union, while the States should have jurisdiction over matters of regional concern. The patterns of distribution in U.S.A. and India are as follows:

#### 1.2.6.1 U.S.A.

In USA, there is a single enumeration of powers, which signifies that the Constitution simply enumerates the powers specially assigned to the Federal Legislature and leaves the entire unremunerated residue to
the State Legislatures. Woodrow Wilson stated that “the State Governments are the ordinary governments of the country; the federal government is its instrument only for the particular purposes”[6]. The Constitution of the USA makes the division of powers between the Federation and the States by the following four provisions:

1. Powers of the Union - The Federal Congress has no general power to make laws for the people; it has got only enumerated powers. These powers are enumerated in Article I, Section 8 to declare war, raise armies, coin money, regulate foreign commerce etc. As to the powers of the national government, Marshall, C.J. said in the case of Gibbons v. Ogden[7] that “the genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the national Government”

2. Powers of the States – The powers of the States are not enumerated by the Constitution. However, according to the Tenth Amendment, the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people. Thus, the residuary powers are given to the States. The reserved rights of the States inter alia includes the right to pass laws, to give effect to laws through executive action, to administer justice through the Courts, and to employ all necessary agencies for legitimate purposes of State Government.

3. Limitations on Union Powers – Congress is prohibited from taxing exports or giving preference to particular States in the exercise of its ‘Commerce’ powers, namely; “No Tax or Duty shall be laid on Articles exported from any State and no preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another, nor shall Vessels bound to or from, one State, be obliged to enter, clear or pay Duties in another” by Clauses. (5) and (6) of Article I, Section 9 respectively.

4. Limitation on States Powers – Though all powers not expressly given to the Union were reserved to the States (10th Amendment), the Constitution at the same time imposed certain limitations upon the exercise of those reserved powers so that their exercise might not interfere with the exercise of the powers conferred upon the National Government. These limitations are e.g;

a) Taxation – No State may, without the consent of Congress, lay any tax on tonnage or on imports and exports beyond what may be necessary for enforcing its inspection laws under Article I, Section 10(3) and
Section 10(2) respectively.

b) Monetary – Under Article I Section 10(1), no State shall coin money, emit bills of credit; make anything but gold and silver coin a tender in payment of debts. Thus, the power over “currency and coin” given to the National Government is exclusive[8]. Actually, it is essential in the commercial and economic interests of the Union to have a uniform monetary system.

c) Foreign and Inter-State Agreements – As per Article I, Section 10 “no State shall enter into any treaty or confederation…..No State shall, without the consent of Congress, enter into any agreement or compact with another State or with a foreign power”. The prohibition against foreign agreements supplements the provisions regarding treaties {Article II, Section 2(2)} in favour of the National Government. The power is made exclusive by prohibiting the States to enter into that field[9] and the prohibition against the inter-State compacts without the consent of Congress is, obviously, meant to prevent the growth of political combinations which may encroach upon the supremacy of the United States.[10] In practice, however, the Clause has made possible inter-state co-operation on common problems with the approval of the National Government.

Subject to the above limitations, the States have full sovereign powers over all persons and things within their respective territorial limits with respect to all matters which are not delegated to Congress by the Constitution, expressly or by necessary implication.

Thus, there is no Concurrent List in the American Constitution. However, a concurrent sphere has resulted from the judicial interpretation that there is a sphere, where a State can legislate so long as Congress does not “occupy the field” or the State legislation does not conflict with a federal legislation.[12] Nevertheless, it seems that each government, national and State, is supreme within their own sphere. In other words neither Government can exercise its powers in such manner as to obstruct the free exercise of power by another.

The position on paper today is that Congress itself cannot under any device; exercise any power which is not granted to it expressly or by necessary implication. But the area of concern is “implied power” founded inter alia, upon the “necessary and proper clause” clause in Article I, Section 8(18) which signifies that the Courts have helped in the expansion of the federal power to an extent undreamt of by the fathers of the Constitution and hence the Congress may legislate on matters under the pretext of necessary and proper which though not comes under their domain.
The federal scheme in the Constitution of India is adopted from the Government of India Act, 1935. The said Act made an innovation upon several precedents to make a treble enumeration of powers, in order to make it as exhaustive as possible and also to minimize judicial intervention and litigation. The three legislative lists (I, II and III) respectively enumerated the powers vested in the Federal Legislature, the Provincial Legislature and to both of them concurrently (Section 100). If however, a matter was not covered by any of the three Lists that would be treated as a residuary power of the Federal Indian Parliament (Section 104) and Section 107 provided for predominance of federal law in case of inconsistency with a Provincial Law, in the concurrent sphere.

Borrowing the pattern of treble enumeration from the Government of India Act, 1935, the Constitution of India makes a three-fold division of powers namely:

a) List I or the Union List – It contains subjects over which the Union shall have exclusive powers of legislation, including 97 items. These include defence, foreign affairs, banking, currency and coinage; union duties and taxes and the like.

b) List II or the State List – It comprises of 66 items or entries over which the State Legislature shall have exclusive power of legislation, such as public order and police, local Government, public health and sanitation, agriculture, forests and fisheries, education, State taxes and duties, and the like.

c) List III or the Concurrent List – It gives concurrent powers to the Union and the State Legislatures over 47 items, such as Criminal Law and procedure, Civil Procedure, marriage, contracts, torts, trusts, welfare of labour, social insurance, economic and social planning.

Thus the framer of the Indian Constitution attempted to exhaust the whole field of legislation as they could comprehend, into numerous items, thus narrowing down the scope for filling up the details by the judicial process of amplifying the given items. Besides, wherever any conflict could be anticipated, the Constitution has given predominance to the Union jurisdiction, so as to give the federal system a strong central bias. Similarly, in all the cases which have come up to the Supreme Court, the Court has upheld the jurisdiction of the Union Indian Parliament. Thus, in case of overlapping, the power of the State Legislature to legislate with respect to matters enumerated in the State List has been made subject to the power of the Union Indian Parliament to legislate in respect of matters enumerated in the Union and Concurrent Lists, and the entries in the State List have to be interpreted accordingly. Similarly, in the concurrent sphere, in case of repugnancy between a Union and a State law relating to the same subject,
the former prevails. If, however, the State law was reserved for the assent of the President and has received such assent, the State law may prevail notwithstanding such repugnancy, but it would still be competent for Indian Parliament to override such State law by subsequent legislation {Article 254(2)}[15]

These apart, the vesting of residual power under the Constitution follows the precedent of Canada, for it is given to the Union instead of the States as in USA and Australia. The Constitution of India vests the residuary power i.e; the power to legislate with respect to any matter not enumerated in anyone of the three Lists,- in the Union Legislature (Article 248). However, the final determination as to whether a particular matter falls under the residuary power or not is that of the Courts.

Moreover, even apart from the central bias in the normal distribution of powers, there are certain extraordinary provisions in the Indian Constitution which provide for expansion of the federal power in cases of emergency or other predominating national interests, instead of leaving it to the judicial interpretation as in USA, Australia or Canada, as we have noticed. These provisions therefore constitute additional limitations upon the powers of the State Legislatures. These exceptional circumstances are:

1. **National Interest** – In the national interest, Indian Parliament shall have the power to make laws with respect to any matter included in the state List, for the temporary period, if the Council of States declares by the resolution of 2/3 of its members present and voting, that it is necessary in the national interest that Indian Parliament shall have power to legislate over such matters. Each such resolution will give rise a leases of one year to ten law in question. A law made by Indian Parliament, which Indian Parliament would not but for the passing of such resolution have been competent to make, shall, to the extent of the inconsistency, seas to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period (Article 249). The resolution of the council of states may be renewed for a period of one year at a time.

2. **Proclamation of emergency** – While a proclamation of emergency made by the Indian Parliament is in operation, Indian Parliament shall have similar power to legislate with respect to State subjects {Articles 250, 353(b)}. A law made by the Indian Parliament, which Indian Parliament would not but for the issue of such proclamation have been competent to make, shall, to the extent of in competency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period (Article 250).

3. **By agreement between States** – If the Legislatures of two or more States resolve that it shall be lawful
for Indian Parliament to make laws with respect to any matters included in the State List relating to those States, Indian Parliament shall have such power as regards such States. It shall also be open to any States to adopt such Union Legislation in relation to itself by a resolution passed in that behalf in the Legislature of the state. In short, this is an extension of the jurisdiction of the union Indian Parliament by consent of the State Legislatures (Article 252).

4. **To implement Treaties** – Indian Parliament shall have the power to legislate with respect to any subject for the purpose of implementing treaties or international agreements and conventions. In others, the normal distribution of powers will not stand in the way of Indian Parliament to enact legislation for carrying out its international obligations, even though such legislation may be necessary in relation to a State subject (Article 253)

5. **Proclamation of Failure of Constitutional Machinery in the States** – When such a proclamation is made by the President, the President may declare that the powers of the Legislature of the State in question shall be exercisable by or under the authority of Indian Parliament {Article 356(1)(b)}

1.2.7 **New trends in federalism – Cooperative Federalism**

Cooperative federalism is a political and constitutional concept developed in the early 20th century that emphasizes the decentralization of power and a not necessarily equal sharing of governmental responsibilities between federal, state and local agencies and institutions. National and state governments tackle issues together in a cooperative fashion as opposed to a system in which policy is imposed on local administrators by an all-powerful federal regime. As a result, both national and state governments are simultaneously independent and interdependent with an overlap of functions and financial resources, but it is difficult for one person or one institution to accumulate absolute power. In addition, this distribution of government provides multiple points of access for citizens interested in influencing state and federal institutions, laws and policies.

The idea was first introduced in the United States during the New Deal era of the 1930s and, as a result, the constitutional concept of dual federalism nearly disappeared. Under dual federalism, the U.S. national government was granted a limited number of powers with the states otherwise sovereign. The states were considered to be as powerful as the federal government within their respective political spheres and each was responsible for specific government functions that did not overlap. States with a vested interest in prolonging an economy based on slavery relied on dual federalism to support their rejection of federal government intervention.
In the New Deal era, cooperative federalism was best exemplified by federal grant-in-aid programs that encouraged state governments to implement programs funded by the national Congress. Instead of imposing a program nationally, the federal government offered significant financial resources to entice each state to implement and administer the program locally. The now canceled Aid to Families with Dependent Children (AFDC) is an example of a grant-in-aid program created in 1935 and administered by the U.S. Department of Health and Human Services. AFDC gave financial help to low-income families with children. Each state that agreed to participate received matching funds from the national government but was subject to federal regulations. Grant-in-aid programs were typically funded and designed by the federal government but administered by participating state governments.

It has been argued since that cooperative federalism in the United States has been slowly eroded by a series of presidents of both mainstream political parties — Republicans and Democrats — that have added discretionary powers to the federal executive branch. Opponents to this perceived expansion of federal power advocate for the autonomy and sovereignty of state governments as described in the Constitution’s 10th amendment. In addition to the United States, Australia, Canada and the European Union among other nations and political entities also practice variations of this form of government.

1.2.7.1 India – Central control versus State autonomy

Sixty three years of Independence have witnessed tremendous changes and there is immediate need to have a fresh look in an introspective spirit at the Centre State relations both in the context of various recommendations of the Sarkaria Commission and formation of three more new states in recent years.

India, as a nation, has been undergoing a radical transformation unprecedented in its scale, sweep and intensity, during the last one-decade since the launching of the package of new economic reforms in mid-1991.

Structural arrangements and clearly defined norms and procedures embodied in the Constitution have provided the guidelines for Indian fledging federalism but it is in the operating dynamics of Centre- State relationship than one sees the true nature of Indian federal equation at three operating levels, viz., political, constitutional and procedural.

The political or politico-constitutional pendulum of Indian federal system has been relentlessly swinging towards a strong Centre for the last five decades and India has become what K. Santhanam called "Centre Paramount Federation" in view of the paramount need to maintain the unity and integrity of India.
All is not well with the present federal system. Empirical evidence exists to prove that the Union vested with enormous finance powers might use financial leverage to starve the states governed by political parties of other complexion and hue.

There is a need to devise a permanent mechanism, which would ensure a better sharing of economic cake so that the states do not become the perpetual wards of the Centre economically. Recent rise of regionalism cannot be viewed as a threat to our federal system but as a reaction against over-centralisation and demand for a more balanced development of the various states.

The Union and State relations can be made more stable and fair only when the political parties and the people are actively involved at all levels. Union-state relations can be improved when there is greater cooperation and coordination between the two for good and effective governance.

1.2.7.2 Tension Areas of Union-State Relations

Appointment of governors, allocation of resources from Centre to States, deployment of Central Police Forces and imposition of President's rule in the States are some of the main irritants in Centre-State relations. Governors are increasingly becoming constitutional redundancies and are perceived as the whipping boys of the Union Government, doing a command performance wherever different parties are ruling at the Centre and state levels.

1.2.7.2.1 Demands of the States

Though the problem is generally termed 'Union-State relationship', there is no unanimity among the States on many issues and hence the dispute is not between Union government on one side and the several State governments on the other.

The non-Congress Chief Ministers held a series of conclaves through the 1980s in Vijayawada, Calcutta and Srinagar, while a proposed conclave in Amritsar was overtaken by the spread of terrorism in the State.

At these forums, the non-Congress Chief Ministers forged strategies for joint actions and articulated their concerns and agendas for federal reforms mostly relating to relief from arbitrary dismissals by the Presidential intervention in the State administration under Article 356 of the Constitution and fiscal autonomy with augmented share in revenue resources and enlarged role in the planning process.

For example, a conference of non-Congress Chief Ministers for the second time in Calcutta on 15 December 1987 deplored the unilateral formulation by the Centre of the terms of reference of the Ninth
Finance Commission and appointed a working group chaired by West Bengal Finance Minister Asim Das Gupta to prepare alternative terms of reference keeping in view the needs of the States. The Chief Ministers felt that the unilateral action of the Centre violated the neutral role of the Commission as an inter governmental agency in tune with the spirit of Article 280 of the constitution.

Territorially based ethnic movements, especially in the north-west and the north-east posed serious challenges to Indian federalism in a very acute way in the 1980s under the regimes of Indira Gandhi and Rajiv Gandhi these movements, especially in Punjab, Assam, Mizoram and Jammu and Kashmir took separatist turns in the form of agitations, terrorist violence, and insurgency.

Extreme pressure was mounted by the separatists inspired and aided from across international borders. In mid-1980s, the Rajiv Gandhi government entered into a series of accords with the major regional parties or movements in Punjab, Assam, Mizoram and Tripura to diffuse the crisis.

The Punjab Accord, between Rajiv Gandhi and the Akali Dal leader Sant Harcharan Singh Longowal, signed in July 1985 proposed the transfer of Chandigarh, the joint capital of Punjab and Haryana, to the former in lieu of the ceding of some Hindi- speaking areas to the latter; the reference of the Anandpur Sahib Resolution of the Akali Dal on greater State autonomy to the Sarkaria Commission on Centre-State Relations; the expansion of the jurisdiction of the Justice Ranganath Mishra Commission inquiring into the November 1984 anti-Sikh riots in Delhi in the wake of Mrs. Gandhi's assassination to include similar disturbances in Bokaro and Kanpur; the enactment of an All-India Gurudwara Act, etc.

The Assam-Accord signed in August 1985 between the Home Secretary R.D. Pradhan and the Assam agitation leaders provided for detection and deletion of the names of foreign intruders into Assam with the base-date for this operation fixed on January 1, 1966. Those migrating to Assam earlier to the date were to be regularized provided their names appeared in the electoral rolls of 1967.

The cut-off point earlier insisted on by the agitationists was to be determined on the basis of the National Register of Citizenship of 1957 and the 1952 electoral rolls. The government had earlier insisted on March 25, 1971, i.e., those who entered Assam from neighbouring East Pakistan (Now Bangladesh) after that date were to be deported, with the ration cards being used as valid document in determining citizenship. Moreover, those who came to Assam after January 1, 1996 (inclusive), up to March 24, 1971, were to be detected in terms of the Foreigners Act 1946 and Foreigners (Tribunal Order, 1964).

The foreigners so detected were to be excluded from the electoral rolls for 10 years. In the meanwhile, they were required to register themselves in respective districts in accordance with Registration of Foreigners Act 1939 and Registration of Foreigners Rules 1930.
The above two movements were in a way diametrically opposed to each other in the sense that the Sikh agitation was fuelled by an intolerant religious fundamentalism seeking to terrorize and drive away the Hindus and moderate Sikhs out of Punjab, while the Assam agitation stemmed from the paranoia of the Assamese threatened to be submerged in their own home by illegal Muslim infiltrators from Bangladesh.

Moreover, Rajiv Gandhi also entered into an accord with the MNF leader Laldenga ending insurgency, granting Statehood to Mizoram, and holding elections leading to the accession of the Mizo rebel as the Chief Minister of newly created State. Further, the political condition in Jammu and Kashmir sharply deteriorated after 1989 leading to a situation even worse than in Punjab and Assam. However, by mid-1990s terrorist violence was brought considerably under control to facilitate Lok Sabha elections in the State in May-June 1996 and Vidhan Sabha elections in September-October the same year. Democratic processes thus returned to the State after more than half a decade with the Congress gaining electorally in the Indian Parliamentary elections and the National Conference sweeping the polls in the Assembly elections.

1.2.8 Political factors influencing federalism

Federalism is a crucial structural factor that affects many aspects of politics, from the nature of the party system, to the way in which public policy is organized, to the method by which the president is chosen. Federalism makes for a complex policymaking process. At the same time, federalism permits varying responses to different situations. It allows for experimentation and for trying out policies different from those of the particular party controlling the national government.

Federalism makes it possible to implement policies that would not be possible to carry out on the state and local levels. The example of voting rights for eighteen-year-olds is one example. Without federalism and the national government's ability to coerce state and local governments to comply, there is no guarantee that eighteen-year-olds would be allowed to vote in all areas of the country.

Federalism both enhances and detracts from democracy. On one hand, federalism promotes democracy because it allows state governments to counterbalance actions by the national government that may be unpopular in their regions. It also promotes democracy by allowing people in each community to do what their own majorities prefer, rather than having to conform to a single national majority.

On the other hand, federalism can interfere with democracy because democratic processes may not work as well at the state level as they do at the national level. In state politics, popular participation
tends to be lower; politics tends to be less visible; interest groups may have an easier time getting their way. Thus, political equality may be impaired. The national government may be better able than state governments to mobilize the public, make politics visible, and ensure that government responds to what ordinary citizens want.

1.2.9 Impact of coalition Govt. in Center on federalism in India

Coalitions have become an indispensable part of government due to surfacing of chequered parties in the political system. But, it varies in developed and developing world. Coalition politics have been successful in the developed nations like Australia, Japan and Canada because of uniform class and similar needs and interest while in the developing countries, it is surrounded by intricacies. In the developing society, the coalition is experiencing dilemmas like instability, crisis due to confusion of ideas, heterogeneous societies, all result in the functioning of the state to a halt.

1.2.9.1 Hung Indian Parliament and Constitution

Indian constitutional framers never anticipated of hung Indian Parliament and politics of opportunism. In the Indian scenario, the coalition is the demand of time to break the hegemony of single party system. Due to transformation in social system, it has become tough to maintain monopoly of a single party to cater the needs of variegated social groups. It led to a new trend that is coalition.

1.2.9.2 Inception of Coalition Government

The initiation of coalition government at the center level can be trace to the Indian Parliamentary election of 1969 when the Congress Party first reduced to minority due to split of it. But now, it is deep rooted in political sphere due to mushrooming of political parties at the regional level. The ramification of these is as majority of people belonging to particular religion, castes and region. In fact, it is loss to the society as well the nation. Precious time and energy is wasted due to chaos in the House over the trifle matter. In the Nehruian times, there were consensus in all policies and agenda of the government but now, the House faces uproar more or less in all issues.

1.2.9.3 Loss from Coalition

Coalition governments both at the Center as well as the States are experiencing more loss than profit. The magnitude of loss gets amplifies when the alliances support the fragile government from outside. At the centre, the coalition groups interfered the policies of the government thus marred the direction of development. The condition becomes awkward when the Prime Minister fails to rally its own
discretionary power and decisions come on the pressure of alliance wings. The nuclear deal with America hinged due to the antagonistic policies of left parties. In the coalition, every party has its own manifesto instead of single one.

1.2.9.4 Bridge Social Gap

On the other hand, the surfacing of regional parties at the national level, enable to give a picture of rural India in true sense. It bridges the social cleavage that develops due to socio-economic condition. Thus, the regional parties have come to stay in the Indian political system and their relevance can also be experienced at the centre level. The credit of federal approach in governance goes to the regional parties. Now, it seems neither the BJP nor the Congress claim hope to obtain Indian Parliamentary majority without the support of regional political formations.

1.2.9.5 Congress and BJP’s Dilemma

The Congress, which ruled India for all the first 40 years of independence, has to make good strategies to be in power at the centre. To boost the morale and strengthen the party, Rahul Gandhi, General Secretary of the Congress touring the entire country and try to sense the real problem of the people. The Congress have to make effective policies otherwise its failure can be successively harvested by the regional parties. The regional powers are also eroding the base of BJP, which came into prominence by exploiting the decay of the Congress. Even the issues like “India shining” and “Babri Masjid” didn't favour them.

1.2.9.6 Drawbacks

Coalition government has more drawbacks than merits, danger always loom of collapsing the government due to withdrawal of support. The government of Mr. Gujral, Mr. Deve Gowda, and Mr. V.P.Singh toppled due to lack of mutual understanding and adjustment. Support from outside is the unbearable condition. Divergence emerges due to the questions of leadership and ministerial berth.

1.2.9.7 Goal of the Coalition

The Goal of the Coalition Government should be to pool the resources of different parties that can be used as unifying force. Instead of being a “mockery of democracy” it should be the platform with human face. We should inculcate values from Australia and Canada that have made remarkable progress even during the phase of coalition era. Alliance rule in West Bengal is a good example of mutual understanding and cooperation of coalition politics. At last, we can say that we can say that coalition form of government is a compulsion not a persuasion.


1.2.10 Implications of Panchayat Raj for federalism

Rajiv Gandhi, the then Prime Minister of India, did try to introduce the element of localisation in Indian federalism through the 64th and 65th Amendment Bills in 1989. These aimed at adding the third tier to Indian federalism by constitutionalising Panchayati Raj Institutions and the urban local bodies. However, he did not succeed as his initiatives were perceived as a disguised attempt for further de-federalisation by containing the already limited autonomy of the States. Consequently his agenda for addition of the dimension of localisation remained un-implemented.

In the meantime the element of globalisation was introduced in Indian federalism as a sequel to the adoption of the New Economic Policy in 1991 during the regime of the P.V. Narasimha Rao-led Congress-I Government. With this began the process of Liberalisation, Privatisation and Globalisation. But simultaneously, Narasimha Rao was able to implement the agenda of Rajiv Gandhi for localisation in Indian federalism. Consequently the 73rd and the 74th Constitutional Amendments were enacted in 1992, implemented in 1993 and operationalised in 1994.

The 73rd Amendment has constitutioned Panchayati Raj Institutions, made these inclusive through the provision for one-third reservation for women and the reservation for the Scheduled Castes and Scheduled Tribes in proportion to their share in the population and to turn these into instruments for making and implementing plans for economic development and social justice pertaining to the list of 29 items in the Eleventh Schedule the powers from which were to be devolved on these by the State Legislatures. The 74th Amendment provided for the same structure, same character and same role for the urban local bodies which were to be devolved the powers given to the 18 items listed in the Twelfth Schedule.

The many scholars have aptly analyzed the above phenomenon on time to time. Center-State relations be recast in order to create a more exposed and cooperative federal polity in consonance with our social-cultural pluralism. This is essential for the sake of harmony between the federal polity and society. In a vast country like ours, the spirit of co-operative federalism should guide the relations between the Centre and the States on the one hand, among different States and between the States and the Panchayati Raj Institutions (PRIs) and the Urban Local Bodies (ULBs) on the other. The essence of co-operative federalism is that the Centre and the State Governments should be guided by the broader national concerns of using the available resources for the benefit of the people. Co-operative federalism encourages the Government at different levels to take advantage of a large national market, diverse and rich natural resources and the potential of human capabilities in all parts of the country and from all sections of the society for building a prosperous nation.

1.2.11 Comparison between Indian Parliamentary and federal systems.
A federal system shifts the balance toward the central government. The regions still have some independent authority, and they can pass many of their own laws and taxes; however, the federal government has a much greater role to play in regulating trade, commerce, labour/education/environmental laws, and the like. The federal government is rather more powerful than a confederal one. Still, the regions retain some control, and there are usually specific powers that the regions have, but the federal government does not. However, the federal constitution has final authority; states cannot act directly against the principles of the national government's policies on rights, etc. Indian Parliamentary systems have nothing to do with any of this. India, Switzerland, Germany, and Canada are federations that have Indian Parliamentary governments. One has nothing to do with the other. A Indian Parliamentary government contrasts with a presidential or semi-presidential government, or with a dictatorship. These are different ways of dividing government power at the national level, not different ways of dividing power between national and regional governments.

If you want to know, a Indian Parliamentary government fuses two branches of government, the executive (who executes, or carries out, the laws) and the legislature (which passes laws). In a presidential system like that of the USA, these powers are divided between a president and a congress. In a Indian Parliamentary system, the leader of the majority party in the Indian Parliament (the Prime Minister) leads both the Indian Parliament in its development of laws and the bureaucracy (government departments) that carry out these laws and enact policies to meet the standards the laws demand. Thus, the prime minister runs both the government agencies and the legislature (by being the leader of his party). In a Indian Parliamentary system, majority usually rules, so any party (or coalition of parties) that can come up with a majority of seats in the Indian Parliament can pick one of its legislators to be leader and prime minister, and then carry out its policies as it sees fit (while respecting the constitution and the will of the judiciary) until the next election (which can usually be held at variable intervals, unlike presidential systems, which have a set schedule).

A prime minister is head of government (he runs the government agencies), while the US president is both head of government and head of state (responsible for figurehead duties like greeting foreign leaders). In Indian Parliamentary systems, this job is given either to an independently elected or appointed president, or to a king or queen, but the job has no real authority because that person is not head of government. Power flows directly from the legislature into the executive (the prime minister and his cabinet ministers, who run the government directly). In a presidential system, the legislature has its own power, but it is independent from the president, and cannot directly run the government except by passing laws or refusing to pay for things. A prime minister is accountable to his party and members of Indian Parliament (who in turn are responsible to the voting public), and so he may be appointed or removed (in
almost all Indian Parliamentary systems) without the calling of a national election. A prime minister only has power for as long as his party supports him. Thus, Indian Parliamentary systems focus much more on party loyalty, and people often vote more on a party's platform than on the candidates they field.

The United States is a presidential system. Indonesia, Mexico, the Philippines, and Ukraine are, too, as are a number of African and almost Latin American countries. France is a hybrid of presidential and Indian Parliamentary systems (semi-presidential), but almost all European governments are Indian Parliamentary, as are India, Australia, Canada, and some other African and Asian states (including, notably, Iraq). Some countries, like Russia, are presidential, but the president wields so much power outside of a framework of rule of law that they cannot even be considered democracies.

**Review Questions**

1. Define the federalism in India?
2. Explain the Division of powers between Center and State?
3. Explain the coalition politics in india?
4. Explain the Political factors influencing federalism?

**Discussion Questions**

Discuss the federalism and its different aspects?
Chapter- 1.3. Preamble, Territory of the Union, and Citizenship

Learning Objectives

- To define the Preamble & its importance.
- To explain the State & Union Territories.
- To explain the Citizenship.

1.3.1 Preamble & its importance

1.3.1.1 Meaning and Significance:

A written constitution invariably starts with a preamble. A preamble describes the philosophy of the constitution. It states the ideals, goals and objectives of the constitution. A preamble is a preface to the constitution.
1.3.1.2 The Preamble of the Constitution of India reads:

"We the people of India having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizens:

Justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and to promote among them all; fraternily assuring the dignity of the individual and the unity and integrity of the nation; in our constituent assembly this twenty sixth day of November 1949, do hereby adopt, enact and give to ourselves this constitution."

1.3.1.3 Significance:

The Preamble of the Constitution of India is a unique piece of document. It embodies the most important values and objectives of our constitution. It is the soul and spirit of the constitution. It briefly but succinctly states what our political leaders and Constitutional Fathers wanted India to be. The Preamble is the mirror of India's Constitution. It is the yardstick with which one can judge the constitution.

1.3.1.4 "We, the People of India":

The Preamble starts with the words, "we, the people of India." These words have immense constitutional and political significance. They say that the people are the source of the constitution: it is the people of India who are the makers of the constitution. It is also implied that there is popular sovereignty in India.

1.3.2 State & Union Territories (Part I: Article 1-4)

1.3.2.1 Name and territory of the Union

(1) India, that is Bharat, shall be a Union of States.
(2) The States and the territories thereof shall be as specified in the First Schedule.
(3) The territory of India shall comprise—
   (a) the territories of the States;
   (b) the Union territories specified in the First Schedule; and
   (c) such other territories as may be acquired.

1.3.2.2 Admission or establishment of new States.—Indian Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.
1.3.2.3 Formation of new States and alteration of areas, boundaries or names of existing States.—
Indian Parliament may by law—
(a) form a new State by separation of territory from any State or by uniting two or more States or parts of
States or by uniting any territory to a part of any State;
(b) increase the area of any State;
(c) diminish the area of any State;
(d) alter the boundaries of any State;
(e) alter the name of any State:

Provided that no Bill for the purpose shall be introduced in either House of Indian Parliament except on
the recommendation of the President and unless, where the proposal contained in the Bill affects the area,
boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of
that State for expressing its views thereon within such period as may be specified in the reference or
within such further period as the President may allow and the period so specified or allowed has expired.

justification I.—In this article, in clauses (a) to (e), —State— includes a Union territory, but in the proviso,
—State— does not include a Union territory.

justification II.—The power conferred on Indian Parliament by clause (a) includes the power to form a
new State or Union territory by uniting a part of any State or Union territory to any other State or Union
territory.

1.3.2.4 Laws made under articles 2 and 3 to provide for the amendment of the First and the Fourth
Schedules and supplemental, incidental and consequential matters.
(1) Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the
First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and
may also contain such supplemental, incidental and consequential provisions (including provisions as to
representation in Indian Parliament and in the Legislature or Legislatures of the State or States affected by
such law) as Indian Parliament may deem necessary.
(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of
article 368.

1.3.3 Citizenship (Part II: Article 5-11)
Citizenship constitutes the indispensable foundational principle of democratic polity. According to
Merriam-Webster Dictionary, a citizen means a person owing allegiance to and entitled to the protection
of a sovereign state. Citizenship provides rights such as right to vote, and are also subjected to duties or
obligation, such as paying taxes. Citizenship is covered in Part II of the constitution, within articles 5-11. It took an enormous amounts of drafts and took two years to be finalized.

1.3.3.1 Citizenship

Article 5-8 conferred citizenship on each person who met the criteria below at the commencement of the Constitution:

- Domiciled in India and born in India
- domiciled not born in India but either of whose parents was born in India
- domiciled, not born in India but ordinarily resident for more than five years
- resident in India but migrated to Pakistan after 1 March 1947 and later returned to India on resettlement permit
- resident in Pakistan but who migrated to India after 19 July 1948 or who came after that date but had resided for more than six months and got registered in prescribed manner
- resident outside India but who or either of whose parents or grand parents were born in India

Thus, Citizenship at the commencement of the constitution included provisions for Citizenship-by domicile, of migrants from Pakistan and of Indians residing in foreign countries.

1.3.3.2 Domicile

Domicile of a person is his permanent home. No person can be without a domicile and no person may have more than one operative domicile. National boundaries do not constitute a hindrance in one’s choice of domicile. This implies that a person may be national of one country, but his/her domicile may be another country. Domicile denotes the connection of a person with a territorial system of law. In fact, citizenship is denoted by domicile and not vice-versa. The latter is distinguishable from citizenship inasmuch as it is vitally connected with territory and not membership of the community which is at the root of the notion of citizenship.

There is only one citizenship, which is of the Union of India, there is no separate state Citizenship as in the United States of America.

1.3.3.3 Rights of citizenship of certain persons who have migrated to India from Pakistan

Article 6 provides citizenship rights to migrants from Pakistan before commencement of constitution. A person who migrated from Pakistan to India before 19 July 1948 shall be considered a citizen of India, provided either of the person's parents or any of his grandparents were born in India as stated in the
Government of India act, 1935 and has been residing since the date of migration. For person/s migrated after 19 July 1948, the person should be registered as a citizen of India by an officer from the Government of India, but for registration the subjected person has to be a resident of India for at least six months, at the date of his application.

1.3.3.4 Rights of citizenship of certain migrants to Pakistan

Article 7 makes special provisions regarding the citizenship rights of persons who migrated to Pakistan after March 1 1947 but returned to India subsequently. Such person/s become entitled to Citizenship of India, provided they fulfill the conditions stated for Migrants from Pakistan stated in Article 6. IS is necessary that in such cases too the visits of the migrants must not be for short/limited periods or be of a temporary nature or on purposes of business or otherwise. It has to be noted that such cases are subjected to this article, as they were before the commencement of the constitution, cases pertaining to the period thereafter are to be governed by the Citizenship Act, 1955.

1.3.3.5 Persons of origin residing outside India

Article 8 provides that any person who or either of whose parents or grandparents was born in India as defined in Government of India Act 1955 and who is ordinarily residing in any country outside India shall be deemed to be a citizen of India if he has registered as an Indian Citizen by the diplomatic or consular representative of India in that country on an application made by him/her in the prescribed form to such diplomatic or consular representative, whether before or after the commencement of the Constitution.

1.3.3.6 Voluntary Acquisition of Citizenship of foreign state

Article 9 states no person shall be a citizen of India by virtue of article 5, or be deemed to be a citizen of India by virtue of article 6 or article 8, if he has voluntarily acquired the citizenship of any foreign State.

1.3.3.7 Continuance of the rights of citizenship

Article 10 reads, every person who is or is deemed to be a citizen of India under any of the foregoing provisions of article 5-10 shall continue to be a citizen of India, subject to the provisions of any law that may be made by Indian Parliament. In the other words, the right of citizenship cannot be taken away from a person except through express Indian Parliamentary legislation.

1.3.3.8 Indian Parliament to regulate the right of citizenship by law
in the foregoing provisions of this Part shall derogate from the power of Indian Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

1.3.3.9 Indian Citizenship Act 1955

The Citizenship Act, 1955 that came into force with effect from 30th December 1955 deals with matters relating to the acquisition, determination and termination of Indian citizenship. It provides for the acquisition of Indian citizenship by birth, by descent, by registration and by naturalization. The act has been amended by the Citizenship (Amendment) Act 1986, the Citizenship (Amendment) Act 1992, the Citizenship (Amendment) Act 2003, and the Citizenship (Amendment) Act, 2005.

The Original Act provided:

- a person born in India after 26 January 1950 would, subject to certain exceptions be a citizen of India by Birth
- anyone born outside India after 26 January 1950, subject to certain requirements, would be a citizen of India if his/her father was an Indian citizen at the time of his/her birth
- under certain conditions, certain category of persons could acquire Indian citizenship by registration in prescribed manner
- foreigners could acquire Indian citizenship on application for naturalization on certain conditions
- if any territory became part of India, the Government of India could by order specify the persons who would become citizens of India as a result thereof
- citizenship could be lost by termination, renunciation or deprivation on certain grounds
- a citizen of commonwealth country would have the status of commonwealth citizen of India.

Government could make suitable provisions on the basis of reciprocity.

Review Questions

1. Define the Preamble?
2. Explain the State & Union Territories?
3. Explain the Citizenship?

Discussion Questions

Discuss the role of preamble in governance in India?
Entrenched Bill of Right: (Part III of Indian Constitution: Article 12-35)

Chapter 2.1 – Introduction

Learning Objectives

- To define the Indian Parliament’s Power of limit application of Fundamental Rights.
- To explain the Amenability of Fundamental Rights.

2.1.1 Indian Parliament’s Power of limit application of Fundamental Rights

A fundamental right is defined as an interest protected by the superior or basic law of the land. The inclusion of Fundamental Rights in the Constitution provide these rights a sanctified place that prohibits unreasonable interference of State in their exercise and also prevent the legislature and the executive from becoming arbitrary or authoritarian. Thus, these rights act as limitations on the State.

2.1.1.1 The nature of fundamental rights

(1) They are enjoyed by the individual.

(2) They are justice able rights and are enforceable by the Court of law.

(3) The Fundamental Rights are enforceable against the State not against an individual. But certain rights are enforceable against both individual and state like:

   - Right against exploitation (Article 23 and 24)
   - Right against untouchability (Article 17)
(4) They are called the limitations upon the State because they check the power of State. They are also called Negative Obligation on State because most of them are negatively worded like ‘State shall not’.

(5) The Fundamental Rights granted to individuals under the Constitution are not absolute rights, but they are ‘Restrictive Rights’. The Constitution lists may grounds on which these rights can be restricted:

(i) Maintenance of Sovereignty and Integrity of the Country.

(ii) Maintenance of friendly relations with foreign States.

(iii) Maintenance of Public Order, Morality and decency.

(iv) Promotion of the interest of any socially and educationally backward classes of citizens or the Schedule Castes and the Schedule Tribes.

(v) Promotion of the interest of Women and children.

These Rights can be restricted by the State (Indian Parliament) but only by means of law. It is for the Supreme Court and High Courts to decide whether the restriction imposed are reasonable or not.

During National Emergency, all the Fundamental Rights (except that relating to Art 20 and 21) can be suspended.

(6) The Fundamental Rights seek to develop the Political Democracy in the country.

2.1.1.2 Difference between Fundamental Rights and other legal Rights

(i) Both are justice-able, but they differ in the enforceability while an ordinary law is protected by ordinary law of land, a Fundamental Rights is protected and guaranteed by the Constitution i.e., in the case of violation of Fundamental Rights of an individual, the aggrieved person can approach the Supreme Court directly to getting his grievances redressed. Whereas in case of violation of any legal right, the aggrieved person may have his relief by filing an ordinary suit in the subordinate Courts or by a Writ application to the High court.

(ii) An ordinary legal right can be changed by the legislature in its ordinary process, the Fundamental Rights can be amended only be a Special Majority (Article 368).
(iii) An ordinary legal right can be suspended or abridged by law of legislature, but Fundamental Rights cannot be suspended on abridged except in the manners laid down in the Constitution itself.

Article 13(2) of the Constitution states that the State shall not make any law which takes away or abridge the Fundamental Rights. The question is whether the _law_ as used in Article 13(2) includes the constitutional Amendment Acts or not? If an Amendment Act is not covered under _law_, then the Indian Parliament can amend any or all of the Fundamental Rights, otherwise the Fundamental Rights are not amendable.

The Supreme Court in Shankari Prasad Vs Union of India (1951) case held that under the Constitution the government enjoys two types of legislature powers:

(1) Ordinary Legislative Power (to make law)

(2) Constituent Legislative Power (to amend the constitution)

The Amendment act is not a law, thus the Indian Parliament can amend any Fundamental Rights by using Constitutional legislative power. The Supreme Court gave similar verdict in Sajjan Singh Vs State of Rajasthan (1965) Case.

However in Golaknath Vs State of Punjab (1967) case the Supreme Court overruled its earlier decision and held that the Fundamental Rights had been given a _transcendental position_ by the constitution, so that no authority functioning under the constitution including the Indian Parliament.

By the 24th Amendment Act 1975 the Indian Parliament amended Articles 13 and 368 to make it clear that Indian Parliament has the power to amend any part of the constitution including Part III of the constitution and the word _law_ in Article 13(2) does not include a constitutional Amendment Act.

The 24th Amendment Act was challenged before the Supreme Court in the Keshavananda Bharati v/s. State of Kerala case in 1979. It upheld the validity of 24th Amendment Act and the Indian Parliament under Article 368 has the power to amend any part of the constitution including the Fundamental Rights. However, the Court held that the Indian Parliament’s amendment power is limited and is subject to — _Basic Structure_” of the constitution. The constitution has some basic structure which cannot be destroyed.

The Supreme Court has not explicitly defined the term — _Basic Structure_” . However in various judgments by the Supreme Court has held that following concepts are part of the Basic Structure of the Constitution:
(1) Supremacy of the constitution

(2) Republican and democratic form of Government

(3) Secular character of the constitution

(4) Federalism

(5) Separation of power between the legislative, judge of executive

(6) The mandate to build a welfare State

(7) Power of Judicial Review

2.1.2 Amenability of Fundamental Rights, Basic features doctrine

The Indian Parliament is changing the institutions under which we live continually, because we are never satisfied with them. Sometimes they are scrapped for new ones; sometimes they are altered; sometimes they are done away with as nuisances. The new ones have to be stretched in the law courts to make them fit, or to prevent them fitting to well if the judges happen to dislike them.

The life of a state is vibrant and in order to facilitate the ever dynamic developments and needs of society, its economic, social and political conditions mutate continuously. So, a Constitution drafted in one context at a particular time may prove inadequate at a later stage. Every Constitution has some method of amendment whereby a provision is modified by way of addition, deletion or correction so as to suit the needs of the present.

Provisions for the amendment of the Constitution are made with a view to overcome the difficulties which may encounter in future in the effective working of the Constitution. The framers of the Constitution were keen to avoid excessive rigidity and wanted it to a bit flexible. They wanted to have a document that could grow with a growing nation and adapt itself to the ever changing needs of people. says Amendment means changes made to legislation, for the purpose of adding to, correcting or modifying the operation of the legislation.

Black‘s Law Dictionary defines Amendment as A formal revision or addition proposed or made to a statute, Constitution, pleading, order, or other instrument AND In Indian Parliamentary law, it means a motion that changes another motion’s wording by striking out text, inserting or adding text, or substituting text.
But Keshavananda Bharti V. State of Kerela provided the best justification as to the scope and definition of the word ‘Amendment’. It purported that A broad definition of the word ‘Amendment’ will include any alteration or change. The word ‘amendment’ when used in connection with the Constitution may refer to the addition of a provision on a new and independent subject, complete in itself and wholly disconnected from other provisions, or to some particular article or clause, and is then used to indicate an addition to, the striking out, or some change in that particular article or clause”.

The Constitution of India provides for amendment mainly in Article 368 and in some other parts as specified therein.

2.1.2.1 Modes Of Amending Constitution
The Constitution of India provides for the amendment by way of Amendment Acts in a formal manner. For the purpose of amendment, the various Articles of the Constitution are divided into three categories. The first category is out of the purview of Article 368 whereas the other two are a part and parcel of the said Article. The various categories of amendment to the Constitution can be summarized as follows:

2.1.2.1.1 Simple Majority
As the name suggests, an article can be amended in the same way by the Indian Parliament as an ordinary law is passed which requires simple majority. The amendment contemplated under Articles 5-11 (Citizenship), 169 (Abolition or creation of Legislative Councils in States) and 239-A (Creation of local Legislatures or Council of Ministers or both for certain Union Territories) of the Indian Constitution can be made by simple majority. These Articles are specifically excluded from the purview of the procedure prescribed under Article 368.

2.1.2.1.2 Special Majority
Articles which can be amended by special majority are laid down in Article 368. All amendments, except those referred to above come within this category and must be affected by a majority of total membership of each House of Indian Parliament as well as 2/3rd of the members present and voting.

2.1.2.1.3 Amendment by Special Majority and Ratification by States
Amendment to certain Articles requires special majority as well as ratification by states. Proviso to Article 368 lays down the said rule. Ratification by states means that there has to be a resolution to that effect by one-half of the state legislatures. These articles include Article 54 (Election of President), 55 (Manner of election of President), 73 (Extent of executive power of the Union), 162 (Extent of executive
power of State), 124-147 (The Union Judiciary), 214-231 (The High Courts in the States), 241 (High Courts for Union Territories), 245-255 (Distribution of Legislative powers) and Article 368 (power of the Indian Parliament to amend the Constitution and procedure therefor) itself. Any list of seventh schedule or representation of states in Indian Parliament as mentioned in the fourth schedule is also included.

2.1.2.2 Procedure For Amendment U/A 368

A Bill to amend the Constitution may be introduced in either house of the Indian Parliament. It must be passed by each house by a majority of the total membership of that house and by a majority of not less than 2/3rd of the members present and voting. Thereafter, the bill is presented to the President for his assent who shall give his assent and thereupon the Constitution shall stand amended. In case, ratification by state is required it has to be done before presenting it to the President for his/her assent.

2.1.2.3 Amenability Of The Indian Constitution

According to Vepa P. Sarathi, there will never be a conflict between Legislature and Judiciary and these two powerful organs will be better capable of guiding the third branch i.e. Executive, if the following view for the purpose of amendment is accepted. Article 368 can be interpreted in the following manner:

A) The power of the Indian Parliament to amend Constitution is absolute and there are no limits on that power.

B) Indian Parliament should not, however, take away the power of the courts to strike down ordinary legislation as tested against the amended Constitution.

One can relate to what Shakespeare said in Measure for Measure:

"O, it is excellent
To have a giant’s strength; but it tyrannous
To use it like a giant."

The elementary question in controversy has been whether Fundamental Rights are amendable so as to take away the basic rights guaranteed by the Constitution. Another controversy deals with the extent, scope and authority of Indian Parliament to amend Constitution. The answer has been given by the Supreme Court from time to time, sometimes under immense pressure and can be understood in the light of the following cases:

2.1.2.3.1. Shankari Prasad V. Union Of India (AIR 1951 SC 458)

The validity of the First Amendment Act to the Constitution was challenged on the ground that it purported to abridge the fundamental Rights under Part 3 of the Constitution of India. Supreme Court held that the power to amend the Constitution, including Fundamental Rights is contained in Article 368. An amendment is not a law within the meaning of Article 13(2). Article 13(2) states that – The State
shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention to this clause shall, to the extent of the contravention, be void”. An amendment is valid even if it abridges any fundamental Right.

2.1.2.3.2 Sajjan Singh V. State Of Rajasthan (AIR 1965 SC 845)
The validity of the 17th Amendment Act, 1964 was challenged on the ground that one of the acts inserted by the amendment in the 9th Schedule affected the petitioner on the basis that the amendment fell within the purview of Article 368 and the requirements in the proviso to Article 368 had not been complied with. Supreme Court approved the judgment in Shankari Prasad case and held that on Article 13 (2) the case was rightly decided. Amendment includes amendment to all provisions of the Constitution.

2.1.2.3.3 Golaknath V. State Of Punjab (AIR 1967 SC 1643)
The Supreme Court prospectively overruled its decision in Shankari Prasad and Sajjan Singh cases and held that Indian Parliament had no power to amend part 3 of the Constitution so as to abridge or take away any of the Fundamental Rights. It also added that Article 368 merely lays down the procedure for the purpose of amendment. Further, The Court said that an amendment is a law under Article 13(2) of the Constitution of India and if it violates any fundamental right, it may be declared void.

2.1.2.3.4 24th Amendment Act, 1971:
Golaknath’s case created a lot of difficulties and as a result the Indian Parliament enacted 24th Amendment act, 1971 whereby it changed the old heading of Article 368 — Procedure for Amendment of the Constitution” to a new heading — Power of the Indian Parliament to Amend the Constitution and Procedure Therefor.”

To the benefit of the Legislators, the 24th Amendment Act, 1971 restored and extended the scope of power of Indian Parliament to amend the Constitution by adding the words — amend by way of addition or variation or repeal any provision in accordance with the provisions laid down in this Article” Further, the amendment provided that Nothing in Article 13 shall apply to any amendment made under this article” by way of an addition of Clause 3 to Article 368.

2.1.2.3.5 Kesavananda Bharti V. State Of Kerela (AIR 1973 SC 1461)
One of the various questions raised in this case was the extent of the power of the Indian Parliament to amend under Article 368. A 13 Judge Constitutional bench was formulated under Chief Justice Sikri in order to evaluate the intricacies of Golaknath’s case. The Supreme Court overruled its decision in Golaknath’s case and held that even before the 24th Amendment, Article 368 contained power as well as procedure for amendment. The majority held that there are inherent limitations on the amending power of
The Indian Parliament and Article 368 does not confer power so as to destroy the ‘Basic Structure’ of the Constitution.

2.1.2.4 Basic Structure:
The Theory of basic structure very effectively proved to be a limitation on the amending power of the Indian Parliament. The Basic Structure doctrine applies only to the Constitutionality of amendments and not to ordinary Acts of Indian Parliament, which must conform to the entirety of the Constitution and not just its basic structure.

2.1.2.4.1 Chief Justice Sikri indicated that Basic structure is:
1. The supremacy of Constitution
2. The republican and democratic forms of government
3. The secular character of Constitution
4. Maintenance of separation of power
5. The federal character of the Constitution

2.1.2.4.2 Justices Shelat and Grover added another three:
1. The mandate to build a welfare state contained in the Directive Principles of State Policy
2. Maintenance of the unity and integrity of India
3. The sovereignty of the country

2.1.2.4.3 Justices Hegde and Mukherjea listed the following:
1. The Sovereignty of India
2. The unity of the country
3. The democratic character of the polity
4. Essential features of individual freedoms
5. The mandate to build a welfare state

2.1.2.4.4 Justice Jaganmohan Reddy referred the Preamble only:
1. A sovereign democratic republic
2. The provision of social, economic and political justice
3. Liberty of thought, expression, belief, faith and worship
4. Equality of status and opportunity

2.1.2.5 42nd Amendment Act, 1976 and Article 368:
42nd Amendment Act, 1976 was passed by the Indian Parliament soon after. Amendment added clause 4 and clause 5 to Article 368. Article 368(4) provided that no Constitutional Amendment shall be called in
any court on any ground. Article 368(5) provided that there shall be no limitation whatsoever on the constituent power of the Indian Parliament.

2.1.2.5.1 Minerva Mills V. Union Of India (AIR 1980 SC 1789)
Supreme Court struck down clauses (4) and (5) of Article 368 inserted by the 42nd amendment. Justification for the deletion of the said clauses was based on the destruction of ‘Basic Structure‘. The Court was satisfied that 368 (4) and (5) clearly destroyed the ‘Basic Structure‘ as it gave the Indian Parliament absolute power to amend Constitution. Limitation on the amending power of the Indian Parliament is a part of the ‘Basic Structure‘ explained in Kesavananda’s case.

2.1.2.5.2 S. P. Sampath Kumar V. Union Of India (AIR 1987 SC 386)
The Constitutional validity of Article 323A and the provisions of the Administrative Tribunals Act was challenged on the ground that it excluded the jurisdiction of High Court under Article 226 and 227. Supreme Court held that Article 323A and Administrative Tribunals Act was valid as it has not excluded Judicial Review under Article 32 and 136. It was not proved beyond reasonable doubt that Article 323A and Administrative Tribunals Act destroyed the basic structure and the Court upheld their validity.

2.1.2.5.3 L. Chandra Kumar V. Union Of India (AIR 1997 SC 1125)
The Supreme Court struck down clause 2(d) of Article 323A and clause 3(d) of Article 323B as they excluded the jurisdiction of High court under Article 226 and 227 as well as jurisdiction of Supreme Court under Article 32 as they damage the power of Judicial Review which is a basic feature of Constitution.

Conclusion
The final word on the issue of Amendability can be related to ‘Basic Structure‘ defined in Kesavananda Bharti’s case. To name a few Minerva Mills‘ case, S. P. Sampath Kumar’s case and L. Chandra Kumar’s case are well based on the principle of ‘Basic Structure‘ and this situation is unlikely to change in the near future. It is clear that all laws and constitutional amendments are now subject to judicial review and laws that transgress the basic structure are likely to be struck down by the Supreme Court. In essence Indian Parliament’s power to amend the Constitution is not absolute and the Supreme Court is the final arbiter over and interpreter of all constitutional amendments.
Review Questions

1. Define the Parliament’s Power of limit application of Fundamental Rights?
2. Explain the Difference between Fundamental Rights and other legal Rights?

Discussion Questions

Discuss the Amenability of Fundamental Rights?
Learning Objectives

- To define the Significance of the Article 12.
- To explain the Scope and concept of 'State under Article 12.
- To explain the Whether any other authorities include public authorities like Company ....
- To describe the Functional analysis of definition of ‘State’.

2.2.1 Significance of the Article 12

The definition of the expression "the State" in Article 12, is however, for the purposes of Parts III and IV of the Constitution, whose contents clearly show that the expression "the State" in Article 12 as also in Article 36 is not confined to its ordinary and constitutional sense as extended by the inclusive portion of Article 12 but is used in the concept of the State in relation to the Fundamental Rights guaranteed by Part III of the Constitution and the Directive Principles of State Policy contained in Part IV of the Constitution which principles are declared by Article 37 to be fundamental to the governance of the country and enjoins upon the State to apply making laws.

Article 298 of the Constitution expands the executive power of the Union of India and of each of the States which collectively constitute the Union to carry on any trade or business. By extending the executive power of the Union and of each of the States to the carrying on of any trade or business Article 298 does not, however, convert either the Union of India or any of the States which collectively form the Union into a Merchant buying and selling goods or carrying on either trading or business activity, for the executive power of the Union and of the States whether in the field of trade or business or in any other field, is always subject to constitutional limitations and particularly the provisions relating to Fundamental Rights in Part III of the Constitution and is exercisable in accordance with and for the furtherance of the Directive Principles of State Policy prescribed by Part IV of the Constitution. The State is an abstract entity and it can, therefore only act through its agencies or instrumentalities, whether such agency or instrumentality be human or juristic. The trading and business activities of the State constitute "public enterprise". The structural forms in which the Government operates in the field of public enterprise are many and varied. These may consist of Government departments, statutory bodies, statutory corporations, Government companies etc. The immunities and privileges possessed by bodies so set up by the Government in India cannot, however, be the same as those possessed by similar bodies established in the private sector because the setting up of such bodies is referable to the executive power of the Government under Article 298 to carry on any trade or business.
2.2.2 Scope and concept of „State under Article 12

State as provided under Article 12 of the Constitution has four components:

( a ) The Government and Indian Parliament of India-
Government means any department or institution of department. Indian Parliament shall consist of the President, the House of People and Council of States

( b ) The Government and Legislature of each State
State Legislatures of each State consist of the Governor, Legislative Council and Legislative Assembly or any of them.

( c ) Local Authorities within the territory of India
Authority means
( i ) Power to make rules, bye- laws, regulations, notifications and statutory orders.
( ii ) Power to enforce them.
Local Authority means Municipal Boards, Panchayats, Body of Port Commissioners and others legally entitled to or entrusted by the government, municipal or local fund.

( d ) Other Authorities
Authorities other than local authorities working
( i ) Within the territory of India or;
( ii ) Outside the territory of India.

2.2.2.1 Judicial Scrutiny
To give a wider dimension to Fundamental Rights, the judiciary has interpreted „State‘ in different contexts at different times.

( a ) Principle of Ejusdem generis
In University of Madras v/s Santa Bai ,the Madras High Court evolved the principle of ejusdem generis i.e. of the like nature. It means that those authorities are covered under the expression „other authorities which perform governmental or sovereign functions.

( b ) In Ujjam Bai v/s Union of India the Supreme Court rejected the principle of ejusdem generis .It observed that there is no common genus between the authorities mentioned in Article 12.

( c ) Performance of commercial activities ; or promotion of educational or economic interests
In Rajasthan State Electricity Board v/s Mohan Lal it was held that to be State, it is not necessary that the
authority must be performing governmental or sovereign functions. It should-
( i ) Be created by the Constitution of India;
(ii ) Have power to make laws;

( d ) Performance of functions very close to governmental or sovereign functions
In Sukhdev v/s Bhagatram, LIC, ONGC ANDIFC were held to be State as performing very close to
governmental or sovereign functions. The Corporations are State when they enjoy
( i ) Power to make regulations;
( ii ) Regulations have force of law.

( e ) Clearance of five tests
In R.D.Shetty v/s International Airport Authority, the Court laid down five tests to be an other authority-
( i ) Entire share capital is owned or managed by State.
( ii ) Enjoys monopoly status.
( iii ) Department of Government is transferred to Corporation.
( iv ) Functional character governmental in essence.
( v ) Deep and pervasive State control.

( f ) Object of Authority
In Ajay Hasia v/s Khalid Mujib the Court observed that the test to know whether a juristic person is State
is not how it has been brought but why it has been brought.

( g ) Clearance of five tests
In Union of India v/s R.C.Jain, to be a local authority, an authority must fulfill the following tests-
( i ) Separate legal existence.
( ii ) Function in a defined area.
( iii ) Has power to raise funds.
( iv ) Enjoys autonomy.
( v ) Entrusted by a statute with functions which are usually entrusted to municipalities.

2.2.2.2 Whether Judiciary Is State
Jurists like H.M.Seervai, V.N.Shukla consider judiciary to be State. Their view is supported by Articles
145 and 146 of the Constitution of India.
( i ) The Supreme Court is empowered to make rules for regulating the practice and procedure of Courts.
( ii ) The Supreme Court is empowered to make appointments of its staff and servants; decide the its
service conditions.
In Prem Garg v/s Excise Commissioner H.P. the Supreme Court held that when rule making power of judiciary is concerned, it is State.

Other jurists say that since judiciary has not been specifically mentioned in Article 12, it is not State.

In Rati Lal v/s State of Bombay, it was held that judiciary is not State for the purpose of Article 12. In A.R.Antulay v/s R.S.Nayak and N.S.Mirajkar v/s State of Maharashtra, it has been observed that when rule making power of judiciary is concerned it is State but when exercise of judicial power is concerned it is not State.

2.2.2.3 Conclusion

The word 'State' under Article 12 has been interpreted by the courts as per the changing times. It has gained wider meaning which ensures that Part-III can be applied to a larger extent. We hope that it would continue to extent its width in coming times.

2.2.3 Whether any other authorities include public authorities like Company …

Introduction

Meaning of ‘State’: The word ‘State’ used in Article 12 refers to the federating units, India itself being a state consisting of these units. The term ‘State’ is defined variously in some of the other articles of the constitution as the context of the particular Part of the Constitution in which it is used requires. Article 12 forms part of Part III of the Constitution which deals with Fundamental Rights and provides definition of ‘State’. The same definition applies to the expression ‘State’ when used in Part IV of the Constitution which provides for the directive principle of the state policy.

2.2.3.1 Meaning of “Authority”

Authority means a public administrative agency or corporation having quasi governmental powers and authorized to administer revenue producing public enterprise. It is wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions held in Rajasthan State Electricity Case. ‘Authority’ in law belongs to the province of power. Authority in administrative law is a body having jurisdiction in certain matters of a public nature.

Guidelines laid down by the Supreme Court in identifying a body as agency of State

In determining whether a corporation or a government company or a private body is an instrumentality or agency of the state, the following tests was held by the Supreme Court to be applicable in the case of Ajay Hasia v. Khalid Mujib

i) Whether the entire share capital is held by the government.

ii) Whether the corporation enjoys monopoly status conferred by the state.
iii) Whether the functions of the corporation are governmental functions or functions closely related thereto which are basically the responsibilities of a Welfare State,

iv) If a department of the government has been transferred to the corporation.

v) The volume of financial assistance received from the state.

vi) The quantum of state control.

vii) Whether any statutory duties are imposed upon the corporation.

viii) The character of the corporation may change with respect to its different functions.

2.2.3.2 Maintainability of a writ petition filed against a corporation by virtue of Art.226 of Constitution of India

It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. If a company is an organ or instrumentality of the state then the Company acts in its executive power given under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest.

2.2.3.3 Conclusion

To conclude with, companies which are owned by government are instrumentalities and agencies of the government exercising sovereign powers thus they are subject to certain limitations to prevent them from exercising arbitrary powers and encroaching upon the basic fundamental rights of the employees. On including statutory corporation within the ambit of the state there is a proper procedure which they have to follow in exercising their powers. In this way their powers are controlled. There are legal remedies available to individuals against these statutory corporations as and when their rights are violated by these companies.

2.2.4 Functional analysis of definition of ‘State’
When our Constitution states that it is being enacted to give to all the citizens of India "Justice, Social, economic and political", when clause (1) of Article 38 of the Constitution directs the State to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which social, economic and political justice shall inform all the institutions of the national life, when clause (2) of Article 38 directs the State in particular, to minimise the inequalities in income, not only amongst individuals but also amongst group of people residing in different areas or engaged in different vocations and when Article 39 directs the State that it shall, in particular, direct its policy towards securing that the citizens men and women equally, have the right to an adequate means of livelihood and that the operation of the economic system does not result in the concentration of wealth and reasons of production to the common detriment and that there should equal pay for equal work for both men and women, it is the doctrine of distributive justice which is speaking through the words of the Constitution.

**Review Questions**

1. Define the Significance of the Article 12?
2. Explain the Scope and concept of ‘State under Article 12’?
3. Explain the Whether any other authorities include public authorities like Company ....?
4. Explain the Functional analysis of definition of ‘State’?

**Discussion Questions**

Discuss the Article 12 of the constitution in detail?
Learning Objectives

- To define the Doctrine of Eclipse.
- To explain the Doctrine of severability.
- To explain the Doctrine of waiver.

2.2.1 Doctrine of Eclipse

This doctrine is applicable to pre-existing laws only. It implies that an existing law which violates fundamental right is not dead or void per-se but only becomes unenforceable. "It is over shadowed or eclipsed by the fundamental rights and remains dormant but it is not dead." If by subsequent amendment fundamental rights are amended in such a way as to give way to these laws, then these laws will again become active.

2.2.1.1 Whether the doctrine is applicable to post Constitutional legislations?

Some laws are held unconstitutional by the courts, now in this scenario, the legal position that remains is that though the law exists in statute books, because of a court decision they are inoperable. therefore in law there is an eclipse cast upon their implementation. Doctrine of eclipse deals with pre constitutional law Art 13(1).

Art 13 provides that any law which made before the commencement of constitution must be consistent with the part III of the constitution. if any statute is inconsistency with the provisions of part III of the constitution such statue shall become void. At the same time such statue shall not be treat as Dead unless it is abolish by Indian Parliament. It will be treated as dormant or remains eclipsed to the extent it comes under the shadow of the fundamental rights.

Regarding the doctrine of eclipse few points need to be consider.
It is held to be applied only the Pre Constitutional Laws, and not to be post constitutional laws.

_Bhikaji v/s State of MP AIR 1955_

The MP Government passed an Act in the year 1950 for nationalizing the motor transport before commencement of the constitution. The statue was challenge by the petitioner under Art 19(1)(g). The Center Govt. Amended Act 1955 on 27-4-1955 enabling the state to nationalize the motor transport. That SC held that the statue of MP sate State nationalizing the motor transport 1950 was cured by the 4th Amendment Act 1955 and therefore the Doctrine of Eclipse has been applied and the such Act is valid.

2.2.1.2 Whether Law under Article 13 covers amendment in the light of Doctrine of basic structure

The Ninth Schedule to the Constitution provides a list of laws which are not amenable to judicial review and in terms of other provisions of the Constitution, these laws cannot be invalidated on grounds of violation of a fundamental right. Typically these laws constitute those which relate to land acquisition and those relating to right of a citizen to hold property. A nine-judge bench of the Supreme Court in _I.R. Coelho v. State of Tamil Nadu_ [(2007) 2 SCC 1] declared that despite the said stipulation, in view of the doctrine of basic structure (which includes 'judicial review') it was open to the Supreme Court to examine the validity of such laws.

In a recent decision [Glanrock Estate (P) Ltd. v. State of Tamil Nadu] the Supreme Court has explained the meaning and application of this doctrine in the light of the doctrine of basic structure as the law of the land. The Bench observed _inter alia_ as under;

8. Coming to the applicability of the judgment of the 9-Judge Bench decision of this Court in _I.R. Coelho (supra)_ , time has come for us to explain certain concepts in that judgment like egalitarian equality, overarching principles and reading of Article 21 with Article 14. In this connection, one needs to keep in mind what is called as the “degree test”. Ultimately, in applying the above three concepts enumerated herein, one has to go by the degree of abrogation as well as the degree of elevation of an ordinary principle of equality to the level of over-arching principle(s). One must keep in mind that in this case the challenge is not to the ordinary law of the land. The challenge is to the constitutional amendment. In a rigid Constitution [See Article 368] power to amend the Constitution is a derivative power, which is an aspect of the constituent power. The challenge is to the exercise of derivative power by the Indian Parliament in the matter of inclusion of the Janmam Act (Act 24 of 1969) as Item No. 80 in the Ninth Schedule of the Constitution vide the Constitution (Thirty-fourth Amendment) Act, 1974. Since the power to amend the Constitution is a derivative power, the exercise of such power to amend the Constitution is subject to two limitations, namely, the doctrine of basic structure and lack of legislative competence. The doctrine of basic structure is brought in as a window to keep the power of judicial review intact as abrogation of such
a power would result in violation of basic structure. When we speak of discrimination or arbitrary classification, the same constitutes violation of Article 14 of the Constitution. In this connection, the distinction between constitutional law and ordinary law in a rigid Constitution like ours is to be kept in mind. The said distinction proceeds on the assumption that ordinary law can be challenged on the touchstone of the Constitution. Therefore, when an ordinary law seeks to make a classification without any rational basis and without any nexus with the object sought to be achieved, such ordinary law could be challenged on the touchstone of Article 14 of the Constitution. However, when it comes to the validity of a constitutional amendment, one has to examine the validity of such amendment by asking the question as to whether such an amendment violates any over-arching principle in the Constitution. What is over-arching principle? Concepts like secularism, democracy, separation of powers, power of judicial review fall outside the scope of amendatory powers of the Indian Parliament under Article 368. If any of these were to be deleted it would require changes to be made not only in Part III of the Constitution but also in Articles 245 and the three Lists of the Constitution resulting in the change of the very structure or framework of the Constitution. When an impugned Act creates a classification without any rational basis and having no nexus with the objects sought to be achieved, the principle of equality before law is violated undoubtedly. Such an Act can be declared to be violative of Article 14. Such a violation does not require re-writing of the Constitution. This would be a case of violation of ordinary principle of equality before law. Similarly, egalitarian equality” is a much wider concept. It is an over-arching principle. Take the case of acquisition of forests. Forests in India are an important part of environment. They constitute national asset. In various judgments of this Court delivered by the Forest Bench of this Court in the case of T.N. Godavarman v. Union of India [Writ Petition No. 202 of 1995], it has been held that inter-generational equity” is part of Article 21 of the Constitution. What is inter-generational equity? The present generation is answerable to the next generation by giving to the next generation a good environment. We are answerable to the next generation and if deforestation takes place rampantly then inter-generational equity would stand violated. The doctrine of sustainable development also forms part of Article 21 of the Constitution. The precautionary principle” and the polluter pays principle” flow from the core value in Article 21. The important point to be noted is that in this case we are concerned with vesting of forests in the State. When we talk about inter-generational equity and sustainable development, we are elevating an ordinary principle of equality to the level of overarching principle. Equality doctrine has various facets. It is in this sense that in I.R. Coelho’s case this Court has read Article 21 with Article 14. The above example indicates that when it comes to preservation of forests as well as environment vis-à-vis development, one has to look at the constitutional amendment not from the point of view of formal equality or equality enshrined in Article 14 but on a much wider platform of an egalitarian equality which includes the concept of inclusive growth”. It is in that sense that this Court has used the expression Article 21 read with Article 14 in I.R. Coelho’s case. Therefore, it is only that breach of the principle of
equality which is of the character of destroying the basic framework of the Constitution which will not be protected by Article 31B. If every breach of Article 14, however, egregious, is held to be unprotected by Article 31B, there would be no purpose in protection by Article 31B. The question can be looked at from yet another angle. Can Indian Parliament increase its amending power by amendment of Article 368 so as to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The answer is obvious. Article 368 does not vest such a power in Indian Parliament. It cannot lift all limitations/ restrictions placed on the amending power or free the amending power from all limitations. This is the effect of the decision in Kesavananda Bharati (supra). The point to be noted, therefore, is that when constitutional law is challenged, one has to apply the “effect test” to find out the degree of abrogation. This is the “degree test” which has been referred to earlier. If one finds that the constitutional amendment seeks to abrogate core values/ over-arching principles like secularism, egalitarian equality, etc. and which would warrant re-writing of the Constitution then such constitutional law would certainly violate the basic structure. In other words, such over-arching principles would fall outside the amendatory power under Article 368 in the sense that the said power cannot be exercised even by the Indian Parliament to abrogate such over-arching principles. It is important to bear in mind that according to Justice Mathew’s observations in Smt. Indira Nehru Gandhi (supra), equality is a feature of rule of law and not vice-versa, as submitted by Mr. Viswanathan, learned counsel for the petitioner(s).

Very often the expression “Rule of Law” is used to convey the idea of a Government that is limited by law. The expression “Rule of Law” describes a society in which Government must act in accordance with law. A society governed by law is the foundation of personal liberty. It is also the foundation of economic development since investment will not take place in a country where rights are not respected. It is in that sense that the expression “Rule of Law” constitutes an overarching principle embodied in Article 21, one aspect of which is equality. It is in that context that this Court has used the phrase “Article 21 read with Article 14” in the judgment in the case of I.R. Coelh (supra) to which one of us Kapadia, J. was a party.

2.2.2 Doctrine of severability and waiver

2.2.2.1 Doctrine of Waiver

The Fundamental rights (FR) under Part III Art 12 to 35 of the constitution are conferred to every citizen of India by the constitution. These constitutional rights are not absolute. There are reasonable restriction impose by the constitution. The primary objective of these FR are based on public policy. Therefore no individual can waive off such RF rights.
The doctrine of waiver of right is based on the premise that a person is his best judge and that he has the liberty to waive the enjoyment of such right as are conferred on him by the state. However the person must have the knowledge of his rights and that the waiver should be voluntary.

**In Basheshr Nath v/s Income Tax commissioner AIR 1959 SC 149, Held**

In this case the petitioner whose matter had been referred to the Investigation commissioner u/s 5(1) of the Taxation of Income Act 1947 was found to have concealed a settlement u/s 8 A to pay Rs 3 Lakhs in monthly installments, by way of arrears of tax and penalty. In the meanwhile the SC in another case held that section 5(1) is ultra vires the constitution, as it was inconsistence with Art 14. So the appellant cannot his waive off his FR.

Conclusion- It means "a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth, either by the acts of judicial or legislative officers, or by his own deed, acts, or representations, either express or implied.

2.2.2.2 **Doctrines of Severability**

Art 13 provides that Act is void which is inconsistent with the Part III of the constitution. Art 13 is having a flexible nature; it does not make the whole Act inoperative. It makes inoperative only such provisions of it as are inconsistent with or violative of fundamental right. Sometimes valid and invalid portion of the Act are so intertwined that they cannot be separated from one another. In such cases, the invalidity of the portion must result in the invalidity of the Act in its entirety, the reason is that the valid part cannot survive independently. In determining whether the valid parts of a statue are severable from the invalid parts. In intention of the Legislature is the determining factor. In other words it should be asked whether the legislature would have enacted at all that which survive without the part found ultra virus. **The rule of severability applies as much clause (2) as to Clause (1) of Art 13 Jia Lal v/s Delhi Administration AIR 1962.** The appellant was prosecuted for an office u/s 19 (f) of the Arm Act 1878. In fact, section 29 of this Act provides that in certain area in which the petitioner did not obtain any license in which the petitioner was residing, it was not necessary to obtain the said license for possession fire arm. Section 29 was challenged as ultra virus and unconstitutional as offending Art 14 and also section 19(f) of the Arms Act 1878 on the ground that two sections were not severable, on the question of severability the SC held that the section 29 of the Arms Act 1878 was ultra virus.

**Review Questions**

1. Define the Doctrine of Eclipse?
2. Explain the Doctrine of severability?
3. Explain the Doctrine of waiver?

**Discussion Questions**

Discuss the nature of Law under Part III of Indian Constitution?
Learning Objectives

- To define the Fundamental Principles of Equality.
- To explain the discrimination and Safeguard against it.
- To explain the creamy Layer.
- To describe the Mandal Commission.

### 3.1.1 Fundamental Principles of Equality (Art. 14)

Article 14 declares that "the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India". The phrase "equality before the law" occurs in almost all written constitutions that guarantee fundamental rights. Equality before the law is an expression of English Common Law while "equal protection of laws" owes its origin to the American Constitution.

Both the phrases aim to establish what is called the "equality to status and of opportunity" as embodied in the Preamble of the Constitution. While equality before the law is a somewhat negative concept implying the absence of any special privilege in favour of any individual and the equal subjection of all classes to the ordinary law, equal protection of laws is a more positive concept employing equality of treatment under equal circumstances.

Thus, Article 14 stands for the establishment of a situation under which there is complete absence of any arbitrary discrimination by the laws themselves or in their administration.

Interpreting the scope of the Article, the Supreme Court of India held in Charanjit Lai Choudhury vs. The Union of India that: (a) Equal protection means equal protection under equal circumstances; (b) The state can make reasonable classification for purposes of legislation; (c) Presumption of reasonableness is in favour of legislation; (d) The burden of proof is on those who challenge the legislation.

Explaining the scope of reasonable classification, the Court held that "even one corporation or a group of persons can be taken to be a class by itself for the purpose of legislation provided there is sufficient basis
or reason for it. The onus of proving that there were also other companies similarly situated and this company alone has been discriminated against, was on the petitioner”.

In its struggle for social and political freedom mankind has always tried to move towards the ideal of equality for all. The urge for equality and liberty has been the motive force of many revolutions. The charter of the United Nations records the determination of the member nations to reaffirm their faith in the equal rights of men and women.

Indeed, real and effective democracy cannot be achieved unless equality in all spheres is realised in a full measure. However, complete equality among men and women in all spheres of life is a distant ideal to be realised only by the march of humanity along the long and difficult path of economic, social and political progress.

The Constitution and laws of a country can at best assure to its citizens only a limited measure of equality. The framers of the Indian Constitution were fully conscious of this. This is why while they gave political and legal equality the status of a fundamental right, economic and social equality was largely left within the scope of Directive Principles of State Policy.

The Right to Equality affords protection not only against discriminatory laws passed by legislatures but also prevents arbitrary discretion being vested in the executive. In the modern State, the executive is armed with vast powers, in the matter of enforcing by-laws, rules and regulations as well as in the performance of a number of other functions.

The equality clause prevents such power being exercised in a discriminatory manner. For example, the issue of licenses regulating various trades and business activities cannot be left to the unqualified discretion of the licensing authority. The law regulating such activities should lay down the principles under which the licensing authority has to act in the grant of these licenses.

Article 14 prevents discriminatory practices only by the State and not by individuals. For instance, if a private employer like the owner of a private business concern discriminates in choosing his employees or treats his employees unequally, the person discriminated against will have no judicial remedy.

One might ask here, why the Constitution should not extend the scope of these right to private individuals also. There is good reason for not doing so. For, such extension to individual action may result in serious interference with the liberty of the individual and, in the process; fundamental rights themselves may become meaningless.
After all, real democracy can be achieved only by a proper balance between the freedom of the individual and the restrictions imposed on him in the interests of the community. Yet, even individual action in certain spheres has been restricted by the Constitution, as for example, the abolition of untouchability, and its practice in any form by any one being made an offence. Altogether, Article 14 lays down an important fundamental right which has to be closely and vigilantly guarded.

There is a related matter that deserves consideration here. The right to equality and equal protection of laws loses its reality if all the citizens do not have equal facilities of access to the courts for the protection of their fundamental rights.

The fact that these rights are guaranteed in the Constitution does not make them real unless legal assistance is available for all on reasonable terms. There cannot be any real equality in the right "to sue and be sued" unless the poorer sections of the community have equal access to courts as the richer sections.

There is evidence that this point is widely appreciated in the country as a whole and the Government of India in particular and that is why steps are now being taken to establish a system of legal aid to those who cannot afford the prohibitive legal cost that prevails in all parts of the country.

3.1.1.1 Classical view of equality (Doctrine of reasonable classification)

The issue of the role and relationship of the values of liberty and equality is as actual today as it was centuries ago when liberal ideas began to question the organic and holistic view of society and the place of individuals therein. Whereas the doctrine of natural rights and the Kantian view of the autonomy of the individual are accepted as the core of liberalism, the concept of equality in its relation to liberty remains under discussion.

Classical liberalism accepted the notion of equality as normative for the citizens before the law. The followers of Kant saw personal freedom in the context of equal autonomy for all. In other words, the quest for equality is legitimate when it does not interfere with the fulfillment of individual autonomy.

Equality is the right to freedom; it is classical liberalism subordinated to liberty. For many liberals it is a tool, guaranteed through democracy's equal suffrage, etc., to achieve individual freedom and autonomy. Equality in liberty means that each person should enjoy as much liberty as is compatible with the liberty of others, and may do anything which does not diminish the equal liberty of others. According to Norberto Bobbio, very early in the development of the liberal state this form of equality inspired two fundamental principles that came to be expressed in constitutional provisions: (a) equality before the law,
and (b) equality of rights. The idea of the rule of law and the state of law (*Rechtstaat*) was developed on the basis of liberal conceptions of the relationship between liberty and equality.

The rule of law had to guarantee equal freedom for its citizens: equality before the law. Any other state interference in personal autonomy was condemned as restricting personal freedom. The minimal or *laissez faire* state was the classical liberal view on the role of the state in society. The notion of equality of rights extends beyond the idea of equality before the law since it presupposes the equal enjoyment by all citizens of certain fundamental constitutionally guaranteed rights.

### 3.1.1.2 Equal Opportunity

The idea of equality of opportunity as a condition for achieving liberty is already a deviation from classical liberalism. It has a social component connected to a new understanding of the role of equality in a much larger sense than pure normative equality or equality of rights. It sees the achievement of freedom as not only restricted to the efforts of the individual by itself, but in a societal context where equal opportunity are given to everyone to achieve personal freedom. Extending the reach of equality of opportunity to all classes and groups in society brought a new dimension to the idea of liberty.

To a great extent, socialism is a result of that understanding of equality. Freedom for everybody as precondition for freedom for all was the closing sentence of the "Communist Manifesto". The phrase was very much forgotten by orthodox Marxism, not to speak of Leninism and Stalinism. It was Bernstein in his reformist socialism who reminded socialists of the liberal strand in some of Marx's work.

The discussion regarding the boundaries of equality of opportunity and the extent to which it is acceptable without interfering with the value of liberty has never ceased. Proponents of the welfare state (social liberalism and social democracy) have different views on this point. Some accept the view in support of equality of opportunity "at the start"; others see it as equality over the life span of an individual. The common idea behind these divergent views is the notion that the state has the main responsibility for assuring everybody the opportunity to realize their potential talent and professional capabilities. This implies equality of opportunity for education, work, health, retirement, etc. In other words, the notion of equality of opportunity has expanded so much in scope that at the beginning of the 70s liberals returned to the classical issue of equality or freedom, or, more ideologized, freedom instead of socialism. The attack against the welfare state was a direct reflection of these sentiments of liberals--conservatives as well as neo-conservatives. All of them feared that the value of equality in its concrete political implementation was endangering personal liberties and restricting the territory of individual autonomy and achievement.
3.1.1.2.1 EGALITARIANISM

In its Leninist-Stalinist version, Communism turned the whole equation upside down. Social equality was the aim of the communists, while individual liberty was subdued. Egalitarianism against social differentiation, "collective freedom" against personal liberties was the ideological base of the attack by the communist partocracy against human rights and freedoms. In the name of "collective equality" personal initiative was repressed and eventually was to a large extent restricted. Private property was declared evil and banned; personal achievement was not well regarded.

A uniform society was created in which all were equally poor, equal in their misery, equal in the deprivation of happiness and security, equal in their small homes, equal in their small salaries and, in the end, equal in their irresponsibility to their job and community. Communism created a pseudo-equality or equality in the lack of freedom for all. Of course, for part of the populace this was a condition for being accepted, while it corresponded to a life and work style based on irresponsibility and little or no effort.

The value of liberty was suppressed as bourgeois individualism. The ruling elite saw the greatest danger to its dictatorship in autonomous thinking and expression. Of course, in that Orwellian society, some were "more equal" than the great mass of people; today many learn the truth of that deceitful pretense of "equality" in totalitarian communism. The ideology of communist egalitarianism was a facade behind which the higher nomenclature had unlimited freedom for personal enrichment, possessed a multitude of privileges, and were corrupt even to extent of criminality.

Egalitarianism as ideology and political praxis failed because it destroyed the basis for personal freedom and individual autonomy. It was formal equality without freedom; it was forced equality based on political repression. The state "planned" the scope of equality and defined the boundaries of personal freedoms. The state totally overwhelmed civil society and restricted its autonomy. Every attempt to assert one's autonomy or individual liberties outside state regulations was severely punished.

As Bobbio rightly observes, libertarianism and egalitarianism are rooted in profoundly divergent conceptions of man and society--conceptions which are individualistic, conflictual and pluralistic for the liberal; totalizing, harmonious and monistic for the egalitarian. The chief goal for the liberal is the expansion of the individual personality, even if the wealthier and more talented achieve this development at the expense of that of the poorer and less gifted. The chief goal for the egalitarian is the enhancement of the community as a whole, even if this entails constrictions of the sphere of individual freedom.

3.1.1.3 Modern view of equality (Equality as absence of arbitrariness)
It is now too well-settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case.

An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness.

Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always. Almost a quarter century back, this Court in S.G. Jaisinghani v. Union of India and Ors., [1967] 2 SCR 703, at p.7 18-19, indicated the test of arbitrariness and the pitfalls to be avoided in all State actions to prevent that vice, in a passage as under:”In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (Dicey—”Law of the Constitution”—Tenth Edn., Introduction cx).In Shrilekha Vidyarthi Vs Union of India

—Law has reached its finest moments”, stated Douglas, J. in United States v. Wunderlick, (*), —when it has freed man from the unlimited discretion of some ruler … Where discretion is absolute, man has always suffered”. It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilker (*), means sound discretion guided by law. It must be governed by rule, not humour: it must not be arbitrary, vague and fanciful.”
After Jaisinghani’s case (supra), long strides have been taken in several well-known decisions of this Court expanding the scope of judicial review in such matters. It has been emphasized time and again that arbitrariness is anathema to State action in every sphere and wherever the vice percolates, this Court would not be impeded by technicalities to trace it and strike it down. This is the surest way to ensure the majesty of rule of law guaranteed by the Constitution of India.

Every discretionary power vested in the executive should be exercised in a just, reasonable and fair way. That is the essence of the rule of law. In United States V Wunderlich (1951) 342 US 98 Law has reached its first finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded, at times his privacy; at times his liberty of movement; at times his freedom of thought; at times his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man’s other invention. John Wilkes (1770) 4 Burr 2528. Discretion means sound discretion guided by law it must be governed by rule not humor; it must not be arbitrary, vague or fanciful. In a state of governed by the rule of Law, discretion must be confined within clearly defined limits. A decision taken without any principle or rule is the antithesis of a decision of a decision taken in accordance with the rule of Law. In a State governed by the rule of law, discretion can never be absolute. Its exercise has always to be in conformity with rules; in contradistinction to being whimsical and should not stand smack of an attitude of “so let it be written, so let it be done”. It is important to emphasize that the absence of arbitrary powers is the first essential of the Rule of Law upon which our whole constitutional system is based. In a system governed by the rule of law, discretion when conferred by upon executive authorities, must be confined within clearly defined limits.  Aeltemesh Rein, Advocate, Supreme Court Of India Vs Union Of India And Others (AIR 1988 SC 1768)

Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14. State Policy: The sweep of Article 14 covers all state action. Non arbitrariness and fairness are the two immobile and unalterable cornerstone of a legal behaviour baseline. Every action even a change of policy in any realm of state activity has to be informed fair and non arbitrary. In E. P. ROYAPPA Vs. STATE OF TAMIL NADU & ANR.

An authority, however, has to act properly for the purpose for which the power is conferred. He must take a decision in accordance with the provisions of the Act and the statutes. He must not be guided by extraneous or irrelevant consideration. He must not act illegally, irrationally or arbitrarily. Any such illegal, irrational or arbitrary action or decision, whether in the nature of legislative, administrative or quasi-judicial exercise of power is liable to be quashed being violative of Article 14 of the Constitution. In Neelima Misra Vs Harinder Kaur Paintal And Others (AIR 1990 SC 1402)
The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. In KASTURI LAL LAKSHMI REDDY Vs. STATE OF JAMMU AND KASHMIR & ANOTHER

In legislations enacted for general benefit and common good the responsibility is far graver. It demands purposeful approach. The exercise of discretion should be objective. Test of reasonableness is more strict. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become bona fide and in good faith merely because no personal gain or benefit to the person exercising discretion should be established. An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty is discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason. In MAHESH CHANDRA Vs. REGIONAL MANAGER, U.P. FINANCIAL CORPORATION AND ORS (AIR 1993 SC 935)

It is now well-settled as a result of the decisions of this Court in E. P. Rayappa v. State of Tamil Nadu, and ….. the decisions of this Court in E. P. Rayappa v. State of Tamil Nadu (supra) therefore, and Maneka Gandhi v. Union of India, (1978) S.C. 248, that Art. 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: It must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Art. 14 and it must characterize every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. In Ramana Dayaram Shetty Vs International Airport Authority Of India And Others (1979 AIR(SC) 1628).

The expression ―arbitrarily‖ means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone. In M/S SHARMA TRANSPORT REP.BY SHRI D.P.SHARMA Vs. GOVERNMENT OF A.P. & ORS.(AIR 2002 SC 322)
A case of conferment of power together with a discretion which goes with it to enable proper exercise of the power and therefore it is coupled with a duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. In AP Aggarwal vs Govt of NCT of Delhi (AIR 2000 SC 3689)

Any state action executive, legislative or judicial is void if it contravenes Art 14. In Budhan v State of Bihar (AIR 1995 SC 191)

A statute may expressly make a discrimination between persons or things or may confer power on an authority who would be in a position to do so. Official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately. In State Of Andhra Pradesh And Another Vs Nalla Raja Reddy And Others (AIR 1967 1458)

The absence of arbitrary power is the first postulate of rule of law upon which our whole Constitutional edifice is based. In a system governed by Rule of Law, discretion when conferred upon an executive authority must be confined within clearly defined limits. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of Rule of Law. Discretion means sound discretion guided by law or governed by known principles of rules, not by whim or fancy or caprice of the authority.

### 3.1.1.4 Interrelationship of Article 14 with Articles 15 and 16

Right to equality is an important right provided for in Articles 14, 15 and 16 of the constitution. It is the principal foundation of all other rights and liberties, and guarantees the following:

- **Equality before law:** Article 14 of the constitution guarantees that all citizens shall be equally protected by the laws of the country. It means that the State cannot discriminate any of the Indian citizens on the basis of their caste, creed, colour, sex, gender, religion or place of birth.

- **Social equality and equal access to public areas:** Article 15 of the constitution states that no person shall be discriminated on the basis of caste, colour and language. Every person shall have equal access to public places like public parks, museums, wells, bathing ghats and temples etc. However, the State may make any special provision for women and children. Special provisions may be made for the advancements of any socially or educationally backward class or scheduled castes or scheduled tribes.
Equality in matters of public employment: Article 16 of the constitution lays down that the State cannot discriminate against anyone in the matters of employment. All citizens can apply for government jobs. There are some exceptions. The Indian Parliament may enact a law stating that certain jobs can only be filled by applicants who are domiciled in the area. This may be meant for posts that require knowledge of the locality and language of the area. The State may also reserve posts for members of backward classes, scheduled castes or scheduled tribes which are not adequately represented in the services under the State to bring up the weaker sections of the society. Also, there a law may be passed which requires that the holder of an office of any religious institution shall also be a person professing that particular religion. According to the Citizenship (Amendment) Bill, 2003, this right shall not be conferred to Overseas citizens of India.

3.1.2 Safeguard against Discrimination in Public Life

3.1.2.1 Article 15 Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
(2) No citizen shall, on ground only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -
   (a) access to shops, public restaurants, hotels and places of public entertainment; or
   (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained whole or partly out of State funds or dedicated to the use of general public.
(3) Nothing in this article shall prevent the State from making any special provision for women and children.
(4) Nothing in this article or in clause (2) or article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

3.1.2.2 Need for definition of discrimination

The Indian Constitution guarantees equality as 'Fundamental Rights' in Articles 14, 15 and 16 under Part III. Article 14 guarantees equality before law and the equal protection of laws. Article 15 prohibits discrimination 'only' on the basis of religion, race, caste, sex, place of birth, or any of them. Article 15 also allows for special provisions to be made for women, children, socially and educationally backward
classes of citizens as well as the Schedule Castes and the Scheduled Tribes (SCs and STs) – such special provisions shall not be considered discriminatory. Article 16 provides for equality of opportunity in matters of public employment. It also allows the state to make reservations in favour of the SC, ST and Other Backward Classes. While the Constitution does not specifically mention reservation for women, the Constitutional (74th Amendment) Act, 1992, brought in provisions mandating one-third reservations for women in local governance bodies. These guarantees apply to state and public institutions. The only provision that binds both the public and the private sector is Article 17 which outlaws untouchability and forbids its practice in any form.

Part IV of the Indian Constitution enlists socio-economic and cultural rights under the title of ‘Directive Principles of State Policies’ (DPSP). While the DPSP, unlike the fundamental rights, are not enforceable, these rights are meant to guide the state while legislating and policy making.

The Supreme Court and the High Courts under Article 32 and 226 respectively, have the power to enforce constitutional guarantees of fundamental rights. This Right to Constitutional Remedies is itself a fundamental right.

For the enforcement of fundamental rights, the Supreme Court has expanded the locus standi which has resulted in public interest litigation on behalf of socially deprived categories. The expansion of locus standi was justified by Justice Bhagwati in S. P. Gupta v. President of India & Others as follows:

―It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.”

3.1.2.3 Existing Legislative Framework

There is no comprehensive anti-discrimination code in India although there are laws that address specific aspects related to equality. For instance, laws like the Maternity Benefits Act, 1961, Equal Remuneration Act, 1976 and the National Rural Employment Guarantee Act, 2005 attempt to address the existent
systemic discrimination towards women in employment. Based on the guarantee of equality, laws have been enacted to address violence against women under civil and criminal laws. The Protection of Domestic Violence Act, 2005 is an example of the civil law to address violence within the home. On the other hand, the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 is an example of criminal law to counter acts of violence against SC/ST women. In the absence of an anti-discrimination code, there is no comprehensive statutory definition of discrimination that takes into account different manifestations of discrimination and its impact.

Other than mechanisms provided under these laws, India has instituted statutory commissions to protect human rights such as the National Human Rights Commission and the National Commission for Women. These commissions have been vested with the function of *inter alia* monitoring and reviewing state action and making recommendations for better enforcement of human rights and women’s rights. However, they have their limitations. Their recommendations are not binding upon the government and they have no power to redress individual grievances and grant relief.

3.1.3 Affirmative action in favour of women, children, educationally and socially backward classes and SCs, STs

3.1.3.1 Affirmative action in favour of women, children

The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Constitution not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women.

Within the framework of a democratic polity, our laws, development policies, Plans and programmes have aimed at women’s advancement in different spheres. From the Fifth Five Year Plan (1974-78) onwards has been a marked shift in the approach to women’s issues from welfare to development. In recent years, the empowerment of women has been recognized as the central issue in determining the status of women. The National Commission for Women was set up by an Act of Indian Parliament in 1990 to safeguard the rights and legal entitlements of women. The 73rd and 74th Amendments (1993) to the Constitution of India have provided for reservation of seats in the local bodies of Panchayats and Municipalities for women, laying a strong foundation for their participation in decision making at the local levels.

India has also ratified various international conventions and human rights instruments committing to secure equal rights of women. Key among them is the ratification of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993.
The Mexico Plan of Action (1975), the Nairobi Forward Looking Strategies (1985), the Beijing Declaration as well as the Platform for Action (1995) and the Outcome Document adopted by the UNGA Session on Gender Equality and Development & Peace for the 21st century, titled "Further actions and initiatives to implement the Beijing Declaration and the Platform for Action" have been unreservedly endorsed by India for appropriate follow up.

The Policy also takes note of the commitments of the Ninth Five Year Plan and the other Sectoral Policies relating to empowerment of Women.

The women’s movement and a wide-spread network of non-Government Organisations which have strong grass-roots presence and deep insight into women’s concerns have contributed in inspiring initiatives for the empowerment of women.

policies, plans, programmes, and related mechanisms on the one hand and the situational reality of the status of women in India, on the other. This has been analyzed extensively in the Report of the Committee on the Status of Women in India, "Towards Equality", 1974 and highlighted in the National Perspective Plan for Women, 1988-2000, the Shramshakti Report, 1988 and the Platform for Action, Five Years After- An assessment"

Gender disparity manifests itself in various forms, the most obvious being the trend of continuously declining female ratio in the population in the last few decades. Social stereotyping and violence at the domestic and societal levels are some of the other manifestations. Discrimination against girl children, adolescent girls and women persists in parts of the country.

The underlying causes of gender inequality are related to social and economic structure, which is based on informal and formal norms, and practices.

Consequently, the access of women particularly those belonging to weaker sections including Scheduled Castes/Scheduled Tribes/ Other backward Classes and minorities, majority of whom are in the rural areas and in the informal, unorganized sector – to education, health and productive resources, among others, is inadequate. Therefore, they remain largely marginalized, poor and socially excluded.

3.1.3. 1.1 Goal and Objectives

The goal of this Policy is to bring about the advancement, development and empowerment of women. The Policy will be widely disseminated so as to encourage active participation of all stakeholders for achieving its goals. Specifically, the objectives of this Policy include
(i) Creating an environment through positive economic and social policies for full development of women to enable them to realize their full potential

(ii) The de-jure and de-facto enjoyment of all human rights and fundamental freedom by women on equal basis with men in all spheres – political, economic, social, cultural and civil

(iii) Equal access to participation and decision making of women in social, political and economic life of the nation

(iv) Equal access to women to health care, quality education at all levels, career and vocational guidance, employment, equal remuneration, occupational health and safety, social security and public office etc.

(v) Strengthening legal systems aimed at elimination of all forms of discrimination against women

(vi) Changing societal attitudes and community practices by active participation and involvement of both men and women.

(vii) Mainstreaming a gender perspective in the development process.

(viii) Elimination of discrimination and all forms of violence against women and the girl child; and

(ix) Building and strengthening partnerships with civil society, particularly women‘s organizations.

3.1.3. 1.2 Judicial Legal Systems

Legal-judicial system will be made more responsive and gender sensitive to women’s needs, especially in cases of domestic violence and personal assault. New laws will be enacted and existing laws reviewed to ensure that justice is quick and the punishment meted out to the culprits is commensurate with the severity of the offence.

At the initiative of and with the full participation of all stakeholders including community and religious leaders, the Policy would aim to encourage changes in personal laws such as those related to marriage, divorce, maintenance and guardianship so as to eliminate discrimination against women.

The evolution of property rights in a patriarchal system has contributed to the subordinate status of women. The Policy would aim to encourage changes in laws relating to ownership of property and inheritance by evolving consensus in order to make them gender just.

3.1.3. 1.3 Decision Making
Women’s equality in power sharing and active participation in decision making, including decision making in political process at all levels will be ensured for the achievement of the goals of empowerment. All measures will be taken to guarantee women equal access to and full participation in decision making bodies at every level, including the legislative, executive, judicial, corporate, statutory bodies, as also the advisory Commissions, Committees, Boards, Trusts etc. Affirmative action such as reservations/quotas, including in higher legislative bodies, will be considered whenever necessary on a time bound basis. Women–friendly personnel policies will also be drawn up to encourage women to participate effectively in the developmental process.

3.1.3. 1.4 Mainstreaming a Gender Perspective in the Development Process

Policies, programmes and systems will be established to ensure mainstreaming of women’s perspectives in all developmental processes, as catalysts, participants and recipients. Wherever there are gaps in policies and programmes, women specific interventions would be undertaken to bridge these. Coordinating and monitoring mechanisms will also be devised to assess from time to time the progress of such mainstreaming mechanisms. Women’s issues and concerns as a result will specially be addressed and reflected in all concerned laws, sectoral policies, plans and programmes of action.

3.1.3. 2 Affirmative action in favour of socially backward classes and SCs, STs

The constitution of India was adopted on November 26, 1949. Some provision of the constitution came into force on same day but the remaining provisions of the constitution came into force on January 26, 1950. This day is referred to the constitution as the “date of its commencement”, and celebrated as the Republic Day.

The Indian Constitution is unique in its contents and spirit. Through borrowed from almost every constitution of the world, the constitution of India has several salient features that distinguish it from the constitutions of other countries.

Dr. Bhimrao Ambedkar, was chairman of the drafting committee. He was the first Law Minister of the India. He continued the crusade for social revaluation until the end of his life on the 6th December 1956. He was honoured with the highest national honour, ‘Bharat Ratna ‘ in April 1990. B.R. Ambedkar was affectionately called Baba Saheb Ambedkar.

Dr. Ambedkar is the man of millennium for social justice, since he was the first man in history to successfully lead a tirade of securing social to the vast sections of Indian humanity, with the help of a law. Dr. Ambedkar was the man who tried to turn the Wheel of the Law toward social justice for all. He has strong fervor to attain social justice among the Indian Communities for this purpose he began his vocation.
At the time of independence, the constitution makers were highly influenced by the feeling of social equality and social justice. For the same reason, they incorporated such provisions in the constitution of India. These are as follows –

The words, —Socialist‖, —secular‖, —democratic” and —public” have been inserted in the preamble. Which reflects it’s from as a —social welfare state.” The expression —socialist” was intentionally introduced in the Preamble.

In D. S. Nakara v. Union of India, the Supreme Court has held that the principal aim of a socialist state is to eliminate inequality in income, status and standards of life. The basic frame work of socialism is to provide a proper standard of life to the people, especially, security from cradle to grave. Amongst there, it envisaged economic equality and equitable distribution of income. This is a blend of Marxism & Gandhism, leaning heavily on Gandhian socialism. From a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society reveals a long march, but, during this journey, every state action, whenever taken, must be so directed and interpreted so as to take the society one step towards the goal.

In Excel Wear v Union of India, the Supreme Court held that the addition of the word ‗socialist‘ might enable the courts to learn more in favour of nationalisation and state ownership of an industry. But, so long as private ownership of industries is recognised which governs an overwhelming large principles of socialism and social justice cannot be pushed to such an extent so as to ignore completely, or to a very large extent, the interest of another section of the public, namely the private owners of the undertaking.

The term ‗justice‘ in the Preamble embraces three distinct forms- social, economic and political, secured through various provisions of Fundamental Rights and Directive Principles. Social justice denotes the equal treatment of all citizens without any social distinction based on caste, colour, race, religion, sex and so on. It means absence of privileges being extended to any particular section of the society, and improvement in the conditions of backward classes (SCs, STs, and OBCs) and women. Economic justice denotes on the non- discrimination between people on the basis of economic factors. It involves the elimination of glaring in equalities in wealth, income and property. A combination of social justice and economic justice denotes what is known as ‗distributive justice‘. Political justice implies that all citizens should have equal political rights, equal voice in the government. The ideal of justice- social, economic and political- has been taken from the Russian Revaluation (1917).

The term ‘equality‘ means the absence of special privileges to any section of the society, and provision of adequate opportunities for all individuals without any discrimination. The Preamble secures at all citizens
of India equality of status an opportunity. This provision embraces three dimensions of equality- civic, political and economic.

The following provisions of the chapter on Fundamental Rights ensure civic equality:

a) Equality before the Law (Article 14).
b) Prohibition of discrimination on grounds of religion, race, caste, sex of place of birth (Article 15).
c) Equality of opportunity in matters of public employment (Article 16).
d) Abolition of untouchability (Article 17).
e) Abolition of titles (Article 18).

There are two provisions in the Constitution that seek to achieve political equality. One, no person is to be declared ineligible for inclusion in electoral rolls on grounds of religion, race, caste or sex (Article 325). Two, elections to the Lok Sabha and the state assemblies to be on the basis of adult suffrage (Article 326).

Article 36 to 51 incorporate certain directive principles of State policy which the State must keep in view while governing the nation, but by Article 37 these principle have been expressly made non-justiciable in a court of law. Although these principles are not judicially enforceable, yet they are not without purpose. The report of the Sub-Committee said:

"The principles of Policy set forth in this part are intended for the guidance of the State. While these principles shall not be cognizable by any Court they are nevertheless fundamental in the governance of the country and their application in the making of laws shall be the duty of the State."

According to Dr. B.R. Ambedkar, the Directive Principles of State Policy is a 'novel feature' of the Indian Constitution. They are enumerated in Part IV of the Constitution. They can be classified into three broad categories- socialistic, Gandhian and liberal- intellectual. The directive principles are meant for promoting the ideal of social and economic democracy. They seek to establish a 'welfare state' in India. However, unlike the Fundamental Right, the directives are non-justiciable in nature, that is, they are not enforceable by the courts for their violation. Yet, the Constitution itself declares that 'these principles are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws'. Hence, they impose a moral obligation on the state authorities for their application. But, the real force (sanction) behind them is political, that is, public opinion.1[8]

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Social Justice is the foundation stone of Indian Constitution. Indian Constitution makers were well known to the use and minimality of various principles of justice. They wanted to search such form of justice which could fulfill the expectations of whole revolution. Pt. Jawahar Lal Nehru put an idea before the Constituent Assembly

"First work of this assembly is to make India independent by a new constitution through which starving people will get complete meal and cloths, and each Indian will get best option that he can progress himself."

Social justice found useful for everyone in its kind and flexible form. Although social justice is not defined anywhere in the constitution but it is an ideal element of feeling which is a goal of constitution. Feeling of social justice is a form of relative concept which is changeable by the time, circumstances, culture and ambitions of the people.

Social inequalities of India expect solution equally. Under Indian Constitution the use of social justice is accepted in wider sense which includes social and economical justice both. According to Chief Justice Gajendragadkar.

"In this sense social justice holds the aims of equal opportunity to every citizen in the matter of social & economical activities and to prevent inequalities”.

The constitution of India does not completely dedicated to any traditional ideology as – equalitarian, Utilitarian, Contractarian or Entitlement theory. Dedication of constitution is embedded in progressive concept of social justice and various rules of justice such as- Quality, Transaction, Necessity, Options etc are its helping organs. Infact dedication of the constitution is in such type of social justice which can fulfill the expectations of welfare state according to Indian conditions. So that in one way it has been told about the value of Equality which is known as the declaration of equal behavior of equals to Aristotil,
directs the state "The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India"3[13] that is distributive justice. In the other way it has been told the protective discrimination by special provision for other backwards of the society such as – SC, ST & Socially and educationally back ward classes, which is the attribute (symbol) of corrective and compensatory justice.

Original Principle of Equalitarian justice is propounded/derived by Aristotle that is equal behavior in equal matter. If there is unequal behavior between equal, there will be injustice.

In State of U.P. Vs. Pradeep Tandon, the Supreme Court accepted reasonable classification justiciable on the basis of unequal behavior between unequal people. In Chiranjeet Las Vs. Union Of India4[16]. and State of J.K. vs. Bhakshi Gulam Mohammad it is held by the Supreme Court that due to some special circumstances one person or one body can be treated as one class. But the question is how to determine inequality? In India it is not easy to determine inequality. In Air India vs. Nergis Mirza the Supreme Court declared the rule of Air India unreasonable and discriminatory. But accepting justiciable element in equality, it is try to make equality more effective and progressive. In E.P. Royappa vs. State of Tamilnadu5[19] Justice Bhagwati has held that equality is movable concept which has many forms and aspects . It cannot be tightened in traditional and principled circle. Equality with equal behavior prohibits arbitrariness in action, inequality is surely be there.

To accept right to equality as an essential element of Justice, India Constitution prohibits unequal behavior on the grounds of religion, race, caste, sex. But constitution accepts that strict compliance of formal equality will make up equality. But the system of special provision for backward classes of society, it is to try to make the principle of equality more effective. Under Article 15(4) the state shall make any special provision for the advancement of any socially and educationally backward classes of citizen or for the scheduled castes, and the Scheduled tribes and in the same manner by accepting the opportunity of equality to employment under state in Article 16 (1), it has excepted the principle of equalization under Article 16(4). If it is in the opinion of the state that any class of the citizens has not adequately representation under state employment, state shall make any provision for the reservation of appointments. According to Art 46 the State shall promote with special care the educational and economic
interests of weaker sections of the people, and in particular, of the scheduled castes and the scheduled tribes, and shall protect them from social injustice and all forms of exploitation.

In a very important case of Indra Shahani vs. Union of India the Supreme Court declared 27% reservation legal for socially and economically backward classes of the society under central services.

Basically protective discrimination is used to fulfill those lacks which arise due to a long time deprivation. It is a part of corrective and compensatory justice. It has been told that peoples of backward class of society have been bearing injustice for generation to generation. Some peoples of the society made supremacy on the benefits of the society and made deprived to others. So this provision of protective discrimination has been made for those deprived people who are living in unbeneeficial circumstances.

Through equal opportunity on the basis of quality the Supreme Court has tried to make a reasonable balance between distribution of benefits and distributive justice. In M.R. Balaji vs State of Mysure, the Supreme Court has held that for the object of compensatory justice, limit of reservation should not be more than 50%. In India Shahni vs. Union of India full bench of nine judges approved this balance between distributive justice through quality and compensatory justice.

There is a very wide planning of justice according to necessity in the constitution. It expects distribution of social benefits according to necessity by which more needy person can get benefits. It is expected to the state that the state shall in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Under Article 41, it is expected to the state that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement, and in other cases of underserved want. It is provided under Article 42 that the state shall make provision for securing just and humane conditions of work and for maternity relief. In Article 43 it is expected that the State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the state shall endeavor to promote cottage industries on an individual or co-operative basis in rural areas. In PUDR vs. Union of India, the Supreme Court has held that minimum wages must be given and not to pay minimum wages is the violation of human dignity and it is also known as exploitation.
In India, courts have performed a great role to make the Social justice successful. In the field of distributive Justice, Legislature and Judiciary both are playing great role but courts are playing more powerful role to deliver compensatory or corrective justice but these principles are known as mutually relatives not mutually opposites. Ideals and goals are to deliver social justice. Medium may be distributive or compensatory justice. The adopted type may be of quality, Necessity, Equality, Freedom, Common interest or other. Although the Supreme Court has not found any possible definition of Social Justice but has accepted it as an essential and an organ of legal system.

The supreme court of India has given a principal and dynamic shape to the concept of social justice. Social justice has been guiding force of the judicial pronouncements. In Sadhuram v. Pulin6[26], the Supreme Court ruled that as between two parties, if a deal is made with one party without serious detriment to the other Court would lean in favour of weaker section of the society. The judiciary has given practical shape to social justice through allowing affirmative governmental actions are held to include compensatory justice as well as distributive justice which ensure that community resources are more equitably and justly shared among all classes of citizens. The concept of social justice has brought revolutionary change in industrial society by charging the old contractual obligations. It is no more a narrow or one sided or pedantic concept. It is founded on the basic ideal of socio-economic equality and its aim is to assist the removal of socio-economic disparities and inequalities. In J.K. Cotton Spinning. And Wiving. Co. Ltd. V. Labour Appellate Tribunal, the Supreme Court of India pointed out that in industrial matters doctrinaire and abstract notions of social justice are avoided and realistic and pragmatic notions are applied so as to find a solution between the employer and the employees which is just and fair.

Despite the well intentioned commitment of ensuring social justice through equalization or protective discrimination policy, the governmental efforts have caused some tension in the society. In the name of social justice even such activities are performed which have nothing to do with social justice. 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.

3.1.4 Combating Discrimination in Public Employment: (Article 16)

3.1.4.1 INTRODUCTION

The word “reservation” has attained a particular legal significance in matters relating to public employment. The concept is founded on separating individuals or groups having certain characteristics (pertaining to backwardness as per Articles 15(4) & 16(4)) from the general category of candidates and
conferring on them the benefit of special treatment. It is discrimination made in favour of the backward classes vis-à-vis the citizens in general and has been referred to as _Compensatory discrimination_ or _Positive Discrimination_.

### 3.1.4.2 CONSTITUTION MANDATE

The Constitution of India has provided, among other various protections and safeguards, safeguards for Public employment to the persons belonging to the Scheduled Castes and Scheduled Tribes, keeping in view the discrimination and disabilities suffered by these classes to catch up and compete successfully with the more fortunate ones in the matter of securing public employment. Specific provisions for reservations in services in favour of the members of Scheduled Castes and Scheduled Tribes have been made as follows in the Constitution of India:-

**Article 16(1):** There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

**Article 16(4):** Article 16 provides for equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, Nevertheless, _nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State_.

There have been two Constitution Amendments incorporated in Article 16(4), they are:-

**Article 16 (4-A) :** Nothing in this article shall prevent the state from making any provision for reservation in matters of promotions, with consequential seniority, to any class or classes of posts in services under the state in favour of SCs/STs which in opinion of state, are not adequate by represented in the services under the state.

The 77th Amendment to the Constitution has been brought into effect permitting reservation in promotion to the Scheduled Castes and Scheduled Tribes.

Thus, by amending the Constitution, the Indian Parliament has removed the base as interpreted by Supreme Court in Indira Sawhney that the appointment does not include promotion. Article 16(4A) thus revives the interpretation put on Article 16. Rule of reservation can apply not only to initial recruitments but also to promotions. But no promotion can be made in promotion posts for the OBC’s.
The Supreme Court has emphasized that Article 16(4A) ought to be applied in such a manner that a balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes as well as for the other members of the society.

**Article 16 (4-B):** —Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.”

The Constitution (Eighty- First Amendment) Act, 2000 has added Article 16(4B) to the Constitution. The Amendment envisages that the unfilled reserved vacancies are to be carried forward to the subsequent years and these vacancies are to be treated as distinct and separate from the current vacancies during any year. The rule of 50% reservation laid down by the Supreme Court is to be applied only to normal vacancies. This means that the unfilled reserved vacancies can be carried forward from year to year without any limit, and are to be filled separately from the normal vacancies. This Amendment also modifies the proposition laid down by the Supreme Court in *Indira Sawhney*.

**Article 335:** This article provides that “the claims of the members of the SCs and STs shall be taken into consideration, consistently with the maintenance of efficiency of administration in the making of appointments in services and posts in connection with the affairs of the Union or of a State”.

### 3.1. 4.3 RESERVATION FOR BACKWARD CLASSES IN INDIA

**ARTICLE 16(4):** This clause (4) expressly provides for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state is not adequately represented in the services under the state. Here the term state denotes both Central and state governments and their instrumentalities.

The power conferred on the State can only be exercised in favour of a backward class and therefore, whether a particular class of citizens is backward, is an objective factor to be determined by the state.

It was held in *Triloki Nath v. State of J & K*, [1] that State determination must be justiciable and may be challenged if it is based on irrelevant considerations.
In Mohan Kumar Singhania v. Union of India, [2] explaining the nature of Article 16(4) the Supreme Court has stated that it is an enabling provision conferring a discretionary power on the state for making any provision or reservation of any backward class of citizens which in the opinion of the state is not adequately represented in the service of the state. Article 16(4) neither imposes any constitutional duty nor confers any Fundamental Right on any one for claiming reservation. The state government takes the total population of the backward class and their representation in the state services and after doing the necessary exercise makes the reservation and provides the percentage of reservation for the posts, then the percentage has to be followed strictly.

3.1. 4.4 WHAT ARE “BACKWARD CLASSES” U/Art. 16(4) of The CONSTITUTION?

There was an overwhelming majority in the nation that was still backward – socially, economically, educationally, and politically. These victims of entrenched backwardness comprise the present scheduled castes (SC), scheduled tribes (ST) and other backward classes (OBC). Even though, these classes are generically the "Backward Classes," the nature and magnitude of their backwardness are not the same.

The words ' "backward class of citizens" occurring in Article 16 (4) are neither defined nor explained in the Constitution though the same words occurring in Article 15 (4) are followed by a qualifying phrase, "Socially and Educationally" backward classes.

In the course of debate in the Indian Parliament on the intendment of Article 16 (4), Dr. B.R. Ambedkar, expressed his views that —backward classes” are which nothing else but a collection of certain castes.

Incidentally, it is also necessary to point out that the Supreme Court in all its decisions on reservation has interpreted the expression 'backward classes' in Article 16 (4) to mean the "socially and educationally" backward. It also emphatically rejected "economic backwardness" as the only or the primary criterion for reservation under article 16 (4) and observed that economic backwardness has to be on account of social and educational backwardness. The true meaning of this expression has been considered in a number of cases by the Supreme Court starting from Balaji to Indira Sawhney.

(1) In M.R. Balaji v. State of Mysore,[3] it was held that the caste of a group of persons cannot be the sole or even predominant factor though it may be a relevant test for ascertaining whether a particular class is backward or not. The two tests should be conjunctively applied in determining backward classes: one, they should be comparable to the Schedule Castes and Schedule Tribes in the matter of their
backwardness; and, two, they should satisfy the means test, that is to say, the test of economic backwardness laid down by the State government in the context of the prevailing economic conditions. Poverty, caste, occupation and habitation are the principal factors contributing to social backwardness.


The apex Court explaining the meaning of ‘Class’ observed that “The quintessence of the definition of “Class” is that a group of persons having common traits or attributes coupled with retarded social, material (economic) and intellectual (educational) development in the sense not having so much of intellect and ability will fall within the ambit of ‘any backward class of citizens’ under Article 16 (4) of the Constitution.”

(3) Further in *R. Chitralekha v. State of Mysore*, it was stated that:

“...what we intend to emphasize is that under no circumstances a "class" can be equated to a "caste", though the caste of an individual or a group of individual may be considered along with other relevant factors in putting him in a particular class.”

(4) In *State of Andhra Pradesh v. P. Sagar*, [7] it has been observed that:

The expression "class" means a homogeneous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted.

(5) In *Triloki Nath v. J & K State* (II) [8] Shah, J., speaking for the Constitution Bench has reiterated the meaning of the word 'class' as defined in the case of Sagar and added that "for the purpose of Article 16 (4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution."
The expression ‘backward class’ is not used as synonymous with ‘backward caste’ or ‘backward community’. The members of an entire caste or community may in a social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class.

(6) In A. Peeriakaruppan, etc. v. State of Tamil Nadu [9]

The Supreme Court observed that —A caste has always been recognised as a class. If the members of an entire caste or community at a given time are socially, economically and educationally backward that caste on that account be treated as a backward class. This is not because they are members of that caste or community but because they form a class.”

(7) Chief Justice Ray in Kumari K.S. Jayasree and Anr. v. The State of Kerala and Anr. [10] was of the view that —In ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot however be made the sole or dominant test...”

(8) In Indira Sawhney and Ors. Vs. Union of India and Ors. [11], the Court observed that:

- The meaning of the expression —backward classes of citizens” is not qualified or restricted by saying that it means those other backward classes who are situated similarly to Scheduled Caste and/or Scheduled Tribes. Backwardness being a relative term must in the context be judged by the general level of advancement of the entire population of the country or the State, as the case may be.

- There is adequate safeguard against misuse by the political executive of the power u/Art. 16(4) in the provision itself. Any determination of backwardness is neither a subjective exercise nor a matter of subjective satisfaction. The exercise is an objective one. Certain objective social and other criteria have to be satisfied before any group or class of citizens could be treated as
backward. If the executive includes, for collateral reasons, groups or classes not satisfying the relevant criteria, it would be a clear case of fraud on power.

- “Caste’ neither can be the sole criterion nor can it be equated with ‘class’ for the purpose of Article 16 (4) for ascertaining the social and educational backwardness of any section or group of people so as to bring them within the wider connotation of ‘backward class’. Nevertheless 'caste' in Hindu society becomes a dominant factor or primary criterion in determining the backwardness of a class of citizens.

- Unless 'caste' satisfies the primary test of social backwardness as well as the educational and economic backwardness which are the established and accepted criteria to identify the 'backward class', a caste per se without satisfying the agreed formulae generally cannot fall within the meaning of 'backward class of citizens' under Article 16 (4), save in given exceptional circumstances such as the caste itself being identifiable with the traditional occupation of the lower strata - indicating the social backwardness. And ‘Class’ has occupation and Caste nexus; it is homogeneous and is determined by birth. It further approved Chitralekha case.

(9) Further in case of Jagdish Negi v. State of U.P.Jt [12] Court held —“backwardness is not a static phenomenon. It cannot continue indefinitely and the State is entitled to review the situation from time to time.”

3.1.5.5 PART III OF THE CONSTITUTION IN RELATION TO RESERVATION IN PUBLIC SERVICES

Article 14 is in general terms whereas Arts. 15 and 16 are of specific nature. Shortly put the combined effect of Arts. 14, 15 and 16 as far as public employment is concerned, is that they guarantee non-discriminatory treatment of citizens in matters relating to public employment. Religion, race, caste, sex, descent, place of birth, residence or any of them cannot be the basis for discrimination against a citizen in matters relating to public employment or office under the state.

Reservation in favour of backward classes of citizens is dealt with by cl. (4) of Art.16. It is an enabling provision and is in the nature of a provision or an exception to cl. (1) of Article 16 of the Constitution?

3.1.5.6 WHETHER Art.16 (4) AN EXCEPTION TO Art.16 (1)?
Although cl. (4) has an over-riding flavour as the opening words —Nothing in the Article shall prevent the State from.........”, suggest as Mudholkar, J. referring to these words in Devdasan pointed out: The over-riding effect of cl.(4) on cls. (1) and (2) could only extend to the making of a reasonable number of reservation of appointments and posts in certain circumstances. That is all”.

The view in T.Devadasan v. Union of India, [13] that Art. 16(4) was an exception to Art. 16(1) received a severe setback from the majority decision in State of Kerala v. N.M. Thomas,[14] which held that 16(4) was not an exception to Art.16(1) but that it was merely an emphatic way of stating a principle implicit in Art.16(1). The view taken in N.M Thomas has been accepted as the correct one and by the majority in Indira Sawhney where the Court pointed out: “Indeed, even without clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms.”

3.1. 4.7 ARTICLE 16(4) AND ARTICLE 335

Article 335: provides that the claims of the members of the SCs and STs shall be taken into consideration, consistently with the maintenance of efficiency of administration in the making of appointments in services and posts in connection with the affairs of the Union or of a State”.

There has been some debate as to whether Art.335 had any limiting effect on the power of reservation conferred by Art. 16 (4). The nine judge bench of the Supreme Court in Indira Sawhney considered the argument that the mandate of Art.335 implied that reservation should be read subject to the qualification engrafted in Art.335 i.e. consistently with the maintenance of efficiency of administration. Dealing with the argument majority framed an issue as to whether reservations were anti-meritarian? The majority then observed that may be efficiency, competence and merit are not synonymous concepts; may be it is wrong to treat merit as synonymous with efficiency in administration and that merit is but a component of the efficiency of an administration.

Even so the relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed. We also firmly believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with-and may in some cases, excel members of open competitor candidates. It is undeniable that nature has endowed merit upon members of
backward classes as much as it has endowed upon members of other classes and what is required is an opportunity to prove it.

But in case of Article 16, Article 355 would be relevant. It may be permissible for the government to prescribe a reasonably lower standard for scheduled castes/Scheduled tribes/backward classes consistent with the requirements of efficiency of administration. It would not be permissible not to prescribe any such minimum standard at all. While prescribing the lower minimum standard for reserved category, the nature and duties attached to the post and the interest of the general public should also be kept in mind. While on Article 355, we are of the opinion that there are certain services and positions where merit alone counts. In such situations, it may not be advisable to provide for reservations. For example technical post in Research and Development organisations/departments/institutions, superspecialities in medicine, engineering etc.

3.1. 4.8 CENT PERCENT RESERVATION NOT PERMISSIBLE:

The state is not entitled to make a cent percent reservation. That would be violative of Art.16 of the Constitution. The Supreme Court has ruled time and again, that where there is no only one post in the cadre, there can be no reservation for the backward class with reference to that post either for recruitment at the initial stage or filling up a future vacancy in respect of that post otherwise the same would amount to 100 per cent reservation. A single promotional post can also not be reserved.

3.1. 4.8.1 Application of Rotational Rule

In case of Post Graduate Institute of Medical Education & Research, Chandigarh [15] it has been categorically stated that unless there is plurality of posts in a cadre, the question of reservation will not arise because any-attempt at reservation by whatever means and even with device of rotation of roster in a single post cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented.

3.1. 4.8.2 EXTENT OF RESERVATION

The extent of reservation should not exceed 50%

In Indira Sawhney case the majority pointed out that cl. (4) of Art. 16 spoke of adequate representation and not proportionate representation—although the proportion of population of backward classes to the
total population would a relevant factor. After referring to the earlier decisions of the Court, the majority concluded that the reservation contemplated in cl. (4) of Art. 16 should not exceed 50%.

It also pointed out that for the purpose of applying the rule of 50%, a year should be taken as the unit and not the entire strength of the cadre.

3.1.5 Pre & Post Mandal scenario and case laws

3.1.5.1 Principle of equality

The concept of equality has been derived from Preamble of the Indian Constitution which guarantees equality of status and opportunity and Article 14 of the Indian Constitution which states that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”. The first expression _equality before the law_ which is taken from the English common law, is a declaration of equality of all persons within the territory of India, implying thereby the absence of any privilege in favour of any individual.

The guiding principle of the article is that all persons and things similar circumstance shall be treated alike both in respect of privilege conferred and liabilities imposed. _Equality before the law _means that amongst equal the law should be equal and equally administered and that like should be treated alike. Hence it forbids discrimination between persons who are substantially in similar circumstances or conditions. It does not forbid different treatment of the unequals. The rule rather is that like should be treated alike and that unlike should be treated differently. The same or uniform treatment of unequals is as bad as unequal treatment of the equals. As a matter of fact all persons are not alike or equal in all respects. Applications of the same laws uniformly to all of them will, therefore, be inconsistent with the principle of equality. To avoid that situation laws must distinguish between those who are equals and to whom they must apply and those who are different and to whom they should not apply. Article 14 forbids class legislation, but does not forbids classification which rests upon reasonable grounds of distinction. The principle of equality does not mean that every law must have universal application to all persons who are not by nature, attainment or circumstances in the same position. The varying needs of different classes of persons require different treatment.

Moving a step ahead in E.P. Royappa v. State of Tamil Nadu the Supreme Court has elaborated the traditional concept of equality which was based on reasonable classification and has laid down a new concept of equality. Bhagwati, J delivering the judgment on behalf of himself, Chandrachud and Krishna Iyer, JJ. propounded the new concept of equality in the following words—_Equality is a dynamic concept with many aspects and dimensions and it cannot be _cribbed, cabined and confined_ within traditional and
doctrine limits. From a positivistic point of view, equality is antithesis to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belong to the rule of law in public while the other, to the whim and caprice of the absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of article 14.”

Explaining the concept of reasonable classification in D.S. Nakara v. Union of India Desai J. who spoke for the majority has assimilated both the doctrine of arbitrariness and doctrine of classification re-stating the concept of equality and the test is to be applied in order to satisfy the requirement of article 14 his Lordship said-

—Thus, the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left of the group and that the differentia must have a rational nexus to the object sought to be achieved by the statute in question.”

Thus it is the rationale of concept of equality that may be many are claiming more than what they are legally entitled to but not a single individual be denied his basic rights. Again in Mithu v. State of Punjab the Court struck down Section 303 of IPC (which states that if a person under life imprisonment in jail commit murder he must be awarded sentence of death but under section 302 if a person commits murder he may be awarded either sentence of death or life imprisonment) as unconstitutional on the ground that the classification between persons who commit murders whilst under the sentence of imprisonment and those who commit murders whilst they were not under the sentence of life imprisonment for the purpose of making death mandatory in the case of former class and optional in the latter class was not based on any rational principle. Again in International Airport Authority case Bhagwati J, reiterated the same principle in the following words :-

—It must now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessary involve negation of equality. The doctrine of classification which is involved by the court is not paraphrase if Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable the impugned legislation or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached.”

3.1. 5.2 Reservation
Reservation is a policy designed to redress past discrimination against lower classes and minority groups through measures to improve their economic and educational opportunities. Reservation is an attempt to promote equal opportunity. It is often instituted in government and educational settings to ensure that minority groups within a society are included in all programs. The justification for reservation is to compensate for past discrimination, persecution or exploitation by the ruling class of a culture or to address existing discrimination. The principle of affirmative action is to promote social equality through the preferential treatment of socioeconomically disadvantaged people. More over the basic aim of reservation is to create social equality. Social equality is a social state of affairs in which all people within a specific society or isolated group have the same status in a certain respect. At the very least, social equality includes equal rights under the law, such as security, voting rights, freedom of speech and assembly, and the extent of property rights. However, it also includes access to education, health care and other social securities. It also includes equal opportunities and obligations, and so involves the whole society. Social equality refers to social, rather than economic, or income equality.

3.1.5.3 History of the practice of reservation
For history of practice of reservation in India please read the following topic from wikipedia:
http://en.wikipedia.org/wiki/Reservation_in_India

3.1.5.4 Mandal Commission Report
The Mandal Commission was established in India in 1979 by the Janata Party government under Prime Minister Morarji Desai with a mandate to "identify the socially or educationally backward." It was headed by Indian Indian Parliamentarian Bindheshwari Prasad Mandal to consider the question of seat reservations and quotas for people to redress caste discrimination, and used eleven social, economic, and educational indicators to determine backwardness. In 1980, the commission's report affirmed the affirmative action practice under Indian law whereby members of lower castes (known as Other Backward Classes (OBC) and Scheduled Castes and Tribes) were given exclusive access to a certain portion of government jobs and slots in public universities, and recommended changes to these quotas, increasing them by 27% to 49.5%. This commission was set up under article 340 for the purpose of articles like 15 and 16.

3.1.5.5 Recommendations of this commission regarding reservation-
Recommendations of Mandal Commission regarding reservations of Scheduled Castes and Scheduled Tribes are that India constitutes of 22.5% SC and ST population and accordingly 22.5% reservation has been made for them in all services and public sector under Central Government and reservation in states should be according to their population.
For Other Backward Classes recommendations for reservation is that they are 52% of total population in India. Accordingly 52% of all the posts under Central Govt should be reserved for them but in view of Supreme Court Judgments it has been held that total quantum of reservation should be below 50%. In view of this proposed reservations for OBC and ST and SC together should be less than 50%. Therefore commission has assigned 27% reservation for them.

3.1. 5.6 With the above general recommendation regarding the quantum of reservation, the Commission proposes the following over-all scheme of reservation for OBCs:-

(1) Candidates belonging to OBCs recruited on the basis of merit in an open competition should not be adjusted against their reservation quota of 27%.

(2) The above reservation should also be made available to promotion quota at all levels.

(3) Reserved quota remaining unfilled should be carried forward for a period of three years and deserved thereafter.

(4) Relaxation in the upper age limit for direct recruitment should be extended in the same manner as done in case of SCs and STs.

(5) A roster system for each category of posts should be adopted by the concerned authorities in the same manner as presently done in respect of SC and ST candidates.

The above scheme of reservations should be applicable to all recruitment to public sector undertakings both under the Central and State Governments, nationalized banks, private sector undertakings which have received financial assistance from the Government, universities and affiliated colleges are covered under this scheme of reservation.

Educational Concessions given by Mandal Commission-Recommendation of Mandal Commission is that seats should be reserved for OBC students in all scientific, technical and professional institutions run by the Central Government as well as State Governments. This reservation will fall under Article 15(4) of the Constitution and the quantum of reservation should be the same as in the Government services, i.e.,
27%. Those States which have already reserved more than 27% seats for OBC students will remain unaffected by this recommendation.

3.1.5.7 Judicial Approach towards Reservation

Indian Judiciary has pronounced some judgments upholding reservations and some judgments for fine tuning its implementations. Lot of judgments regarding reservations have been modified subsequently by Indian Parliament through constitutional amendments. Some judgments of Indian judiciary have been flouted by state and central Governments. Given below are the major judgments given by Indian courts and reflecting the constitutional status of reservation.

In Ajay Hasia v. Khalid Mujib the regional engineering college made admissions of the candidates on the basis of oral interview after written test. The test of oral interview was challenged on the ground that it was arbitrary and unreasonable because high percentage of marks were allocated for oral test and candidates were interviewed only for 2-3 minutes. The court struck down the rule prescribing high percentage of marks for oral test reallocation of one-third of the total marks was plainly arbitrary and unreasonable and violative of article 14 of the constitution. It is said that the oral interview test cannot be regarded a very satisfactory test for addressing and evaluating the caliber of candidates as it is subjective and based on first impression and its result is influenced by many uncertain factors and it is capable of abuse. It cannot be the exclusive test. It should be resorted to only as an additional or supplementary test and must be conducted by persons of high integrity, caliber and qualification. The court suggested that the interview be recorded in order to judge whether it was conducted in arbitrary manner. In the instant case a large number of candidates were admitted on the basis of high marks obtained on the interview although they had obtained low marks at the written test but the court declined to quash admissions in view of lapse of 18 months when students has almost completed three semesters. A mere suspicion that some candidates had obtained high marks in interview but very low marks in written test did not establish malafide on the part of selectors.

In D.V. Bakshi v. Union of India the petitioners challenged the validity of the rule allotting 100 marks with 50 pass marks for oral test on the ground that it gives arbitrary powers to the authorities to pick and choose the candidates. The court distinguished the Ajay Hasia’s case with the present case and held that allotment of maximum marks for oral test is not arbitrary particularly in case of selections of professionals. The test which may be valid for competitive examinations or admissions to educational institutions may not hold good where it concerns selection for appointments in public services. The test; aid down in Ajay Hasia’s case cannot apply in matter of grant of license as a Custom House Agent. No hard and fast rule can be laid down in this behalf as much would depend on the nature of performance expected for the responsibility to be handled by the candidate after his selection. The duties,
responsibilities and functions of a Custom House Agent are very special and demanding not only a high
degree of probity and integrity but also intellectual skills, adaptability, judgment and capacity to take
prompt decisions in conformity with the law, rules and regulations. Thus, there is justification for an oral
test prescribing 100 marks with 50 percent as passing marks in selecting such persons.

3.1. 5.8 Relation between Reservation and Principle of Equality-

Equality has been promised by State under Article 14 of the Indian Constitution and Article 14 is
considered as the soul of the Indian Constitution because without equality no country can be considered
as republic and it is the need of equality which have forced human beings to come under state so that they
can get security, equal protection of law and equality in all aspects. In our Preamble we have adopted the
word equality from French Revolution which itself shows the aims of our Constitution and Article 14
further is a step forward towards the accomplishment of that aim. Equality itself means that like should be
treated alike and not unlike should be treated like. That is why Article 14 permits reasonable classification
between likes and unlikes so that unlike should be given special treatment to bring them on the equal
footing with the likes and in fact identical treatment in unequal circumstances would itself amount to
inequality.[25] Goal of equality will not be considered to be achieved till everyone will be on the equal
footing. Thus idea to attain equality has given birth to the concept of reservation or affirmative action.
Reservation is a special treatment given to the unlikes till they come on the equal footing with the likes in
the society. Reservation is a concept developed with a view to provide special help to the weak so that
they can overcome their weakness and can compete with the strong. In landmark judgments like D.V.
Bakshi v. Union of India and Air India v. Nargesh Mirza Supreme Court has given wonderful Judgments
which proves that which has proved that inequality anywhere will never be tolerated and therefore
Judgments of these cases have established new landmarks in the concept of equality. Equality is a state of
complete justice and in order to attain it reservation is a powerful remedy. Reservation have proved to be
highly successful in many countries for e.g. U.S. has affirmative action for blacks and in various other
countries reservation is playing major role in narrowing the gap between different classes.

In the historic Mandal Commission case the Supreme Court by the 6-3 majority has held that the sub
classification of the backward classes into more backward classes and backward classes can be done for
the purpose of Article 16(4). But as a result of sub classification the reservation cannot exceed more than
50 percent. The distinction should be based on the degree of social backwardness. In fact such
classification would be necessary to help the more backward classes otherwise those of the Backward
Classes who are little more advanced than the more backward classes might take away all the seats. Thus
reservation and equality are two sides of the same coin and if equality is the aim then reservation is the
best possible way to reach that aim”. 
3.1. 5.9 Conclusion

Indian Constitution is one of the best and largest written Constitution of the world. Article 14 of our Constitution is itself soul of Indian Constitution and even Article 22 is secondary to it because what is the meaning of life when there is no equality. Indian reservation system has been a major success in improving the position of the Backward Classes and past decades have shown remarkable development in position of Backward and Oppressed Classes in India. Though our reservation system is an outcome of huge amount of research by commissions and Government agencies like Mandal Commission etc but even then somewhere our system is lacking on the applicability part also some fault are there in identification of the Backward Classes because despite of giving so many years of reservation their position have not been developed to that extent as it should have been. Our present reservation system is caste based and it has been seen that the upper segment of each class who are forward then the others are developing and are using maximum benefit of reservation and also now they have attained both the economic equality as well as social equality because they are economically sound now while the lower segment of the same cast are still unaware of their rights of reservation and they are still backward. In order to equate this inequality which is there in the same caste, the reservation policy should be based on the economic condition basis so that each and every individual of this country who is backward socially as well as economically will get equal chance to develop. Many castes are now economically forward but still they socially backward. We need some new methods other than caste based reservations in order to narrow this gap and to increase them socially. OBC reservation percentage should increase from 27% because they are 52%[30] of our population while ST and SC’s should get less reservation because they are 22.5% of our population but still they have 22.5%[31] of seats reserved for them.

3.1.6 Determination of Criteria for backward classes

Article 340 of the Constitution of India deals with backwardness due to social and Educational causes. In Tamilnadu it is understood broadly on caste basis namely Brahmin and Non Brahmin as soon in the Government order then popularly known as communal G.O. i.e. Government order. It was intended by some who enjoyed monopoly for age long in the matter of educational and service in the state that the said communal Government order offended the equality class depriving the Brahmans of their equal opportunity under the Constitution. Thus Articles 15 and 16 came to be amended adding C1(4) to each of the said Articles.

Article 15 (4) says "Nothing in Art. 15 or in Clause (2) of Art. 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward class of citizens or for the Schedule caste in Schedule tribes." Art 16(4) also says "Nothing in this Article shall prevent the
state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the state is not adequately represented in the services under the state.

In the given context one must understand the purpose of the directions contained in the order in W.P.No.4999-95/80 and 402/81 by the Supreme Court of India for identifying the Backward class and the Classification and the same must be read with emphasis on the clause "adequately represented in the services of the state" in the Art 16(4) and "the advancement of Social and educational backward classes" as contained in art. 15(4) of the Constitution of India. Thus the criteria is well laid down in the Constitution itself and the scope cannot be extended by introducing other criteria's for instance women. The general Clauses Act says that he includes she, men includes women. Thus men and women are part of a family in a community and cannot be considered independently of their family and community status. Art. 16(2) prevent discrimination against on grounds of "only" of "sex" but then Cl(4) of the same Article makes a proviso to Art. 16(1) and (2). Thus Art 15(3) is an enabling section and not directory. Women and children cannot be treated as a class distinct from their families and communities. However the position and condition of women in a backward class could be considered along with other facts in the backward class while formulating remedial measures. But women as such cannot be identified as backward class.

Because there are women in Hindus, Christians and Muslims governed by their age long customs and traditions and investigation into their Constitutions generally will defeat the purpose to identify the Backward class as such and it is a digression leading to endless and purposeless inquiry and investigation.

Further jurisdictional limitations of courts have to be considered in understanding the directions of courts. They will not go into matters which are not property brought before it. The concept of "judicial notice" is to enable courts to take cognizance of certain existing facts, though not brought before it in the manner prescribed by rules of evidence and such facts taken note of for the limited purpose necessary for adjudicating the dispute for rendering "complete justice". But when facts stated in the pleadings are vague and general, they are directed to be precise and exact and for which purpose the Courts appoint officers of court under order 26 of the Civil procedure code in any suit by issue of a commission for various purposes including local investigation. When it involves scientific investigation experts are appointed as Commissioners. But this discretion is used judiciously to meet the ends of justice and not as a matter of course.

Thus it must be established that the complaint of acts where illegal and unconstitutional and that he is
aggrieved. When it is a matter of state policy or an act done in public interest, courts refuse to interfere. In this case to appoint a commission for identifying the backward class with a direction cover all questions as bear upon the enumeration and classification of backward classes is in the nature of an obligation cast upon the state by court in order to ascertain the property in fixing the ratio of reservations for backward classes in the matter of education in the state.

Thus where the state is to protect the backward class of people who have not had the taste of education and service in the state and when the communities to be provided are so large that the state has to make suitable The need to protect the interest of the classes of people who have had not the taste of education and service in the state. It must be conceded at the outset that the state is the absolute authority in such matters as it the elected represented body with a mandate from the people for a period of time and the court must be slow in interfering with peoples mandate as the law are for the people made by the people. The Courts are not appellate authority to substitute its policy and mandate.

Thus one creates conflict in the working of the separation and independence of judiciary. The individual right is subject to the public good and convenience and his right cannot override public interest. Therefore the possible hardship caused to the people who have been so long enjoying the monopoly in the matter of education and service in the state, cannot outweigh the need and benefit of the community in the given circumstances. It is therefore necessary that the community which have been so long enjoying the monopoly must adjust with the social condition and be prepared to sacrifice and find alternative avenues which they are capable of in the modern world. Even among the classes other that Brahmins who are not included in the list of backward classes, the grievance may be the same but however genuine it may be, has to be understood with reference to the need of the community.

In a democracy, citizens have to give and take and the sense of superiority by birth and tradition has no meaning the purpose. Therefore attempts to nullify Art 16(4) by introducing new criteria is an attempt to replace domination in the name of religion by the guise of legal interpretation and division ignoring the need to provide the class of people who have not had the taste of education and service in the state so far and left backward in the state by manipulations of the power that be and the proportion of such people must be considered with total population. The concept of efficiency and competence in such circumstances are relative and anyman can acquire competence and be efficient by discipline and experience. First they must be given opportunities and they must be educated and brought in the general discipline.

The large proportion of people cannot be left backward, incompetent. Inefficent saying that they are useless. They must be, if qualified, given the opportunity and cannot be denied because they are unable
to compete with others. To cite an instance in Tamilnadu there is a state aided legal Aid Board, and it maintains a panel of lawyers to assist the Board and to assist the applicants in the legal work and if one goes through the list of advocates given work form the area of the panel he wonder see that are few advocates who are familiar and known ---a number of advocates enrolled in the panel are left out for various reasons. This list of "drop outs" and "left to their fate" is mainly due to the indifference of the power that be and if the state Board is not going to bring such "backward" into the mainstream of legal professions, the free legal aid scheme becomes and aid to the already affluent lawyers and not for common good. So in a backward country like India one has to make sincere efforts to take all with him in the path of progress and the ways and means are to be devised to take such backward, reserved and shy people by providing them with proper incentive training and encouragement.

This is a peculiar problem of social constraints prevailing in our country. One has to be pulled out of his lethargy and inferiority complex and a kind of "dragging the feet" attitude. Special efforts are needed. Dynamic leadership is needed for the purpose. In the name of efficiency and merit if he is to be left out the country will continue to be backward forever. Because of the reservation policy, many people from the rural areas are able to get the needed opportunities in the matter of education and services in the state. Thus the reservation policy gained popularity in social democratic republic set up. It must be noticed that this is not a state for traditionally well settled and efficient few to rule over others.

Enumeration and classification of backward classes in Tamil Nadu has to be reviewed only with reference to Art. 15(4) and Art. 16(4) and not independent of such constitutional directive principles. In any such a review, the historical fact and the purpose of the amendment has to be understood and it has relevance to the existing social and educational conditions in the state. Even the British empire recognized it and thus formulated the reservation policy in the matter of education and service in the state. If the courts to interfere with such mandate of the people in the name of "complete justice" there comes the conflict of judiciary and Indian Parliament in the claim who is superior. These matters are understood in the administrative law.

The jurisdiction of courts in Writs are limited by certain constraints and in extreme cases to is possible and the comes do advise the Government not interfere with the administration by the threat of contempt proceedings. The separation of power is such ---- a purpose and meaning. Courts can be dynamic without interfering with the administration particularly in the matter of state policy. Therefore the directions to the Government to appoint its own commission to test the validity of its own act is made on certain assertions that of any real need for the same. Therefore an application for review, if any should be on the question of constitutional property of the direction made and not for criteria’s for classification. Classifications are already done in Art 15(4) and Art. 16(4) read with Art.340.
The statement that socially women occupy a very low status is a matter of opinion. The Backward Class Commission is not the appropriate authority to safeguard their legitimate interest. Government has a separate ministry to safeguard their legitimate interest and the act has recognized the need for various legislation's to pretest them and bring them into the mainstream of social life in the community.

Several of the good and well intended social upliftment projects of the state are so misdirected by such vested interest frustrating the very objects and purpose of the legislation, order or direction of the Government. These vested interest are local and --- and they continue to grow richer and the poor becomes the poor and the relief never reaches the people for whom it was intended. The Supreme Court being concerned with the validity of the ration fixed in the matter of reservation have no relevant materials rejected the application. But it has directed to doubt the bonafides of the Government and therefore it should have the Government to appoint its own commission to review its own policy.

Therefore the commission is to help the court to understand the magnitude and enormity of the problem and disparity existing between haves and have notes and how certain communities dominate the society as they have achieved monopoly and resist all attempts to give equal opportunity to other class of people and the urgent need for such reservation to save community from such destructive vested interests. The number of classes of people who have not tasted the services in the Government compared to the total population is alarming and to educate more such people who have not had the taste of education is the responsibility of the Government. This is the background for various agitations as one call it "Survival of the sons of the Soil".

However this opportunity may be utilized to gather information at the root level namely in the villages panchayats to justify the propriety in fixing such ration by Government to such classes of people who have attained sufficient proportion compared to the total population in education and services in the state could be deleted and the progress attained by such communities maybe recorded as achievement by the reservation policy. The method of collecting dates through group representations and associations create all the problems and confusions blurring the vision of the commissions preventing it from doing social justice. It is curious that those who have been enjoying the monopoly also apply for inclusion in the list of backward classes claiming their right to be included under various pretensions. The claims of women to be classified as backward class is one of such form.

Art 46 mentions about the promotion of educational and economic interest of schedule castes Tribes and other weaker sections. The weaker section is not defined and therefore to be understood as classes of people living under the stress and stain of social injustice and all forms of exploitation. The problems so recognized of the weaker section is of economic nature and not social art educational. A man may be
poor as in the case of priest but he will have the social backing to enable his son to become an I.A.S. whereas a rich landlord of a backward community with all his affluence will not be able to educate his sons as he lacks the necessary cultural and social background. So the state is concerned about the social backwardness irrespective of his economic conditions.

10. Today women in general are progressing in the services and many varied ways and their representations in the services are considerable. Women in forward communities are able to secure jobs by their affluence and influence whereas women belonging to the backward classes still toil under social injustice and exploitation. Thus women be understood as a class independently of their community and background. Thus in general scheme of General administration representation seeking reservation exclusively for women has no meaning and purpose.

3.1.7 Doctrine of creamy Layer

The creamy layer is a term used in Indian politics to refer to the relatively wealthier and better educated members of the Other Backward Classes (OBCs) who are not eligible for government sponsored educational and professional benefit programs. The term was introduced by the Sattanathan Commission in 1971, which directed that the "creamy layer" should be excluded from the reservations (quotas) of civil posts and services granted to the OBCs.

3.1.7.1 Classification

The Supreme Court defines "creamy layer" by quoting an office memorandum dated 8 September 1993. The term was originally introduced in the context of reservation of jobs for certain groups in 1992. The Supreme Court has said the benefit of reservation should not be given to OBC children (SCs, STs, and the unreserved are exempt now) of constitutional functionaries such as the president, judges of the Supreme Court and high courts, employees of central and state bureaucracies above a certain level, public sector employees, members of the armed forces and paramilitary personnel above the rank of colonel.

The children of persons engaged in trade, industry and professions such as a doctor, lawyer, chartered accountant, income tax consultant, financial or management consultant, dental surgeon, engineer, architect, computer specialist, film artists and other film professional, author, playwright, sports person, sports professional, media professional or any other vocations of like status whose annual income is more than ₹6,00,000 for a period of three consecutive years. OBC children belonging to any family that earns a total gross annual income (from sources other than salary and agricultural land) of ₹6,00,000 for a period of three consecutive years, as the income ceiling for the creamy layer raised from ₹1,00,000 (in 1993
when the office memo was accepted) to ₹6,00,000 (for a period of three consecutive years) in May 2013, belong to the creamy layer and so are also excluded from being categorised as "socially and educationally backward" regardless of their social/educational backwardness.

3.1.7.2 Misinterpretation

Most of the people in India misunderstand the concept of creamy layer. Points that are commonly misunderstood include:

1. The creamy layer category of the candidate is decided based on the parent's post/income but not by the candidate's own post/income.
2. Eligibility regarding civil service roles is only based on the level he/she is in, but not by the salary they earn.
3. ₹6,00,000 criteria will be applied only to business people but not to salaried people even if he/she is a salaried employee in the government/PSU/public organizations.
4. Business people's children will fall under the creamy layer only if they earn ₹6,00,000 for a period of three consecutive years.

3.1.7.3 Applications

The "creamy layer" concept is meant only for the OBCs. This concept is not applied to the scheduled castes category and scheduled tribes category.

3.1.7.4 Non-creamy layer certificate

This certificate is to be produced by "non-creamy" OBCs applying against reserved vacancies for appointment to posts/admission to central educational institutions (CEIs), under the Government of India.

The authorities competent to issue the OBC "Non-Creamy Layer" certificate are:

1. District Magistrate / Additional Magistrate / Collector / Deputy Commissioner / Additional Deputy Commissioner / Deputy Collector / Ist Class Stipendiary Magistrate / Sub-Divisional magistrate / Taluka Magistrate / Executive Magistrate / Extra Assistant Commissioner (not below the rank of Ist Class Stipendiary Magistrate).
3. Revenue Officer not below the rank of Tahsildar and
4. Sub-Divisional Officer of the area where the candidate and/or his family resides.
3.1.8 Mandal Commission.

The Mandal Commission was established in India in 1979 by the Janata Party government under Prime Minister Morarji Desai with a mandate to "identify the socially or educationally backward." It was headed by Indian Parliamentarian B.P. Mandal to consider the question of seat reservations and quotas for people to redress caste discrimination, and used eleven social, economic, and educational indicators to determine backwardness. In 1980, the commission's report affirmed the affirmative action practice under Indian law whereby members of lower castes (known as Other Backward Classes (OBC), Scheduled Castes (SC) and Scheduled Tribes (ST)) were given exclusive access to a certain portion of government jobs and slots in public universities, and recommended changes to these quotas, increasing them by 27% to 49.5%. Mobilization on caste lines had followed the political empowerment of ordinary citizens by the constitution of free India that allowed common people to politically assert themselves through the right to vote.

3.1.8.1 Setting up of Mandal Commission

The plan to set up another commission was taken by the Morarji Desai government in 1978 as per the mandate of the Constitution of India under article 340 for the purpose of Articles like 15 and 16. The decision was made official by the president on 1 January 1979. The commission is popularly known as the Mandal Commission with its chairman being B.P. Mandal.

3.1.8.2 Criteria to identify OBC

The Mandal Commission adopted various methods and techniques to collect the necessary data and evidence. In order to identify who qualified as an "other backward class," the commission adopted eleven criteria which could be grouped under three major headings: social, educational and economic.

3.1.8.2.1 Social

1. Classes considered as socially backward by others.
2. Classes which mainly depend on manual labor for their livelihood.
3. Classes where at least 25 per cent females and 10 per cent males above the state average get married at an age below 17 years in rural areas and at least 10 per cent females and 5 per cent males do so in urban areas.
4. Classes where participation of females in work is at least 25 per cent above the state average.
3.1.8.2.2 **Educational**

1. Classes where the number of children in the age group of 5–15 years who have never attended school is at least 25 percent above the state average.
2. Classes where the rate of student drop-out in the age group of 5–15 years is at least 25 percent above the state average.
3. Classes amongst whom the proportion of matriculates is at least 25 per cent below the state average.

3.1.8.2.3 **Economic**

1. Classes where the average value of family assets is at least 25 per cent below the state average.
2. Classes where the number of families living in kuccha houses is at least 25 per cent above the state average.
3. Classes where the source of drinking water is beyond a half kilometer away for more than 50 per cent of the households.
4. Classes where the number of households having taken consumption loans is at least 25 per cent above the state average.

3.1.8.3 **Weighting indicators**

As the above three groups are not of equal importance for the purpose, separate weightage was given to indicators in each group. All the Social indicators were given a weightage of 3 points each, educational indicators were given a weightage of 2 points each and economic indicators were given a weightage of 1 point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also.

Thus, the Mandal Commission judged classes on a scale from 0 to 22. These 11 indicators were applied to all the castes covered by the survey for a particular state. As a result of this application, all castes which had a score of 50% (i.e. 11 points) were listed as socially and educationally backward and the rest were treated as 'advanced'.

3.1.8.4 **Observations and findings**

The commission estimated that 54% of the total population (excluding SCs and STs), belonging to 3,743 different castes and communities, were 'backward'. Figures of caste-wise population are not available...
beyond. So the commission used 1931 census data to calculate the number of OBCs. The population of Hindu OBCs was derived by subtracting from the total population of Hindus, the population of SC and ST and that of forward Hindu castes and communities, and it worked out to be 52 per cent. Assuming that roughly the proportion of OBCs amongst non-Hindus was of the same order as amongst the Hindus, the population of non-Hindu OBCs was considered as 52 per cent.

- Assuming that a child from an advanced class family and that of a backward class family had the same intelligence at the time of their birth, it is obvious that owing to vast differences in social, cultural and environmental factors, the former will beat the latter by lengths in any competitive field. Even if an advanced class child's intelligence quotient was much lower compared to the child of backward class, chances are that the former will still beat the latter in any competition where selection is made on the basis of 'merit'.

- In fact, what we call 'merit' in an elitist society is an amalgam of native endowments and environmental privileges. A child from an advanced class family and that of a backward class family are not 'equals' in any fair sense of the term and it will be unfair to judge them by the same yard-stick. The conscience of a civilised society and the dictates of social justice demand that 'merit' and 'equality' are not turned into a fetish and the element of privilege is duly recognised and discounted for when 'unequal' are made to run the same race.

- To place the amalgams of open caste conflicts in proper historical context, the study done by Tata institute of Social Sciences Bombay observes. –The British rulers produced many structural disturbances in the Hindu caste structure, and these were contradictory in nature and impact …. Thus, the various impacts of the British rule on the Hindu caste system, viz., near monopolisation of jobs, education and professions by the literati castes, the Western concepts of equality and justice undermining the Hindu hierarchical dispensation, the phenomenon of Sanskritization, genteel reform movement from above and militant reform movements from below, emergence of the caste associations with a new role set the stage for the caste conflicts in modern India. Two more ingredients which were very weak in the British period, viz., politicisation of the masses and universal adult franchise, became powerful moving forces after the Independence.

3.1.8.5 Recommendations

The report of the commission was submitted in December 1980. The following are the recommendations as stated in the report:
It may appear the upliftment of Other Backward Classes is part of the larger national problem of the removal of mass poverty. This is only partially correct. The deprivation of OBCs is a very special case of the larger national issue: here the basic question is that of social and educational backwardness and poverty is only a direct consequence of these two crippling caste-based handicaps. As these handicaps are embedded in our social structure, their removal will require far-reaching structural changes. No less important will be changes in the perception of the problems of OBCs by the ruling classes of the country.

3.1.8.6 Implementation

All the recommendations of the report are not yet implemented.

The recommendation of reservations for OBC's in government services was implemented in 1993. As on 27 June 2008 there is still a backlog of 28,670 OBC vacancies in government jobs.

The recommendation of reservations in Higher educational institutes was implemented in 2008.

3.1.8.7 Criticisms

The National Sample Survey puts the figure at 32%. There is substantial debate over the exact number of OBC's in India, with census data compromised by partisan politics. It is generally estimated to be sizeable, but lower than the figures quoted by either the Mandal Commission or and National Sample Survey.

There is also an ongoing controversy about the estimation logic used by the Mandal Commission for calculating OBC population. The Indian statistician Yogendra Yadav, a supporter of reservations, agrees that there is no empirical basis to the Mandal figure. According to Yadav, "It is a mythical construct based on reducing the number of SC/ST, Muslims and others and then arriving at a number."

The National Sample Survey's 1999–2000 round estimated around 36 percent of the country's population as belonging to the Other Backward Classes (OBC). The proportion falls to 32 per cent on excluding Muslim OBCs. A survey conducted in 1998 by National Family Health Statistics (NFHS) puts the proportion of non-Muslim OBCs as 29.8 per cent.

L R Naik, the only Dalit member in the Mandal Commission refused to sign the Mandal recommendations. Naik argued that there were two social blocks among the OBCs: upper caste (Jat and Gujjar) and upper OBCs (Yadavs, Kurmis, etc.) and Most Backward Classes (MBCs). He feared that upper OBCs would corner all the benefits of reservation.
3.1.8.8 Protest

A decade after the commission gave its report, V.P. Singh, the Prime Minister at the time, tried to implement its recommendations in 1989. The criticism was sharp and colleges across the country held massive protests against it. Soon after, Rajiv Goswami, student of Delhi University, committed self-immolation in protest of the government's actions. His act further sparked a series of self-immolations by other college students and led to a formidable movement against job reservations for Backward Castes in India. First student to die due to self-immolation was Surinder Singh Chauhan on 24 Sep 1990.

3.1.8.9 Arguments against reservations

The opponents of the issue argue:

- Allocating quotas on the basis of caste is a form of racial discrimination, and contrary to the right to equality. If at all, quotas should be based on economic hardships, which can be changed, not on race. Basing them on an unchangeable factor makes them unfair and useless. Despite the improvement in lower caste socioeconomic status, the presence of caste will still be felt and administered officially.

- As a consequence of legislating to provide reservations for Christians and Muslim, religious minorities in all government education institutions will be introduced which is contrary to the ideas of secularism, and is a form of anti-discrimination on the basis of religion.

- Most often, only economically sound people (and rather rich) from the so-called lower castes will make use of most of the reserved seats, thus counteracting the spirit of reservations. Political parties know reservations are no way to improve the lot of the poor and the backward. They support them because of self-interest of the "creamy layer", who use the reservations to further their own family interests, and as a political flag of 'achievement' during election campaigns. Several studies show that the OBC class is comparable with the general caste in terms of annual per capita consumption expenditure, and the top strata of OBC is ahead in a host of consumption areas.

- The quality of these elite institutes may go down, because merit is severely being compromised by reserving seats for certain caste-based communities.

- There are no efforts made to give proper primary education to truly deprived classes, so there is no need to reserve seats for higher studies. The government schools in India have absolutely no
comparison to the public schools in the developed countries, and only about 65% of the Indian population is literate. The critics argue that "reservation" only in higher institutions and jobs, without improving primary and secondary education, cannot solve this problem.

- The government is dividing people on the basis of castes for political advantages.

- The caste system is kept alive through these measures. Instead of coming up with alternative innovative ideas which make sure equal representation at the same time making the caste system irrelevant, the decision is only fortifying the caste system.

- The autonomy of the educational institutes are lost.

- Not everyone from the so-called upper classes are rich, and not all from so called lower classes are poor.

- The reservation policy will create a huge unrest in the Indian society. Providing quotas on the basis of caste and not on the basis of merit will deter the determination of many educated and deserving students of India.

- Multi-national companies will be deterred by this action of the government, and foreign investment in India may dry down, hurting the growth of the Indian economy. Doubtless, urgent actions to improve the lot of the majority, which has not benefited from development—not achieved after 55 years of reservations for scheduled castes—are essential. But this must not hazard improving the economy's competitiveness in a very competitive world.

- There are already talks of reservations in the private sector. If even after providing so many facilities to reserved categories during education, if there is no adequate representation of those people in the work force, there must be some problems with the education system.

Critics of the Mandal Commission argue that it is unfair to accord people special privileges on the basis of caste, even in order to redress traditional caste discrimination. They argue that those that deserve the seat through merit will be at a disadvantage. They reflect on the repercussions of unqualified candidates assuming critical positions in society (doctors, engineers, etc.). As the debate on OBC reservations spreads, a few interesting facts which raise pertinent question are already apparent. To begin with, is there any clear idea what proportion of our population is OBC? According to the Mandal Commission (1980) it is 52 percent. According to 2001 Indian Census, out of India's population of 1,028,737,436 the Scheduled Castes comprise 166,635,700 and Scheduled Tribes 84,326,240, that is 16.2% and 8.2% respectively. There is no data on OBCs in the census. However, according to National Sample Survey's 1999–2000
round around 36 per cent of the country's population is defined as belonging to the Other Backward Classes (OBC). The proportion falls to 32 per cent on excluding Muslim OBCs. A survey conducted in 1998 by National Family Health Statistics (NFHS) puts the proportion of non-Muslim OBCs as 29.8 per cent. The NSSO data also shows that already 23.5 per cent of college seats are occupied by OBCs. That's just 8.6 per cent short of their share of population according to the same survey. Other arguments include that entrenching the separate legal status of OBCs and SC/STs will perpetuate caste differentiation and encourage competition among communities at the expense of national unity. They believe that only a small new elite of educated Dalits, Adivasis, and OBCs benefit from reservations, and that such measures don't do enough to lift the mass of people out of poverty.

**Review Questions**

1. Define the Fundamental Principles of Equality?
2. Explain the discrimination and *Safeguard against it*?
3. Explain the creamy Layer?
4. Explain the various provisions related to weaker sections?

**Discussion Questions**

Discuss the Mandal Commission and its effect?

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**Chapter - Right to Freedoms: Art 19-22**

**Learning Objectives**

- To define the right to freedoms.
- To explain the Right to life and Personal Liberty.
- To explain the Right against exploitation.
- To describe the Right to religious freedom.

**3.2.1 Availability of fundamental freedoms under Article 19 to Citizens only**
These rights are enjoyed only by citizens. It confers six democratic rights as they are deemed essential for the healthy functioning of a democracy. Originally the constitution included 7 Democratic Rights. By 44th Amendment Act 1978, the Right to property was removed from the list. These rights are enjoyed by the citizen, but they are not absolute rights and each of them is liable to be curtailed by the State.

The Six Fundamental Freedom can be curtailed by putting following restrictions:

(i) In the interest of sovereignty and integrity of India.

(ii) In the maintenance of public order, morality and decency.

(iii) In maintenance of friendly relations with Foreign State.

(iv) In the interest of the promotion of well being of the backward section of citizens and also the weaker sections of Society.

(v) In the interest of any Scheduled Tribe.

3.2.2 Can legal persons enjoy protection under Article 19?

3.2.2.1 Introduction

Speech is God's gift to mankind. Through speech a human being conveys his thoughts, sentiments and feeling to others. Freedom of speech and expression is thus a natural right, which a human being acquires on birth. It is, therefore, a basic right. "Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers" proclaims the Universal Declaration Of Human Rights (1948). The people of India declared in the Preamble of the Constitution, which they gave unto themselves their resolve to secure to all the citizens liberty of thought and expression. This resolve is reflected in Article 19(1)(a) which is one of the Articles found in Part III of the Constitution, which enumerates the Fundamental Rights.

Man as rational being desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. The guarantee of each of the above right is, therefore, restricted by the Constitution in the larger interest of the community. The right to freedom of speech and expression is subject to limitations imposed under Article 19(2).
Public order as a ground of imposing restrictions was added by the Constitution (First Amendment) Act, 1951. Public order is something more than ordinary maintenance of law and order. Public order in the present context is synonymous with public peace, safety and tranquility.

3.2.2.2 Meaning And Scope

Article 19(1)(a) of Indian Constitution says that all citizens have the right to freedom of speech and expression. Freedom of Speech and expression means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. It thus includes the expression of one's idea through any communicable medium or visible representation, such as gesture, signs, and the like. This expression connotes also publication and thus the freedom of press is included in this category. Free propagation of ideas is the necessary objective and this may be done on the platform or through the press. This propagation of ideas is secured by freedom of circulation. Liberty of circulation is essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value. The freedom of speech and expression includes liberty to propagate not one's views only. It also includes the right to propagate or publish the views of other people; otherwise this freedom would not include the freedom of press.

Freedom of expression has four broad special purposes to serve:
1) It helps an individual to attain self-fulfillment.
2) It assists in the discovery of truth.
3) It strengthens the capacity of an individual in participating in decision-making.
4) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.
5) All members of society would be able to form their own beliefs and communicate them freely to others.

In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive generous support from all those who believe in the participation of people in the administration. It is on account of this special interest which society has in the freedom of speech and expression that the approach of the Government should be more cautious while levying taxes on matters of concerning newspaper industry than while levying taxes on other matters.

Explaining the scope of freedom of speech and expression Supreme Court has said that the words "freedom of speech and expression" must be broadly constructed to include the freedom to circulate one's views by words of mouth or in writing or through audiovisual instrumentalities. It therefore includes the right to propagate one's views through the print media or through any other communication channel e.g.
the radio and the television. Every citizen of this country therefore has the right to air his or their views through the printing and or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution.

Freedom to air one's view is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death knell to democracy and would help usher in autocracy or dictatorship. The modern communication mediums advance public interest by informing the public of the events and development that have taken place and thereby educating the voters, a role considered significant for the vibrant functioning of a democracy. Therefore, in any setup more so in a democratic setup like ours, dissemination of news and views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2) of the Constitution.

The various communication channels are great purveyors of news and views and make considerable impact on the minds of readers and viewers and our known to mould public opinion on vitals issues of national importance. The freedom of speech and expression includes freedom of circulation and propagation of ideas and therefore the right extends to the citizen to use the media to answer the criticism leveled against the views propagated by him. Every free citizen has undoubted right to lay what sentiments he pleases. This freedom must, however, be exercised with circumspection and care must be taken not to trench on the rights of other citizens or to jeopardise public interest.

3.2.3 New Dimensions Of Freedom Of Speech And Expression

Government has no monopoly on electronic media: The Supreme Court widened the scope and extent of the right to freedom of speech and expression and held that the government has no monopoly on electronic media and a citizen has under Art. 19(1)(a) a right to telecast and broadcast to the viewers/listeners through electronic media television and radio any important event. The government can impose restrictions on such a right only on grounds specified in clause (2) of Art. 19 and not on any other ground. A citizen has fundamental right to use the best means of imparting and receiving communication and as such have an access to telecasting for the purpose.

Commercial Advertisements: The court held that commercial speech (advertisement) is a part of the freedom of speech and expression. The court however made it clear that the government could regulate the commercial advertisements, which are deceptive, unfair, misleading and untruthful. Examined from another angle the Court said that the public at large has a right to receive the "Commercial Speech". Art. 19(1)(a) of the constitution not only guaranteed freedom of speech and expression, it also protects the right of an individual to listen, read, and receive the said speech.
Telephone Tapping: Invasion on right to privacy: Telephone tapping violates Art. 19(1)(a) unless it comes within grounds of restriction under Art. 19(2). Under the guidelines laid down by the Court, the Home Secretary of the center and state governments can only issue an order for telephone tapping. The order is subject to review by a higher power review committee and the period for telephone tapping cannot exceed two months unless approved by the review authority.

3.2.4 Freedom Of Press

The fundamental right of the freedom of presses implicit in the right the freedom of speech and expression, is essential for the political liberty and proper functioning of democracy. The Indian Press Commission says that "Democracy can thrive not only under the vigilant eye of legislature, but also under the care and guidance of public opinion and the press is par excellence, the vehicle through which opinion can become articulate." Unlike the American Constitution, Art. 19(1)(a) of the Indian Constitution does not expressly mention the liberty of the press but it has been held that liberty of the press is included in the freedom of speech and expression. The editor of a press for the manager is merely exercising the right of the expression, and therefore, no special mention is necessary of the freedom of the press. Freedom of press is the heart of social and political intercourse. It is the primary duty of the courts to uphold the freedom of press and invalidate all laws or administrative actions, which interfere with it contrary to the constitutional mandate.

3.2.4.1 Right to Information

The right to know, 'receive and impart information has been recognized within the right to freedom of speech and expression. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. The right to know has, however, not yet extended to the extent of invalidating Section 5 of the Official Secrets Act, 1923 which prohibits disclosure of certain official documents. One can conclude that 'right to information is nothing but one small limb of right of speech and expression.

3.2.4.2 Grounds Of Restrictions

Clause (2) of Article 19 contains the grounds on which restrictions on the freedom of speech and expression can be imposed:

1) Security of State: Under Article 19(2) reasonable restrictions can be imposed on freedom of speech and expression in the interest of security of State. The term "security of state" refers only to serious and
aggravated forms of public order e.g. rebellion, waging war against the State, insurrection and not ordinary breaches of public order and public safety, e.g. unlawful assembly, riot, affray. Thus speeches or expression on the part of an individual, which incite to or encourage the commission of violent crimes, such as, murder are matters, which would undermine the security of State.

2) Friendly relations with foreign states: This ground was added by the constitution (First Amendment) Act, 1951. The object behind the provision is to prohibit unrestrained malicious propaganda against a foreign friendly state, which may jeopardise the maintainance of good relations between India, and that state. No similar provision is present in any other Constitution of the world. In India, the Foreign Relations Act, (XII of 1932) provides punishment for libel by Indian citizens against foreign dignitaries. Interest of friendly relations with foreign States, would not justify the suppression of fair criticism of foreign policy of the Government.

It is to be noted that member of the commonwealth including Pakistan is not a "foreign state" for the purposes of this Constitution. The result is that freedom of speech and expression cannot be restricted on the ground that the matter is adverse to Pakistan.

3) Public Order: This ground was added by the Constitution (First Amendment) Act. 'Public order' is an expression of wide connotation and signifies "that state of tranquility which prevails among the members of political society as a result of internal regulations enforced by the Government which they have established."

Public order is something more than ordinary maintenance of law and order. 'Public order' is synonymous with public peace, safety and tranquility. The test for determining whether an act affects law and order or public order is to see whether the act leads to the disturbances of the current of life of the community so as to amount to a disturbance of the public order or whether it affects merely an individual being the tranquility of the society undisturbed.

Anything that disturbs public tranquility or public peace disturbs public order. Thus communal disturbances and strikes promoted with the sole object of causing unrest among workmen are offences against public order. Public order thus implies absence of violence and an orderly state of affairs in which citizens can peacefully pursue their normal avocation of life. Public order also includes public safety. Thus creating internal disorder or rebellion would affect public order and public safety. But mere criticism of government does not necessarily disturb public order. In its external aspect 'public safety' means protection of the country from foreign aggression. Under public order the State would be entitled to prevent propaganda for a state of war with India.
The words 'in the interest of public order' includes not only such utterances as are directly intended to lead to disorder but also those that have the tendency to lead to disorder. Thus a law punishing utterances made with the deliberate intention to hurt the religious feelings of any class of persons is valid because it imposes a restriction on the right of free speech in the interest of public order since such speech or writing has the tendency to create public disorder even if in some case those activities may not actually lead to a breach of peace. But there must be reasonable and proper nexus or relationship between the restrictions and the achievements of public order.

4) Decency or morality: The words 'morality or decency' are words of wide meaning. Sections 292 to 294 of the Indian Penal Code provide instances of restrictions on the freedom of speech and expression in the interest of decency or morality. These sections prohibit the sale or distribution or exhibition of obscene words, etc. in public places. No fix standard is laid down till now as to what is moral and indecent. The standard of morality varies from time to time and from place to place.

5) Contempt of Court: Restriction on the freedom of speech and expression can be imposed if it exceeds the reasonable and fair limit and amounts to contempt of court. According to the Section 2 'Contempt of court' may be either 'civil contempt' or 'criminal contempt.'

6) Defamation: A statement, which injures a man's reputation, amounts to defamation. Defamation consists in exposing a man to hatred, ridicule, or contempt. The civil law in relating to defamation is still uncodified in India and subject to certain exceptions.

7) Incitement to an offence: This ground was also added by the constitution (First Amendment) Act, 1951. Obviously, freedom of speech and expression cannot confer a right to incite people to commit offence. The word 'offence' is defined as any act or omission made punishable by law for the time being in force.

8) Sedition: As understood by English law, sedition embraces all those practices whether by words, or writing which are calculated to disturb the tranquility of the State and lead ignorant person to subvert the government. It should be noted that the sedition is not mentioned in clause (2) of Art. 19 as one of the grounds on which restrictions on freedom of speech and expression may be imposed.

3.2.4.3 Conclusion

From this article it can be easily concluded that right to freedom of speech and expression is one of the most important fundamental right. It includes circulating one's views by words or in writing or through
audiovisual instrumentality, through advertisements and through any other communication channel. It also comprises of right to information, freedom of press etc. Thus this fundamental right has a vast scope.

From the above case law analysis it is evident that the Court has always placed a broad interpretation on the value and content of Article 19(1)(a), making it subjective only to the restrictions permissible under Article 19(2). Efforts by intolerant authorities to curb or suffocate this freedom have always been firmly repelled, more so when public authorities have betrayed autocratic tendencies.

It can also be comprehended that public order holds a lot of significance as a ground of restriction on this fundamental right. But there should be reasonable and proper nexus or relationship between the restriction and achievement of public order. The words 'in the interest of public order' include not only utterances as are directly intended to lead to disorder but also those that have the tendency to lead to disorder.

3.2.5 Freedoms under Article 19(1) (a) to (g).

3.2.5.1 Article 19(1) (a) (Freedom of Speech and Expression)

Freedom of Speech and expression means the right to express one's own convictions and opinion freely.

(i) The word "freely" means the freedom of a citizen to express his views and opinion in any conceivable means including by words of mouth, writing, printing, pictures, banners, signs and even by way of silence.

(ii) The Supreme Court held that the participation in sports is an expression of one's self and thus, it is a form of freedom of speech.

(iii) In Jindal Vs Union of India 2004 case, Supreme Court held that hoisting the National Flag by citizens is a form of freedom of speech and expression. However, the freedom of speech does not mean that other individuals are under obligation to listen to other's opinion.

(iv) It also means the right of a citizen to express other's opinion. The constitution nowhere, mentions in explicit term the freedom of Press. It is an inferred right implicit under Article 19(1) (a).

(v) The right to Freedom of Speech and opinion is meaningless when other's are prevented from listening or knowing (access to information). So, in this sense, this also means the right to have access to other's views and opinions. It is for this interpretation that the Right to Information (RTI) as a fundamental right emerges under Article 19(1) (a).
(vi) It also means the right to have political dissent, the right to have political opinion of your own. It also means the right to have your own party. The Supreme Court ruled that Freedom of Speech is an inalienable adjunct to the Right to Life (Article 21). These are not two separate rights but related rights.

The Supreme Court has observed that there are no geographical limitation to freedom of speech and expression guaranteed under Article 19(1) (a) and this freedom is exercisable not only in India but also outside India and if State action sets up barrier to its citizens on the exercise of this expression in any country in the world, it would violate the freedom of Speech and expression.

3.2.5.2 Article 19(1) (b) (Freedom of Assembly)

It guarantees to all citizens the right to assemble peacefully and without arms. It is a corollary of Article 19(1) (a). This right is not absolute but restricted. The assembly must be non-violent and must not cause any breach of public peace. If the assembly is disorderly or riotous then it is not protected under Article 19(1) (b) and reasonable restrictions may be imposed under article 19(3).

3.2.5.3 Article 19(1) (c) (Freedom to Form Association)

It guarantees the right to form associations. It includes the association of any kind- political, social or cultural. Further, it also means the right to join or not to join any association or right to continue or not to continue with the association.

(1) It gives rise to the right to form Trade Unions. It is a fundamental right of workers to form trade unions.

(2) The Supreme Court conferred that the Constitution does not recognizes the right to strike. It is a legal right but the strike must follow some rules. Workers can strike only after giving due notice.

(3) In CPM Vs Bharat Kumar 1998 Case the Supreme Court stated that Bandh is illegal. Bandh (A general strike) is illegal because it carries an element of aggression or compulsion. The compulsion of shutting down offices, shops and disturbance to public transport system, therefore violate a fundamental Right of citizen (Right to Freedom of movement). Moreover, bandh prevents the workers to earn their daily bread; therefore it violates the Right to Livelihood. It also violates the right to Freedom of Speech and expression.

(4) The Supreme Court held that the Hartal is not illegal. Because there is not any form of coercion involved not disturb normal life criticism.
(5) ESMA (Essential Services Maintenance Act)- The citizens involved in delivery of essential services cannot go on strike (Telecommunication, Administration etc.).

Right to form Association under Armed Forces Article 33 of the Constitution empowers the Indian Parliament to pass a law restricting the right to form political association to:

(a) The members of the Armed Forces.

(b) The members of the Forces charged with or

c) Persons employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence, or

d) Persons employed in or connection with the telecommunication system.

Example: Police Forces (Restriction of Rights) Act, 1966, thus they do not have the right to form trade unions and hence not to go on strike.

3.2.5.4 Article 19(1) (d) (Freedom of Movement)

It guarantees to citizens the right to move freely throughout the territory of India. The word ‘throughout’ means no part of the country can be made inaccessible to the people of India. The word freely means where ever one likes and however one likes. But these rights can be restricted on the ground of Security, Public order or for protecting the interests of the Scheduled Tribes.

3.2.5.5 Article 19(1) (e) (Freedom of Residence)

It is a corollary of Article 19(1)(d). It provides that the right to reside and settle down throughout the territory of India. This right is subject to certain reasonable restriction in the areas like the Scheduled areas or border areas.

3.2.5.6 Article 19(1) (g) (Freedom of Trade and Occupation)

It guarantees all citizens the right to choose any profession, occupation, trade or business. This right can be restricted by the State under Article 19(6) which includes:

(i) Imposing reasonable restrictions in the interest of general public.
(ii) Prescribe professional or technical qualifications necessary for carrying on any profession, trade or business to the exclusion of private citizens, wholly or partially.

First Amendment Act, 1951 – The right to freedom of Trade and occupation can be restricted by the State in law, in public interest whereby the state can take over a business or trade either completely or partially.

3.2.6 Safeguard against abuse of criminal law (Article 20: Freedom against self-incrimination, Protection against double jeopardy, Protection against retrospective operation of criminal law.

Article 20 deals with protection in respect of conviction for certain form of offences. It is available to all individuals (citizens and non-citizens). It contains three kinds of protection to individual against the State:-

3.2.6.1 Retrospective Criminal Legislation (Ex-Post facto Criminal Legislation)

Article 20(1) state that no person shall be convicted of any offence except for the violation of a law in force at the time of the commission of the offence.

(i) This means that an individual can be punished for the commission of an act only if the said act had been declared by a law as an offence at the time of commission of an offence.

(ii) An act which was originally a non-criminal act cannot be made into a criminal offence subsequent and the individual is punished for that.

(iii) Therefore Article 20(1) prohibits the State from enacting ex-post facto criminal legislation. It means a criminal legislation cannot be given a retrospection effect.

(iv) The immunity cannot be claimed against Preventive Detention. Again the protection does not cover trial.

(v) Further Article 20(1) says that no person shall be subjected to a punishment greater than what is prescribed in law for the commission of an offence.

3.2.6.2 Double Jeopardy

Article 20(2) states that no person shall be prosecuted and punished for the same offence more than once. Thus Article 20(2) prohibits double jeopardy. Under The doctrine of double jeopardy- a person can be punished only for the punishment of an offence at one time. However, it applies only to in the case of
judicial body. It does not apply for the punishment given by a non-judicial body. Therefore, a civil servant prosecuted and convicted by a court of law can be punished under departmental proceedings for the same offence.

Likewise a person punished departmentally may be prosecuted in a court of law. Again, since the operation of Article 20(2) is confined to indictment before a criminal court, it does not ban proceedings before a civil court for disobedience of an injunction along with criminal proceeding.

3.2.6.3 Article 20(3) – Prohibition against self-Incrimination

No person who is accused under any offence shall be compelled by the State to be a witness against himself. This clause applies only in cases where confusion is made to a police officer whether voluntarily or under compulsion.

Under the frame of criminal jurisprudence, a person is presumed to be innocent and it is for the prosecution to establish his guilt. A person accused of an offence need not make any statement against his will. If an accused makes a confession voluntarily before the Judicial Magistrate then it will be allowed as evidence in a court of law.


It states that no person shall be deprived of his life or personal liberty by the State except according to the procedure established by law. It is article 21 that has undergone the greatest changes due to liberal interpretation provided by the Supreme Court.

According to the Supreme Court Article 21 guarantees not merely the right to life but also the right to dignified life. It could thus be seen that all the Fundamental Rights and the Directive Principles ultimately aim to extend a level of quality of life to people.

Without the right to life, for an individual to enjoy other Fundamental Rights become meaningless. Thus Article 21 has emerged as the Fundamental of all Fundamental Rights. It has become the heart and soul of the Constitution. Even if the other fundamental rights have not been provided in the Constitution, a liberal interpretation to Article 21 will lead implicitly to such rights.
As the Supreme Court observes that the Article 21 as a composite right and has given right to largest number of inferred rights primarily right to live with dignity, right to Primary Education, up to 14 years of age, right to health of workers, right to speedy trial for the under trials, right against cruel punishment, right to shelter etc.

It is article 21 that makes the difference between a Constitutional State and a Police State.

In its earlier decision in A.K. Gopalan Vs State of Madras (1950) case the Supreme Court stated that personal liberty is different from liberty and thus Article 19 and 21 are two different articles. The right to personal liberty is a limitation upon the powers of the executive but not that of the legislature and only safeguards the individual against arbitrary or illegal action on the part of executive.

In Monika Gandhi Vs Union of India (1978) case the Supreme Court had overruled its earlier decision and stated that the liberty cannot be diluted. The personal freedom guarantee granted under article 19 and personal liberties mentioned under article 21 should not be read separately. Both of them supplement and complement each other. The expression personal liberty under article 21 also includes the freedom provided under article 19. Both overlap each other. Also article 21 safeguards the individual against the arbitrary or illegal actions not only on the part of the Executive but also on the legislature. Any law made by the legislature imposing restrictions on personal liberty of individuals should not be arbitrary, unfair or unreasonable.

3.2.7 Right to education Art. 21-A

Education is the most potent mechanism for the advancement of human beings. It enlarges, enriches and improves the individual's image of the future. A man without education is no more than an animal.

Education emancipates the human beings and leads to liberation from ignorance. According to Pestalozzi, education is a constant process of development of innate powers of man which are natural, harmonious and progressive. It is said that in the Twenty First Century, 'a nation's ability to convert knowledge into wealth and social good through the process of innovation is going to determine its future,' accordingly twenty first century is termed as century of knowledge.

The significance of education was very well explained in case of Brown V Board of Education, in following words: "It is the very foundation of good citizenship. Today, it is principal instrument in awakening the child to cultural value, in preparing him for later professional training and in helping him to adjust normally to his environment. "It is said that child is the future of nation.
International cooperation related to what is now called 'the right to education' has a more limited history. A private organisation, the International Bureau of Education, was established in Geneva in 1924 and was transformed into an inter-governmental organization in 1929 as an international coordinating centre for institutions concerned with education. A much broader approach was chosen, however, with the establishment of UNESCO in 1945. United Nations, on 10th December, 1998, adopted Universal Declaration of Human Rights. The Preamble to the UDHR stated that: every individual and organ of society...., shall strive by teaching and education to promote respect for these rights and freedoms...." In accordance with the Preamble of UDHR, education should aim at promoting human rights by importing knowledge and skill among the people of the nation states.

Every one has a right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

Article 26 (2) states that Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for maintenance of peace. Further, Article 26 (3) provides that parents have a prior right to choose the kind of education that shall be given to their children." The right to education has also been recognized by the International covenant on Economic, Social and Cultural Rights. Article 13

(1) states that,.: The states parties to the present covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and sense of its dignity, and shall strengthen the respect for human right and fundamental freedoms.... Article 13

(2) further provides that the states Parties to the present covenant recognize that, with a view to achieving the full realization of this right:
(a) Primary education shall be compulsory and available free to all;
(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who...
have not received on completed the whole period of their primary education;
(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

During the general discussion by the committee on Economic, Social and Cultural Rights on the right to education (1998), an agreement was reached that four elements define its core content:
(1) No one shall be denied a right to education;
(2) Everyone is entitled to basic (primary) education in one form or another; this includes basic education for adults. Primary education must be compulsory and free. No one may withhold a child from primary education. A state has an obligation to protect this right from encroachment by third persons;
(3) The minorities have the right to be taught in the language of their choice, in institutions outside the official system of public education. UNESCO has adopted a number of normative documents, conventions and recommendations ensuring the enjoyment of the right to education for everyone.

The best known among these is the Convention against Discrimination in Education, which was adopted on 14th December 1960 by the General Conference and which entered into force in 1962. The role of international organisation regarding the implementation of the right to education is just not limited to the preparation of documents and conducting conferences and conventions but it also undertakes the operational programmes assuring, access to education of refugees, migrants, minorities, indigenous people, women and the handicaps. India participated in the drafting of the Declaration and has ratified the covenant; Hence India is under obligation to implement such provisions.

The Founder Fathers of the nation recognizing the importance and significance of right to education made it a constitutional goal, and placed it under chapter IV Directive Principle of State Policy of the Constitution of India. Article 45 of the Constitution requires state to make provisions within 10 years for free and compulsory education for all children until they complete the age of 14 years.

Further Article 46 declares that the state shall promote with special care the educational and economic interests of the weaker section of the people.... It is significant to note that among several Articles enshrined under Part IV of the Indian Constitution, Article 45 had been given much importance as education is the basic necessary of the democracy and if the people are denied their right to education then democracy will be paralyzed; and it was, therefore, emphasized that the objective enshrined under Article 45 in Chapter IV of the Constitution should be achieved within ten years of the adoption of the Constitution. By establishing the obligations of the state the Founder Fathers made it the responsibility of coming governments to formulate a programme in order to achieve the given goals, but unresponsive and sluggish attitude of the government to achieve the objective enshrined under Article 45 belied the hopes
and aspirations of the people. However, the Judiciary showed keen interest in providing free and compulsory education to all the children below the age of fourteen years. In case of Mohini Jain V State of Karnataka, the Supreme Court held that right to education is fundamental right under Article 21 of the Constitution.

The right to education springs from right to life. The right to life under Article 21 and the dignity of the individual cannot fully be appreciated without the enjoyment of right to education. The Court observed: 

*Right to life is compendious expression for all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life. It extends to the fully range of conduct which the individual is free to pursue. .... The right to life under Article 21 and the dignity of the individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to provide educational facilities at all levels to its citizens.*

In case of Unni Krishan V State of Andhra Pradesh the Supreme Court was asked to examine the decision of Mohini Jain's case. In the present case the Apex Court partly overruled given in the Mohini Jain case. The Court held that, the right to education is implicit in the right to life and personal liberty guaranteed by Article 21 and must be interpreted in the light of the Directive Principle of State Policy contained in Articles 41, 45 and 46.

The Apex Court, however, limited the State obligation to provide educational facilities as follows.

(i) Every Citizen of this Country has a right to free education until he completes the age of fourteen years; (ii) Beyond that stage, his right to education is subject to the limits of the economic capacity of the state.

Further the Supreme Court in M.C. Mehta V State of Tamil Nadu the Supreme Court observed that, to develop the full potential of the children they should be prohibited to do hazardous work and education should be made available to them. In this regard the Court held that, the government should formulate programme offering job oriented education so that they may get education and the timings be so adjusted so that their employment is should not be affected.Again in Bandhua Muti Morcha V Union of India, Justice K. Ramaswamy and Justice Sagir Ahmad, observed, illiteracy has many adverse effects in a democracy governed by rule of law. Educated citizens could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop spirit of tolerance and reform.

Therefore, education is compulsory...., compulsory education is one of the states for stability of democracy, social integration and to eliminate social evils." The Supreme Court by rightly and harmoniously construing the provision of Part III and IV of the constitution has made right to education a basic fundamental right.
The Government of India by Constitutional (86th Amendment Act) Act, 2002 had added a new Article 21A which provides that "the state shall provide free and compulsory education to all children of the age of 6 to 14 years as the state may, by law determine". And further strengthened this Article 21A by adding clause (K) to Article 51-A which provides "who is a parent or guardian to provide opportunities for education to his child or ward between the age of 6 and 14 years." On the basis of Constitutional mandate provided in Article 41, 45, 46, 21A and various judgments of Supreme Court the Government of India has taken several steps to eradicate illiteracy, improvement the quality of education and make children back to school who left the school for one or the reasons. Some of these programmes are National Technology Mission, District Primary Education Programme, and Nutrition Support for Primary Education, National Open School, Mid- Day Meal Scheme, Sarva Siksha Abhiyan and other state specific initiatives. Besides, this several states have enacted legislation to provide free and compulsory primary education such as- the Kerala Education Act 1959, the Punjab Primary Education Act 1960, the Gujarat Compulsory Primary Education Act 1961, U.P. Basic Education Act 1972, Rajasthan Primary Education Act 1964, etc.

However, the Constitution of India and Supreme Court have declared that the education is now a fundamental right of the people of India, but it does not speak about millions of children who are in the age group of 0-5 years. It is needed that the Constitution should again be amended and the children of age group of 0 -5 years should be included; as by the time the child reaches the age of 6 years he/she gets in to the child labour due to the poverty. Moreover the Constitution only ensures that the state shall provide primary education to the children up to the age of 14 years, and the secondary and higher education is contingent and conditional upon the economic capacity of the state. The right to education will be meaningful only and only if the all the levels education reaches to all the sections of the people otherwise it will fail to achieve the target set out by our Founder Father to make Indian society an egalitarian society.

3.2.8 Preventive detention and fundamental rights (Article 22).

3.2.9 Article 22 Protection against arrest and detention in Certain Cases

Article 22 provides procedural safeguards against arbitrary arrest and detection. It is applicable to all individuals (Citizens and non-citizens). It does not confer a Fundamental Right on an individual against arrest and detention. It only extends certain procedural safeguards in case of arrest of individual. Thus it comes into play only after a person has been arrested. Its object is to prevent arbitrary arrest and detention by the State. Article 22 confers following safeguards in case of arrest and detention:-

3.2.9.1 Article 22(1)
No person who is arrested shall be detained in custody without being informed as soon as possible of the reasons for such arrest. Further he shall not be denied the right to consult and be defended by an advocate of his choice.

3.2.9.2 Article 22(2)

The arrested person shall be produced before the nearest judicial magistrate within 24 hours of his arrest. While calculating the 24 hours the time taken to travel from place to detention to the Court and by intervening holidays shall not be taken into consideration.

3.2.9.3 Article 22(3)

No person shall be detained in the custody beyond the period for which his detention has been authorized by the Judicial Magistrate. The above safeguards are not available to

(1) Enemy aliens

(2) The persons who are arrested under Preventive Detention laws such as NSA, COFE POSA, POTA Unlawful Activities (Prevention Act) etc.

The Detentions are of two types: Punitive and Preventive

Punitive Detention means detention after a proper trial. In such cases the arrested person is informed of his ground of arrest. He has been given a reasonable opportunity to defend himself and the prosecution has succeeded on his guilt and the court has punished him with a sentence.

On the other hand, Preventive Detention means detention without trial. In such cases, crimes may not have had happened and one of the objective is to prevent an individual from proceeding further commit a crime. Therefore a person can be arrested merely on the ground of suspicion. The rights of such arrested persons are largely governed by the respective preventive detention laws.

3.3 Right against exploitation under Article 23-24

The right against exploitation, given in Articles 23 and 24, provides for two provisions, namely the abolition of trafficking in human beings and Begar (forced labour), and abolition of employment of children below the age of 14 years in dangerous jobs like factories and mines. Child labour is considered a gross violation of the spirit and provisions of the constitution. Begar, practised in the past by landlords, has been declared a crime and is punishable by law. Trafficking in humans for the purpose of slave trade
or prostitution is also prohibited by law. An exception is made in employment without payment for compulsory services for public purposes. Compulsory military conscription is covered by this provision.

3.4 Right to religious freedom (Art 25), Protection of freedom of Religious Denominations (Art 26), Scope of Article 27 and Article 28

3.4.1 The Republic of India is a Secular State

The concept of secularism is implicit in the Preamble of the Constitution which declares the resolve of the people to secure to all its citizens "liberty of though, belief, faith and worship". In India, a Secular State was never considered as an irreligious or atheistic State. It only means that in matters of religion it is neutral. It is the ancient doctrine in India that the State protects all religions but interferes with none. Secularism is thus neither anti-God nor pro-God. It treats alike the devout, the antagonistic and the atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion. The State can have no religion of its own. It should treat all religions equally. The State must extend similar treatment to the Temple, the Mosque, the Church. In a secular state the State is only concerned with the relation between man and man, not with relation of man and God. It is left to the individual's conscience. Worshipping of God should be according to the dictates of one's own conscience. Man is not answerable to the State for the variety of his religious views. There can be no compulsion in law of any creed or practise of any form of worship.

3.4.2 Freedom of Religion in India - Article 25(1)

This guarantees to every person the freedom of conscience and right to profess, practise and propagate religion. This right is however, subjected to public order, morality and health and to the other provisions of Part III of constitution. Also, under sub-Clauses(a) and (b) of Clause (2) of Article 25 The State is empowered by law:

(a) to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practise;
(b) to provide for (i) social welfare and reform, and (ii) to throw open Hindu religious institution of a public character to all classes and sections of Hindus.

Article 25 (1) also guarantees not right to convert any person to one's own religion, but it allows to transmit or spread one's religion by an exposition of its tenets. It therefore postulates that there is not 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.

The protection of Article 25 and 26 is thus not limited to matters of doctrine of belief. It extends also to
acts done in pursuance of 'religion' and, therefore, contain a guarantee for rituals and observances, ceremonies and mode of worship which are integral parts of religion. What constitute an essential part of religion or religious practise has to be decided by the courts with reference to a doctrine of a particular religion and include practise which are regarded by the community as a part of its religion.

3.4.3 Restrictions on Freedom of Religion:

1. Religious liberty subjected to public order, morality and health
In the name of religion no act can be done against public order, morality and health of public. Thus section 34 of the Police Act prohibits the slaughter of cattle or indecent exposure of one's person in public place. These acts cannot be justified on plea of practice of religious rites. Likewise, in the name of religion 'untouchability' or traffic in human beings e.g., system of Devdasis cannot be tolerated. These rights are subjected to the reasonable restrictions under clause (2) of Article 19. For instance, a citizen's freedom of speech and expression in matters of religion is subjected to reasonable restrictions under Article 19(2). Right to propagate one's religion does not give right to any one to "forcibly" convert any person to one's own religion. Forcible conversion of any person to one's own religion might disturb the public order and hence could be prohibited by law.

2. Regulation of economic, financial, political and secular activities associated with religious practices-Clause (2) (a)
The freedom to practice extends only to those activities which are the essence of religion. It would not cover secular activities which do not form the essence of religion. It is not always easy to say which activities fall under religious practice or which are of secular, commercial or political nature associated with religious practice. Each case must be judge by its own facts and circumstances.

3. Social Welfare and Social Reforms-Clause (2) (b)
Under this clause the State empowered to make laws for social welfare and social reform. Thus under this clause the State can eradicate social practices and dogmas which stand in the path of the country's onward progress. Such laws do not affect the essence of any religion. This declares that where there is conflict between the need of social welfare and reform and religious practice must yield. Prohibition of evil practices such as Sati or system of Devadasi has been held to be justified under this clause.

The right protected under this clause is a right to enter into a temple for the purpose of worship. But it does not follow from this that, that right is, absolute and unlimited in character. No one can claim that a temple must be kept open for worship at all hours of the day and night or that he should be permitted to perform services personally which the Acharya alone could perform. The State cannot regulate the manner in which the worship of the deity is performed by the authorised pujaris of the temple or the hours and days on which the temple is to be kept open for Darshan or Puja for devotees. The right of Sikhs to wear and carry Kripan is recognised as a religious practice in justification 1 of
Article 25. It does not mean that he can keep any number of Kripans. He cannot possess more than one Kripan without licence.

3.4.4 Freedom to manage religious affairs - Article 26
Article 26 says that, subject to public order, morality and health, every religious denomination or any section of it shall have the following rights- (a) to establish and maintain institutions for religious and charitable purpose,
(b) to manage its own affairs in matters of religion,
(c) to own and acquire movable and immovable property,
(d) to administer such property in accordance with law.
The right guaranteed by Article 25 is an individual right while the right guaranteed by Article 26 is the right of an 'organised body' like the religious denomination or any section thereof.

3.4.5 Freedom from taxes for promotion of any particular religion - Article 27
Article 27 provides that no person shall be compelled to pay tax for the promotion or maintenance of any religion or religious denomination. This Article emphasises the secular character of the State. The public money collected by way of tax cannot be spent by the State for the promotion of any particular religion.

3.4.6 Prohibition of Religious Institution in State aided Institution - Article 28

According to Article 28(1) no religious instruction shall be imparted in any educational institution wholly maintained out of State funds. But this clause shall not apply to an educational institution which is administered by the State but was not established under any endowment or trust which requires that religious instruction shall be imparted in such institution. Thus Article 28 mentions four types of educational institutions:
(a) Institutions wholly maintained by the State.
(b) Institutions recognised by the State.
(c) Institutions that are receiving aid out of the State fund.
(d) Institutions that are administered by the State but are established any trust or endowment.
In the institutions of (a) type not religious instructions can be imparted. In (b) and (c) type of institutions religious instructions may be imparted only with the consent of the individuals. In the (d) type institution, there is not restriction on religious instructions.

3.5 Cultural and Educational Rights of Minorities & Right to establish educational institution of minority (Article 29-30)
As India is a country of many languages, religions, and cultures, the Constitution provides special measures, in Articles 29 and 30, to protect the rights of the minorities. Any community which has a language and a script of its own has the right to conserve and develop it. No citizen can be discriminated against for admission in State or State aided institutions.

All minorities, religious or linguistic, can set up their own educational institutions to preserve and develop their own culture. In granting aid to institutions, the State cannot discriminate against any institution on the basis of the fact that it is administered by a minority institution. But the right to administer does not mean that the State cannot interfere in case of maladministration. In a precedent-setting judgement in 1980, the Supreme Court held that the State can certainly take regulatory measures to promote the efficiency and excellence of educational standards. It can also issue guidelines for ensuring the security of the services of the teachers or other employees of the institution. In another landmark judgement delivered on 31 October 2002, the Supreme Court ruled that in case of aided minority institutions offering professional courses, admission could only be through a common entrance test conducted by State or a university. Even an unaided minority institution ought not to ignore the merit of the students for admission.

3.6 Right to enforce fundamental rights Article 32-35, and Constitutional remedies under Art 32 & 226

The right to constitutional remedy was created as one of the main fundamental rights, because the constitution recognized the need to protect the rights of the citizens. In case of any one of the fundamental rights being deprived or denied to the resident of the country, the individual or the party has the right to present their case in a court. In this case, the court has the flexibility to assign writs to the public in the form of habeas corpus, mandamus, prohibition, quo warranto and certiorari. In the case of a national emergency, the government has the flexibility to append the right of the citizen. According to Article 32, Indian citizens can stand up and fight for their fundamental rights if they are breached.

3.6.1 The Writs

- A writ of *Habeas corpus* requires that a person under arrest should be brought before a judge or court. The underlying principle behind the writ of Habeas Corpus is that a prisoner should be released from unlawful detention. It originated from the English Legal system and has been adopted in many nations since. Another form of the writ known as the Great Writ is also a complex order submitted to the court, which demands the custodian or the keeper of the prisoner to provide sufficient proof or documents in support of his or her authority of keeping the prisoner.
The Writ of Mandamus is another important jurisdictional remedy in which an order is passed on from a superior institution to a supplementary, subordinate court or authority that prohibits the court or government official from performing a certain act under the nature of statutory obligation. This is basically issued in the form of command to either take a particular form of action or refrain from doing it, and is backed with legal rights and reasoning.

Prohibition is writ issued by the high court or the Supreme Court to the local courts to prevent them from proceeding with a case which does not fall under its jurisdiction.

Certiorari is a writ issued to lower courts, when these courts have gone beyond the scope of their jurisdictions.

Quo Warranto writ is issued to a person who has been wrongly appointed in the office of authority. This obligates the accused of presenting whatever evidence he or she has to the court to support the reasons for occupying a particular post.

3.6.2 Article 32 Components

The Article in the Indian Constitution states that the Supreme Court or can accept writs from citizens or organizations if any of the fundamental rights have been denied to them. Along with exercising writs, the Supreme Court can also give other lower courts or even take away the responsibility of jurisdiction for certain cases.

Different Mechanisms for Protecting Rights

- The national commission for minorities is a flexible, autonomous body created by the Government of India that helps in monitoring the lower classes, castes and minorities. This commission works for the betterment and of these minority groups. The Commission looks into the complaints lodged by minorities and go ahead with plans that safeguard their rights and privileges of being an independent Indian Citizen.

- The National Commission for Women has been functioning since 1992 and works for the protection of women rights in cases such as dowry, exploitation, prostitution, and protects them from becoming victims of religious disputes and unfair job opportunities. The commission regularly holds campaigns and activities that safeguard the lives of women in the country.

- National Commission for Scheduled Tribes protects the interests of schedule tribes. The government will monitor and safeguard the rights of the Scheduled tribes and offer opportunities in the processes of socio-economic development, in terms of employment and also in terms of gaining medical and educational relie.
Review Questions

1. Define the right to freedoms?
2. Explain the Right to life and Personal Liberty?
3. Explain the Right against exploitation?
4. Explain the Land Relations in Pre-British India?

Discussion Questions

Discuss the freedom of expression in present circumstances?
Directive Principals and human rights

Learning Objectives

- To define the Directive Principals.
- To explain the Fundamental duties.
- To explain the Human Rights.
- To describe the Role of Media and NGO in protection of Human Rights.

4.1 Directive Principals of State Policy (Art 36-51), Fundamental Duties (Art 51A)

4.1.1 Importance of directive principles of State Policy as lying down the Perspective (outlook) for the preferred values of the society

An important feature of the constitution is the Directive Principles of State Policy. Although the Directive Principles are asserted to be "fundamental in the governance of the country," they are not legally enforceable. Instead, they are guidelines for creating a social order characterized by social, economic, and political justice, liberty, equality, and fraternity as enunciated in the constitution's preamble.

The Forty-second Amendment, which came into force in January 1977, attempted to raise the status of the Directive Principles by stating that no law implementing any of the Directive Principles could be declared unconstitutional on the grounds that it violated any of the Fundamental Rights. The amendment simultaneously stated that laws prohibiting "antinational activities" or the formation of "antinational associations" could not be invalidated because they infringed on any of the Fundamental Rights. It added a new section to the constitution on "Fundamental Duties" that enjoined citizens "to promote harmony and the spirit of common brotherhood among all the people of India, transcending religious, linguistic and regional or sectional diversities." However, the amendment reflected a new emphasis in governing circles on order and discipline to counteract what some leaders had come to perceive as the excessively freewheeling style of Indian democracy. After the March 1977 general election ended the control of the Congress (Congress (R) from 1969) over the executive and legislature for the first time since independence in 1947, the new Janata-dominated Indian Parliament passed the Forty-third Amendment (1977) and Forty-fourth Amendment (1978). These amendments revoked the Forty-second Amendment's provision that Directive Principles take precedence over Fundamental Rights and also curbed Indian Parliament's power to legislate against "antinational activities."

The Directive Principles of State DPSP are Policy (contained in part IV, articles 36 to 50,) of the Indian Constitution. Many of the provisions correspond to the provisions of the ICESCR. For instance, article 43 provides that the state shall endeavor to secure, by suitable legislation or economic organization or in any
other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities, and in particular the state shall endeavor to promote cottage industries on an individual or cooperative basis in rural areas. This corresponds more or less to articles 11 and 15 of the ICESCR. However, some of the ICESCR rights, for instance, the right to health (art. 12), have been interpreted by the Indian Supreme Court to form part of the right to life under article 21 of the Constitution, thus making it directly enforceable and justiciable. As a party to the ICESCR, the Indian legislature has enacted laws giving effect to some of its treaty obligations and these laws are in turn enforceable in and by the courts.

Article 37 of the Constitution declares that the DPSP shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.” It is not a mere coincidence that the apparent distinction that is drawn by scholars between the ICCPR rights and ESC rights holds good for the distinction that is drawn in the Indian context between fundamental rights and DPSP. Thus the bar to justiciability of the DPSP is spelled out in some sense in the Constitution itself.

It was said by several members in the Constituent Assembly that the directive principles are superfluous or mere guidelines or pious principles or instructions. They have no binding force on the State. In his speech Dr. Ambedkar answered.

— The directive principles are like instruments of instructions which were issued to the Governor in General and Governors of colonies and to those of India by the British Government under the 1935 Act under the Draft Constitution. It is proposed to issue such instructions to the president and governors. The text of these instruments of the instructions shall be found in scheduled IV to the Constitution of India. What are called directive principles is that they are instructions to the Legislature and the Executive. Such a thing is, to my mind, to be welcomed. Wherever there is grant or power in general terms for peace, order and good government that it is necessary that it should be accompanied by the instructions regulating its exercise.” It was never intended by Dr. Ambedkar that the Directive Principles had no legal force but had moral effect while educating members of the Government and the legislature, nor can it be said that the answer referred to necessarily implied with the Directive Principles had no legal force.

4.1.1.1 Observations of Prof. Bhat

Firstly, some of the directive principles of State policy, which are related to distributive justice, moulded the property relations by influencing the interrelationship doctrine, both directly and indirectly.
Secondly, the interrelationship doctrine is very much influenced by Article 39A of the Constitution, which provides for equal justice and free legal aid in the justice delivery system.

Thirdly, the directive principles of State shall strive to secure its citizens right to an adequate means of livelihood and make the effective provision for securing right to work.

Fourthly, the directive principle that ‘tender age of children are not abused’, and that ‘children are given opportunities and facilities to develop in a healthy manner and in a conditions of freedom and dignity that childhood and youth are protected against exploitation against moral and material abandonment’; [Article 39(f) have provided the spirit of law to the Apex Court.

Fifthly, the directive principle of ‘Equal pay for equal work’; and ‘participation of workers in management’; were received through right to equality under Article 14 in Part III, in various cases, such as Randhir Singh (AIR 1982 SC 469) and National Textile Workers Union case (AIR 1983 SC 75).

Sixthly, the directive principles relating to uniform civil code has the potentiality of using the interrelationship doctrine for its implementation.

Seventhly, the promotion of educational and economic interest of Scheduled Caste and Scheduled Tribe and other weaker section of the society, contemplated under Article 46 provides a guidance for affirmative actions under Article 15(4) and 16(4) and a pointer for resolving tension between formal and substantive equality by laying emphasis on infusing of strength and ability to compete, through eduction and training to weaker sectors (M.R. Balaji vs. State of Mysore – AIR 1963 SC 649).

Finally, the directive principle that the State shall endeavour to foster respect for international law and treaty obligations has a great potentiality of absorbing the international principles relating to guarantee as under of human rights, and thus influence the interrelationship doctrine.

4.1.1.2 The convictions are reflected:

(i) The impact of directive principles upon the interrelationship doctrine or vice-versa is not only theoretical but also practical and rewarding. Interrelationship doctrine has given impetus to, and got animated by the process of reading the directive principles into Part III of the Constitution.

(ii) It is true to say that the interrelationship doctrine has its roots in the very text of the constitution. This can be seen when the objects set in the Preamble, followed by Juxtaposing of right to equality with classification, the flexibility imbibed in fundamental rights, the spirit of law (operation of whole Part-III of the Constitution visa-vis the impugned law) rejection of compartmentalised treatment of fundamental
rights and finally, the distinction between citizens and non-citizens with regard to availability of fundamental rights and the possibility of invoking a fundamental right to avail a suspended fundamental right during emergency are taken into account with a conscious approach of unity in diversity.

Former Chief Justice of India Shri M.N. Venkatachelaiah, said that professor Bhat examines the relationship of fundamental rights inter se and the jurisprudential and constitutional foundations of that interrelationship. The interrelationship is also a necessary implication of constitutionalism and Rule of Law. It was viewed that professor Bhat, in his elegant analysis, indicates the 'parallel streams'; and 'cross-currents' of fundamental rights and how these rights inform and enrich each other. This discourse has its familiar ring in the International Human Rights Regime, and the principles of their universality, indivisibility and interdependence Fundamental Rights and DPSP.

When the tussle for primacy between fundamental rights and DPSP came up before the Supreme Court in the case of State of Madras v. Champakam Dorairajan (1951) SCR 525 first, the court said, “The directive principles have to conform to and run subsidiary to the chapter on fundamental rights.” Later, in the Fundamental Rights Case (referred to above), the majority opinions reflected the view that what is fundamental in the governance of the country cannot be less significant than what is significant in the life of the individual. Another judge constituting the majority in that case said: “It building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles.” This view, that the fundamental rights and DPSP are complementary, “rather part being superior to the other,” has held the field since.

The DPSP have, through important constitutional amendments, become the benchmark to insulate legislation enacted to achieve social objectives, as enumerated in some of the DPSP, from attacks of invalidation by courts. This way, legislation for achieving agrarian reforms, and specifically for achieving the objectives of articles 39(b) and (c) of the Constitution, has been immunized from challenge as to its violation of the right to equality (art. 14) and freedoms of speech, expression, etc. (art. 19). However, even here the court has retained its power of judicial review to examine if, in fact, the legislation is intended to achieve the objective of articles 39(b) and (c), and where the legislation is an amendment to the Constitution, whether it violates the basic structure of the constitution. Likewise, courts have used DPSP to uphold the constitutional validity of statutes that apparently impose restrictions on the fundamental rights under article 19 (freedoms of speech, expression, association, residence, travel and to carry on a business, trade or profession), as long as they are stated to achieve the objective of the DPSP.

The DPSP are seen as aids to interpret the Constitution, and more specifically to provide the basis, scope and extent of the content of a fundamental right.
To quote again from the Fundamental Rights case:

Fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment and even abrogation of these rights in circumstances not visualised by the constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV.

The Maneka Gandhi Case and Thereafter
Simultaneously, the judiciary took upon itself the task of infusing into the constitutional provisions the spirit of social justice. This it did in a series of cases of which Maneka Gandhi v. Union of India (1978) 1 SCC 248 was a landmark. The case involved the refusal by the government to grant a passport to the petitioner, which thus restrained her liberty to travel. In answering the question whether this denial could be sustained without a predecisional hearing, the court proceeded to explain the scope and content of the right to life and liberty. In a departure from the earlier view, A.K.Gopalan v. State of Madras 1950 SCR 88 the court asserted the doctrine of substantive due process as integral to the chapter on fundamental rights and emanating from a collective understanding of the scheme underlying articles 14 (the right to equality), 19 (the freedoms) and 21 (the right to life). The power the court has to strike down legislation was thus broadened to include critical examination of the substantive due process element in statutes. Once the court took a broader view of the scope and content of the fundamental right to life and liberty, there was no looking back. Article 21 was interpreted to include a bundle of other incidental and integral rights, many of them in the nature of ESC rights. In Francis Coralie v. union territory of India(AIR 1978 SC 597) the court declared:

—The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.”

The combined effect of the expanded interpretation of the right to life and the use of PIL as a tool led the court into areas where there was a crying need for social justice. These were areas where there was a direct interaction between law and poverty, as in the case of bonded labor and child labor, and crime and poverty, as in the case of under trials in jails. In reading several of these concomitant rights of dignity, living conditions, health into the ambit of the right to life, the court overcame the difficulty of
justiciability of these as economic and social rights, which were hitherto, in their manifestation as DPSP, considered nonenforceable.

4.1.2 Relationship between Fundamental Rights & Directive Principles of State Policy

Since both the Fundamental Rights and the Directive Principles were of common origin, it is clear that they both had the same objectives, namely to ensure the goal of a welfare society envisaged by the Preamble. If the Fundamental rights seek to achieve the goal by guaranteeing certain minimal rights to the individual as against State action, the Directives enjoin the State to ensure the welfare of the people collectively. Whenever the State makes laws, they should be made consistently with these principles with a view to establishment of an egalitarian society.

The idea of embodying a code of Directive Principles has been borrowed by the framers of the Constitution from the Irish Constitution of 1937, which contains similar provisions.

The preamble, the Directive Principles and the Fundamental Rights constitute the more important features of our Constitution. The Directive Principals of the State Policy enshrined in Part IV and the Fundamental Rights, guaranteed in Part III of the Constitution.

Although Fundamental Rights and Directive Principles appear in the Constitution as district entities, it was the Assembly that separate them; the leaders of the freedom struggle had drawn no distinction between the positive and negative obligations of the states. Both types of rights had developed as a common demand, products of national and social revolutions, of their almost inseparable intertwining and of the character of Indian polity itself.

The directive principles, though fundamental in the governance of the country, are not enforceable by any court in terms of the express provisions of Article 37 of the Constitution, while fundamental rights are enforceable by the Supreme Court and the High Court in terms of the express provisions of Article 32 and 226 of the Constitution. This does not, however, mean or imply any dichotomy between the two. It social aspect can, however, be amended only by legislation to carry out the objectives of the directive principles of state policy.

The researcher, through this paper attempts to examine and explore the inter-relationship between Fundamental Rights and the Directive Principles, enshrined in Part III and Part IV of the Constitution respectively.
The first part of the paper will focus on the origin of the concept of Directive Principles and Fundamental Rights, and trace as to how inspite of them having a common origin, they were separated. The next part of the paper will deal with how the judiciary in India, has interpreted the relations between Part III and Part IV.

4.1.2.1 Origin of fundamental rights and directive principles of state policy

Although, the Fundamental Rights and the Directive Principles of State Policy (hereinafter DPSPs) appear in the Constitution distinct entities, historically both had a common origin. Initially, the leaders of the Independent Movement had drawn no distinction between the positive and the negative obligations of the State. Both had developed as a common demand, as products of social and national and social revolutions, of their almost inseparable intertwining and character of the Indian politics itself. The demand for certain minimal individual rights dates back to 1895, when the Indian National Congress was formed. Indians wanted the same rights and privileges as that enjoyed by the British in India. The first explicit demand for the fundamental rights was made in the Constitution of India Bill, 1985. Article 16 of the Bill laid down a variety of rights including free speech, free-state education etc. The objective of guaranteeing certain undeniable rights or irrevocable rights against oppression was at the back of the resolution of Madras Congress in 1927 which provided setting up of a committee to draft ‘a Swaraj Constitution of India’ on the basis of Declaration of Rights and the Nehru Report, produced by the Committees headed by Motilal Nehru, in 1928. A genesis of many provisions which has been included under Directive Principles in the Constitution of 1949, found its place in the Nehru Report, under the heading of Fundamental Rights.

The idea that some of the rights that are to be incorporated in the Constitution might be non-justiciable was clearly formulated, for the first time in the Sapru Committee Report, in 1945, though it left the further development of that idea to legal experts. It observed that the rights are to be divided in such a manner that breaches of some may form the subject of judicial pronouncement, and the breaches of others may be remedied without resort to the courts.”

The inclusion of non-justiciable rights in the sub-committee on Fundamental Rights was met with mixed reactions, some being pessimistic, while others optimistic. T. T. Krishnamachari called it as a ‘veritable dustbin of sentiments attaching no value.” But to Ambedkar, the Directives were like ‘Instruments of Instructions’, and were hailed as the essence of the Constitution. According to him it was the most cardinal and important provision of the Constitution.
The enumeration of the fundamental rights and the non-justiciable directives was also performed by Sir B.N. Rau, in his draft of Fundamental Rights, presented by him in the Fundamental Rights Sub-Committee, which was appointed by the Constitution. It was pointed out by him that some of the provisions could not be enforced by legal action in courts of law, like the rights to work, leisure, and the like guaranteed under the Soviet Constitution (1936), by Articles 118-121. He therefore divided the rights in the draft into two groups- Group A and Group B. Group B included the Fundamental Rights which were to be enforced by legal action”. These rights later came to embodied in Part III of the Constitution. In Group A on the other hand, Sir B.N. Rau included the non-justiciable rights, which though could not be enforced by an individual in a court of law, was yet to be a part of the Constitution because of their educational value.

In the Draft Constitution, the fundamental rights were included in Part III, which consisted of Articles 7-27, while the non-justiciable rights were placed under Part IV, with the heading Directive Principles of State Policy, which consisted of Articles 28-40. It was emphasized that the need for incorporating the directives in the Constitution was because they were “fundamental in the governance of the country”. The Drafting Committee and the Constituent Assembly did not accept the amendment proposed by Sir B.N. Rau which would have given primacy to laws made to implement Directive Principles, which conflicted with one or more Fundamental Rights. Though Dr. Ambedkar admitted that the Directive Principles have no legal force, he was not prepared to admit that they were useless.

Soon after the commencement of the Constitution, an undue emphasis was laid on the unenforceability of the Directive Principles without taking into account their importance and the constitutional duty imposed upon the State to implement them. The judicial attitude towards the relationship between Part III and Part IV is discussed in the next section.

4.1.2.2 Judicial interpretation of the relation between fundamental rights and directive principles

The question of relationship between Directive Principles and Fundamental Rights has caused some difficulty and the judicial attitude has undergone a change over time.

4.1.2.3 Conflict Between Fundamental Rights And Directive Principles

Since the Directive Principles lay wide objectives of the State which cannot be legally enforced, while the Fundamental Rights are judicially enforceable, the question as to what happens if one is inconsistent with another, or one is in contravention of another naturally arises. For example a conflict can arise between the fundamental rights to carry on business guaranteed by Article 19(1)(g) and the Directive upon the State to safeguard and promote the interests of the workers under Article 39, 41-43. If one traces the way
this problem has been approached by the judiciary it would show that while initially the judiciary adopted a strict legal position, and held that the Directive Principles are subservient to the Fundamental Rights, while the later and more recent development has been towards avoidance of any conflict by applying the principles of reconciliation and harmonious construction.

In several early cases, the Supreme Court took the literal interpretive approach to Article 37 and ruled that Directive Principles could not over-ride a Fundamental Right, and in case of a conflict between the two, the Fundamental Right would prevail over the Directive Principles. This point was settled by the Supreme Court in State of Madras v. Champakam Dorairajan, where the court invalidated an order which provided for communal reservation of seats for admission into a State educational institution, even though it was inspired by Article 46. According to the court, since Fundamental Rights were enforceable and the directive Principles were not, the laws to implement Directive Principles could not take away Fundamental Rights. The Directive Principles should run subsidiary and conform to the Fundamental Rights.

In Venkataraman v. State of Madras, also the same point was reiterated, and said that the Madras Government’s order to give preference to the Harijans and backward classes was unconstitutional for it was discriminatory in relation to other backward classes.

As a result of these judgments, where the orders were struck down as violative of Article 15(1) and 29(2), the Constitution (First Amendment) Act, 1951 was brought about, 1951, which added clause 4 to Article 15, stating that nothing in Article 15(1) or 29(2) shall prevent the state from making any social provision for the advancement of socially and educationally backward classes. This made it clear that Directive Principles were no less important than Fundamental Rights, However, despite the amendment courts did not give much importance to the Directive Principles.

4.1.2.4 The Doctrine of Harmonious Construction

Though the judiciary continued to hold that the Directives were subordinate to the Fundamental Rights, an attempt was made to achieve the ideals mentioned Directive Principles. The Supreme Court’s view regarding the interplay of Directive principles and Fundamental Rights underwent a change. The courts came to realize that there should not be any conflicts between two sets of provisions of the Constitution which have a common origin and a common objective as would nullify either of them. The way out was found to lie in the doctrine of harmonious construction, arising out of the cannon of interpretation that parts of the same instrument must be read together in order to reconcile them with one another. Applying this doctrine, the Supreme Court came to adopt the view that in determining the ambit the ambit of Fundamental Rights themselves, the court might look at relevant Directive Principles. However it must be
noted that the earliest formulation of the doctrine of harmonious construction, the court looked at the problem from the other end, namely reading the Directives as being limited by the Fundamental Rights.

The doctrine of harmonious construction as a new technique of interpretation in this field was introduced in Hanif Quareshi Mohd. v. State of Bihar, where the court invalidated a ban on the slaughter of all cattle, on the ground that it constituted an unreasonable restriction on the right to carry on a butcher’s business, as guaranteed by Article 19(1)(g), notwithstanding the Directive under Article 41. However it was stated that the Constitution has to be interpreted harmoniously, and the Directive principles must be implemented, but it must not be done in such a way that its laws takes away or abridge the fundamental rights. Otherwise the protecting provisions of Chapter III will be "a mere rope of sand".

Similar view was expressed in In Re Kerala Education Bill where the court held that a law which sought to compel minority education institutions for children, not to charge fees would contravene the fundamental right guaranteed to such institution by Article 30, even though the State was enjoined by Article 45 to provide free education for children below 14. However, Das C.J., was said that the courts must not entirely ignore the Directive Principles and the principle of harmonious construction should be adopted to give effect to both Fundamental Rights and Directive Principles as much as possible. It was stated that while interpreting a statute, the courts would look for the light to the ‗lode star' of Directive Principles.

4.1.2.5 Fundamental Rights and Directive Principles are co-equal:

A change in the judicial attitude can be perceived in Sajjan Singh v. State of Rajasthan, where Mudholkar J., said that even if the fundamental Rights were taken as unchangeable, the much needed dynamism may be achieved by properly interpreting the Fundamental Rights in the light of Directive Principles. According to him, Part IV, is “fundamental in the governance of the country and the provisions of Part III must be interpreted harmoniously with these principles.” Here not only it was emphasized that there is a need to resolve the conflicts between the fundamental rights and the directive principles, but also that the former should be interpreted in light of the latter.

In Bijoya Cotton Mills v. State of West Bengal, the Apex Court laid down two rules of construction-one, in case of a conflict between the right of the individual and the laws aiming to implement socio-economic policies, in pursuance to Directive Principles, weight should be given to the latter, and two- every legislation enacted in pursuance of Directive Principles should be construed as one purporting to be in public interest, or as a reasonable restriction to the Fundamental Rights.
In Golak Nath v. State of Punjab, the same principle was applied by Justice Subba Rao, and it was emphasized that the Fundamental Rights and the Directive Principles form an ‘integrated scheme’ which was elastic enough to respond to the changing needs of the society. All the Fundamental Rights are not only in consonance with the provisions of Article 37, but also in complete harmony with the intention of the Constitution makers and the Preamble of the Constitution. Since then the judiciary’s attitude has become more positive and affirmative towards Directive Principles, and both came to be regarded as co-equal.

Hence without making the Directive Principles justiciable as such, the judiciary began to implement the values underlying these Principles to the extent possible. The Supreme Court in C. B. Boarding and Lodging v. State of Mysore, asserted that there is ‘no conflict on the whole’, between the Fundamental Rights and Directive Principles. Here it was stated that the ambit of freedom of business guaranteed Article 19(1)(g) should be determined in the light of the Directive Article, and that the Fundamental Rights and the Directive Principles are complementary and supplementary to each other. The court further elaborated that the provisions of the Constitution are not created as barriers to progress. They provide a plan for orderly progress towards social order contemplated by the Preamble to the Constitution. According to the court, it is a fallacy to think that the Constitution provides for only rights and no duties. While rights conferred under Part III are fundamental, the Directions under Part IV are fundamental in the governance of the country. There is no conflict between the provisions in Part III and Part IV both are complementary and supplementary to each other.

4.1.2.6 Subordinating Fundamental Rights to Directive Principles:

However, since Champakam has not been over-ruled explicitly by any case, the question as to how to reconcile an unavoidable conflict between the Fundamental Rights and Directive Principles still remained uncertain. This issue was resolved by the Supreme Court in the landmark judgment of Kesavananda Bharti v. State of Kerala, where views were expressed that fundamental rights of the few must ‘subserve the common good’ as embodied in the Directive Principles, and that whenever the Legislature made a law to implement a Directive Principle the court should up-hold it notwithstanding its inconsistency with any Fundamental Rights, and irrespective of the rule of harmonious construction as between different mandates of the Constitution. According to Mathew, J. it is imperative that in order to build up a just social order, the Fundamental Rights should be subordinated to the Directive Principles. Hence the view which taken in this case was that the Fundamental Rights should be subordinated to the Directive Principles. Here the court came to the conclusion as regards Article 31C, that if Indian Parliament decides to amend the Constitution, so as to take away a Fundamental Right, in order to give priority to the Directive Principles, the court cannot struck down the amendment on the ground that what was intended
to be subsidiary by the Constitution makers has been made dominant. Hence the courts subordinated the Fundamental Rights to the Directive Principles.

4.1.2.7 Fundamental Rights and the Directives are complementary to each other:

The court in State of Kerala v. N.M. Thomas considered the question as to whether the Directive under Article 46 could be invoked as an aid to interpret and cut down the ambit of the guarantee in Article 16(1). The majority read the Directive in Article 46 as an exception to the rule embodied in Article 16(1), apart from Article 16(4). The principle of harmonious construction was reiterated and that every attempt should be made to resolve the apparent conflicts between the two.

Chandrachud, C.J., in Minerva Mills Ltd v. Union of India said that the Fundamental Rights are not an end in themselves, but are, means to an end”. The end is specified in the Directive Principles. Further it was said that the Fundamental Rights and the Directive Principles together constitute the core commitment to social revolution, and together they are the conscience of the Constitution. The Indian Constitution is founded upon the bedrock of balance between the two. The court held that to give absolute primacy to one over the other is to disturb the harmony of the Constitution, and that this harmony and balance between the two is an essential feature and a basic structure of the Constitution. To destroy the guarantees by Part III in order to achieve the goals in Part IV will destroy the basic character of the Constitution. Hence section 4 of the 42nd Amendment which gave primacy to Directive principles over Fundamental Rights under Articles 14, 19, 31, was held by the majority to be unconstitutional.

So the courts went back to holding that the Fundamental Rights and the Directives are complementary to each other and did away with the view that Directive Principals should be given primacy.

In Unnikrishnan v. State of Andhra Pradesh and a host of other cases it was held that Fundamental Rights and Directive Principles cannot be read to be exclusionary of each other. Fundamental Rights are a means to achieve the goals specified in the Directives, and they must be construed in the light of Directive Principles. In Delhi Transport Corporation v. DTC Mazdoor Congress it has been held that Part IV must be read as an integral and incorporeal whole with the subject-matter of what is to be protected by its various provisions particularly fundamental rights. Both Part III and Part IV are like two wheels of a chariot, aiming to make social and economic democracy a truism.

The fact that the Fundamental Rights should be construed in the light of the Directive Principles has been since then, held by the judges in various cases. This integrative approach, that both Part III and Part IV should be read together, has now come to hold the field. It has now become a judicial strategy to read the Fundamental Rights along with the Directive Principles with a view to define the scope and ambit of the
former. Mostly the Directive Principles have been used to broaden, and give depth to some Fundamental Rights, and to imply more rights therefrom for the people over and above what are expressly stated in the Fundamental Rights.

The biggest beneficiary of this approach has been Article 21. By reading Article 21 with the Directive Principles, a bundle of rights has been read into Article 21. Accordingly it has been held that Article 21 includes the right to live with human dignity, the right to enjoy pollution free water, air and environment, the right to health and social justice, the right to education, the right to shelter, the right to privacy etc.

**4.1.2.8 Conclusion**

From the above discussion, it will be seen that the development of law regarding the conflict and irreconcilability between fundamental rights and the directive principles, has passed through four distinct stages. At the beginning, a strict literal interpretation was advocated and the Fundamental Rights were to prevail over the Directive Principles. Later in course of time, a perceptible, and a welcome change came over the judicial attitude, and the courts though subordinated the Directives to the Fundamental Rights, took the view that the mechanism of harmonious construction should be used to interpret the two Parts. The next stage came with the case of Sajjan Singh, and Golak Nath, where the judiciary began expanding the Directive Principles and interpreted the two Parts as being co-equal, and without any conflict. Kesavananda Bharti, was a turning point in the history of Directive Principles Jurisprudence, where for the first time the court held that the Directive principles should be given primacy over the Fundamental Rights. This was the third stage. However, in Minerva Mills the judiciary again went back to stating that there should be balance and harmony between Part III and Part IV, and that none should be given a primacy over the other. Since then this has been the view taken by the courts in the subsequent cases.

The recent trend in this regard, is that though the Directive Principles are unenforceable, and a State cannot be compelled to undertake a legislation to implement a Directive, the Supreme Court has been issuing directions to the State to implement the Principles. Hence various aspects of Part IV are being enforced by the courts indirectly. Today thus, the Directive Principles no longer remain merely a moral obligation of the Government.

**4.1.3 Fundamental duties**
Fundamental Duties in India are guaranteed by the Constitution of India in Part IVA in Article 51A. These fundamental duties are recognized as the moral obligations that actually help in upholding the spirit of nationalism as well as to support the harmony of the nation, as well as of the citizens. These duties are designed concerning the individuals and the nation. However, these fundamental duties are not legally enforceable. Furthermore, the citizens are morally obligated by the Constitution to perform these duties. These Fundamental Duties were added by the 42nd Amendment Act in 1976.

Article 51-A of the constitution provides 10 Fundamental Duties of the citizen. These duties can be classified accordingly as relating to the environment, duties towards the state and the nation and also towards self. However, the main purpose of incorporating the fundamental duties is to encourage the sense of patriotism among the country’s citizens.

The international instruments, such as, the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights include reference of such fundamental duties. These Fundamental Duties are such commitments that expand to the citizens as well as the state at large. According to the Fundamental Duties, all the citizens should respect the national symbols as well as the constitution of the country. The fundamental duties of the land also intend to uphold the right of equality of all individuals, defend the environment and the public property, to build up scientific temper, to disown violence, to struggle towards excellence and to offer compulsory education. In addition, the 11th Fundamental Duty of the country was added in the year 2002 by the 86th constitutional amendment. It states that every citizen who is a parent or guardian, to offer opportunities for education to his child or, as the case may be, ward between the age of 6 and 14 years.

**4.1.3.1 Fundamental Duties of Indian Citizens are as follows -**

* To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;

* To cherish and follow the noble ideals which inspired our national struggle for freedom;

* To uphold and protect the sovereignty, unity and integrity of India;

* To defend the country and render national service when called upon to do so;

* To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to
The dignity of women;

* To value and preserve the rich heritage of our composite culture;

* To protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures;

* To develop the scientific temper, humanism and the spirit of inquiry and reform;

* To safeguard public property and to abjure violence;

* To strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement

The Fundamental Duties of Indian citizens serve an imperative purpose, as a democratic polity cannot succeed if the citizens refuse to assume responsibilities and duties and are not enthusiastic to be active participants in the process of governance. The Fundamental Duties are considered as the responsibilities which should be performed by each and every civilian of India.

4.2.1 Introduction to Human Rights

4.2.1.1 Concept and development of Human Rights

Human rights are commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being. This chapter examines the concept of human rights and its origins, explaining the different terms and classifications.

4.2.1.2 Historical antecedents

The origins of human rights may be found both in Greek philosophy and the various world religions. In the Age of Enlightenment (18th century) the concept of human rights emerged as an explicit category. Man/woman came to be seen as an autonomous individual, endowed by nature with certain inalienable fundamental rights that could be invoked against a government and should be safeguarded by it. Human rights were henceforth seen as elementary preconditions for an existence worthy of human dignity.
Before this period, several charters codifying rights and freedoms had been drawn up constituting important steps towards the idea of human rights. During the 6th Century, the Achaemenid Persian Empire of ancient Iran established unprecedented principles of human rights. Cyrus the Great (576 or 590 BC - 530 BC) issued the Cyrus cylinder which declared that citizens of the empire would be allowed to practice their religious beliefs freely and also abolished slavery. The next generation of human rights documents were the Magna Charta Libertatum of 1215, the Golden Bull of Hungary (1222), the Danish Erik Klipping’s Håndfaesting of 1282, the Joyeuse Entrée of 1356 in Brabant (Brussels), the Union of Utrecht of 1579 (The Netherlands) and the English Bill of Rights of 1689. These documents specified rights which could be claimed in the light of particular circumstances (e.g., threats to the freedom of religion), but they did not yet contain an all-embracing philosophical concept of individual liberty. Freedoms were often seen as rights conferred upon individuals or groups by virtue of their rank or status.

In the centuries after the Middle Ages, the concept of liberty became gradually separated from status and came to be seen not as a privilege but as a right of all human beings. Spanish theologians and jurists played a prominent role in this context. Among the former, the work of Francisco de Vitoria (1486-1546) and Bartolomé de las Casas (1474-1566) should be highlighted. These two men laid the (doctrinal) foundation for the recognition of freedom and dignity of all humans by defending the personal rights of the indigenous peoples inhabiting the territories colonised by the Spanish Crown.

The Enlightenment was decisive in the development of human rights concepts. The ideas of Hugo Grotius (1583-1645), one of the fathers of modern international law, of Samuel von Pufendorf (1632-1694), and of John Locke (1632-1704) attracted much interest in Europe in the 18th century. Locke, for instance, developed a comprehensive concept of natural rights; his list of rights consisting of life, liberty and property. Jean-Jacques Rousseau (1712-1778) elaborated the concept under which the sovereign derived his powers and the citizens their rights from a social contract. The term human rights appeared for the first time in the French Déclaration des Droits de l’Homme et du Citoyen (1789).

The people of the British colonies in North America took the human rights theories to heart. The American Declaration of Independence of 4 July 1776 was based on the assumption that all human beings are equal. It also referred to certain inalienable rights, such as the right to life, liberty and the pursuit of happiness. These ideas were also reflected in the Bill of Rights which was promulgated by the state of Virginia in the same year. The provisions of the Declaration of Independence were adopted by other American states, but they also found their way into the Bill of Rights of the American Constitution. The French Déclaration des Droits de l’Homme et du Citoyen of 1789, as well as the French Constitution of 1793, reflected the emerging international theory of universal rights. Both the American and French Declarations were intended as systematic enumerations of these rights.
The classic rights of the 18th and 19th centuries related to the freedom of the individual. Even at that time, however, some people believed that citizens had a right to demand that the government endeavour to improve their living conditions. Taking into account the principle of equality as contained in the French Declaration of 1789, several constitutions drafted in Europe around 1800 contained classic rights, but also included articles which assigned responsibilities to the government in the fields of employment, welfare, public health, and education. Social rights of this kind were also expressly included in the Mexican Constitution of 1917, the Constitution of the Soviet Union of 1918 and the German Constitution of 1919.

In the 19th century, there were frequent inter-state disputes relating to the protection of the rights of minorities in Europe. These conflicts led to several humanitarian interventions and calls for international protection arrangements. One of the first such arrangements was the Treaty of Berlin of 1878, which accorded special legal status to some religious groups. It also served as a model for the Minorities System that was subsequently established within the League of Nations.

The need for international standards on human rights was first felt at the end of the 19th century, when the industrial countries began to introduce labour legislation. This legislation - which raised the cost of labour - had the effect of worsening their competitive position in relation to countries that had no labour laws. Economic necessity forced the states to consult each other. It was as a result of this that the first conventions were formulated in which states committed themselves *vis-à-vis* other states in regard to their own citizens. The Bern Convention of 1906 prohibiting night-shift work by women can be seen as the first multilateral convention meant to safeguard social rights. Many more labour conventions were later to be drawn up by the International Labour Organisation (ILO), founded in 1919 (see II§1.D). Remarkable as it may seem, therefore, while the classic human rights had been acknowledged long before social rights, the latter were first embodied in international regulations.

The atrocities of World War II put an end to the traditional view that states have full liberty to decide the treatment of their own citizens. The signing of the Charter of the United Nations (UN) on 26 June 1945 brought human rights within the sphere of international law. In particular, all UN members agreed to take measures to protect human rights. The Charter contains a number of articles specifically referring to human rights (see II§1.A). Less than two years later, the UN Commission on Human Rights (UNCHR), established early in 1946, submitted a draft Universal Declaration of Human Rights (UDHR) to the UN General Assembly (UNGA). The Assembly adopted the Declaration in Paris on 10 December 1948. This day was later designated Human Rights Day.

During the 1950s and 1960s, more and more countries joined the UN. Upon joining they formally accepted the obligations contained in the UN Charter, and in doing so subscribed to the principles and
ideals laid down in the UDHR. This commitment was made explicit in the Proclamation of Teheran (1968), which was adopted during the first World Conference on Human Rights, and repeated in the Vienna Declaration and Programme of Action, which was adopted during the second World Conference on Human Rights (1993).

Since the 1950s, the UDHR has been backed up by a large number of international conventions. The most significant of these conventions are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These two Covenants together with the UDHR form the International Bill of Human Rights. At the same time, many supervisory mechanisms have been created, including those responsible for monitoring compliance with the two Covenants (see II§1.C).

Human rights have also been receiving more and more attention at the regional level. In the European, the Inter-American and the African context, standards and supervisory mechanisms have been developed that have already had a significant impact on human rights compliance in the respective continents, and promise to contribute to compliance in the future. These standards and mechanisms will be discussed in more detail throughout this book (see Part II).

4.2.1.3 Defining human rights

Human rights are commonly understood as being those rights which are inherent in the mere fact of being human. The concept of human rights is based on the belief that every human being is entitled to enjoy her/his rights without discrimination. Human rights differ from other rights in two respects. Firstly, they are characterised by being:

- Inherent in all human beings by virtue of their humanity alone (they do not have, e.g., to be purchased or to be granted);
- Inalienable (within qualified legal boundaries); and
- Equally applicable to all.

Secondly, the main duties deriving from human rights fall on states and their authorities or agents, not on individuals.

One important implication of these characteristics is that human rights must themselves be protected by law (‘the rule of law’). Furthermore, any disputes about these rights should be submitted for adjudication through a competent, impartial and independent tribunal, applying procedures which ensure full equality
and fairness to all the parties, and determining the question in accordance with clear, specific and pre-existing laws, known to the public and openly declared.

The idea of basic rights originated from the need to protect the individual against the (arbitrary) use of state power. Attention was therefore initially focused on those rights which oblige governments to refrain from certain actions. Human rights in this category are generally referred to as _fundamental freedoms_. As human rights are viewed as a precondition for leading a dignified human existence, they serve as a guide and touchstone for legislation.

The specific nature of human rights, as an essential precondition for human development, implies that they can have a bearing on relations both between the individual and the state, and between individuals themselves. The individual-state relationship is known as the _vertical effect_ of human rights. While the primary purpose of human rights is to establish rules for relations between the individual and the state, several of these rights can also have implications for relations among individuals. This so-called _horizontal effect_ implies, among other things, that a government not only has an obligation to refrain from violating human rights, but also has a duty to protect the individual from infringements by other individuals. The right to life thus means that the government must strive to protect people against homicide by their fellow human beings. Similarly, Article 17(1) and (2) of the ICCPR obliges governments to protect individuals against unlawful interference with their privacy. Another typical example is the Convention of the Elimination of All Forms of Racial Discrimination (CERD), which obliges states to prevent racial discrimination between human beings. State obligations regarding human rights may involve desisting from certain activities (e.g., torture) or acting in certain ways (e.g., organising free elections).

4.2.1.4 Terminology

The term _human rights_ is used to denote a broad spectrum of rights ranging from the right to life to the right to a cultural identity. They involve all elementary preconditions for a dignified human existence. These rights can be ordered and specified in different ways. At the international level, a distinction has sometimes been made between civil and political rights, on the one hand, and economic, social and cultural rights on the other. This section clarifies this distinction. Since other classifications are also used, these will likewise be reviewed, without claiming, however, that these categorisations reflect an international consensus. It is also clear that the various categorisations overlap to a considerable extent.

Although human rights have been classified in a number of different manners it is important to note that international human rights law stresses that all human rights are universal, indivisible and interrelated.
The indivisibility of human rights implies that no right is more important than any other.

### 4.2.1.5 Classic and social rights

One classification used is the division between _classic_ and _social_ rights. _Classic_ rights are often seen to require the non-intervention of the state (negative obligation), and _social_ rights as requiring active intervention on the part of the state (positive obligations). In other words, classic rights entail an obligation for the state to refrain from certain actions, while social rights oblige it to provide certain guarantees. Lawyers often describe classic rights in terms of a duty to achieve a given result (‗obligation of result‘) and social rights in terms of a duty to provide the means (‗obligations of conduct‘). The evolution of international law, however, has led to this distinction between _classic_ and _social_ rights becoming increasingly awkward. Classic rights such as civil and political rights often require considerable investment by the state. The state does not merely have the obligation to respect these rights, but must also guarantee that people can effectively enjoy them. Hence, the right to a fair trial, for instance, requires well-trained judges, prosecutors, lawyers and police officers, as well as administrative support. Another example is the organisation of elections, which also entails high costs.

On the other hand, most _social_ rights contain elements that require the state to abstain from interfering with the individual‘s exercise of the right. As several commentators note, the right to food includes the right for everyone to procure their own food supply without interference; the right to housing implies the right not to be a victim of forced eviction; the right to work encompasses the individual‘s right to choose his/her own work and also requires the state not to hinder a person from working and to abstain from measures that would increase unemployment; the right to education implies the freedom to establish and direct educational establishments; and the right to the highest attainable standard of health implies the obligation not to interfere with the provision of health care.

In sum, the differentiation of _classic_ rights from _social_ rights does not reflect the nature of the obligations under each set of rights.

### 4.2.1.6 Civil, political, economic, social and cultural rights

#### 4.2.1.6.1 Civil rights

The term _civil rights_ is often used with reference to the rights set out in the first eighteen articles of the UDHR, almost all of which are also set out as binding treaty norms in the ICCPR. From this group, a further set of _physical integrity rights_ has been identified, which concern the right to life, liberty and
security of the person, and which offer protection from physical violence against the person, torture and inhuman treatment, arbitrary arrest, detention, exile, slavery and servitude, interference with one’s privacy and right of ownership, restriction of one’s freedom of movement, and the freedom of thought, conscience and religion. The difference between ‘basic rights’ (see below) and ‘physical integrity rights’ lies in the fact that the former include economic and social rights, but do not include rights such as protection of privacy and ownership.

Although not strictly an integrity right, the right to equal treatment and protection in law certainly qualifies as a civil right. Moreover, this right plays an essential role in the realisation of economic, social and cultural rights.

Another group of civil rights is referred to under the collective term ‘due process rights’. These pertain, among other things, to the right to a public hearing by an independent and impartial tribunal, the ‘presumption of innocence’, the *ne bis in idem* principle (freedom from double jeopardy) and legal assistance (see, e.g., Articles 9, 10, 14 and 15 ICCPR).

### 4.2.1.6.2 Political rights

In general, political rights are those set out in Articles 19 to 21 UDHR and also codified in the ICCPR. They include freedom of expression, freedom of association and assembly, the right to take part in the government of one’s country and the right to vote and stand for election at genuine periodic elections held by secret ballot (see Articles 18, 19, 21, 22 and 25 ICCPR).

### 4.2.1.6.3 Economic and social rights

The economic and social rights are listed in Articles 22 to 26 UDHR, and further developed and set out as binding treaty norms in the ICESCR. These rights provide the conditions necessary for prosperity and wellbeing. Economic rights refer, for example, to the right to property, the right to work, which one freely chooses or accepts, the right to a fair wage, a reasonable limitation of working hours, and trade union rights. Social rights are those rights necessary for an adequate standard of living, including rights to health, shelter, food, social care, and the right to education (see Articles 6 to 14 ICESCR).

### 4.2.1.6.4 Cultural rights

The UDHR lists cultural rights in Articles 27 and 28: the right to participate freely in the cultural life of the community, the right to share in scientific advancement and the right to the protection of the moral
and material interests resulting from any scientific, literary or artistic production of which one is the author (see also Article 15 ICESCR and Article 27 ICCPR).

4.2.1.7 The alleged dichotomy between civil and political rights, and economic, social and cultural rights

Traditionally it has been argued that there are fundamental differences between economic, social and cultural rights, and civil and political rights. These two categories of rights have been seen as two different concepts and their differences have been characterised as a dichotomy. According to this view, civil and political rights are considered to be expressed in very precise language, imposing merely negative obligations which do not require resources for their implementation, and which therefore can be applied immediately. On the other hand, economic, social and cultural rights are considered to be expressed in vague terms, imposing only positive obligations conditional on the existence of resources and therefore involving a progressive realization.

As a consequence of these alleged differences, it has been argued that civil and political rights are justiciable whereas economic, social and cultural rights are not. In other words, this view holds that only violations of civil and political rights can be adjudicated by judicial or similar bodies, while economic, social and cultural rights are ‘by their nature’ non-justifiable.

Over the years, economic, social and cultural rights have been re-examined and their juridical validity and applicability have been increasingly stressed. During the last decade, we have witnessed the development of a large and growing body of caselaw of domestic courts concerning economic, social and cultural rights. This caselaw, at the national and international level, suggests a potential role for creative and sensitive decisions of judicial and quasi-judicial bodies with respect to these rights.

Many international fora have elaborated on the indivisibility and interdependency of human rights. As stated in the 1993 Vienna Declaration and Programme of Action: ‘All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.’ The European Union (EU) and its member states have also made it clear on numerous occasions that they subscribe to the view that both categories of human rights are of equal importance, in the sense that an existence worthy of human dignity is only possible if both civil and political rights and economic, social and cultural rights are enjoyed. In their Declaration of 21 July 1986, they affirmed that ‘the promotion of economic, social and cultural rights as well as of civil and political rights is of paramount importance for the full realisation of human dignity and for the attainment of the legitimate aspirations of every individual.’
The so-called Limburg Principles on the Implementation of the ICESCR also indicate that a sharp distinction between civil and political rights on the one hand and economic, social and cultural rights on the other is not accurate. These principles were drawn up in 1986 by a group of independent experts, and followed in 1997 by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. Together, these documents provide a clear justification of the nature of the state party obligations under the ICESCR. The same can be said of the 1990 General Comment 3 of the UN Committee on Economic, Social and Cultural Rights on the nature of states parties’ obligations in relation to the ICESCR.

Fortunately, continuous declarations at the international level on the indivisibility and interdependency of all rights have finally been codified by way of the recently adopted Optional Protocol to the ICESCR. States parties to the Optional Protocol will recognise the competence of the Committee on Economic, Social and Cultural Rights to receive and consider individual and collective complaints alleging violations of economic, social and cultural rights set forth in the ICESCR. The Committee will also be empowered to request interim measures to avoid possible irreparable damage to the victims of the alleged violations and, where it receives reliable information indicating grave or systematic violations, it shall conduct an inquiry which may include a visit to the state party.

The adoption of the Optional Protocol on the 60th anniversary of the UDHR, on 10 December 2008, represents an historic advance for human rights. Firstly, economic, social and cultural rights - historically demoted to an inferior status with limited protection - are now finally on an equal footing with civil and political rights. Secondly, through an individual complaints procedure the meaning and scope of these rights will become more precise, facilitating efforts to respect and guarantee their enjoyment. Thirdly, the existence of a potential remedy at the international level will provide an incentive to individuals and groups to formulate some of their economic and social claims in terms of rights. Finally, the possibility of an adverse finding of the Committee on Economic, Social and Cultural Rights will give economic, social and cultural rights salience in terms of the political concerns of governments; which these rights largely lack at present.

4.2.1.8 Fundamental and basic rights

Fundamental rights are taken to mean such rights as the right to life and the inviolability of the person. Within the UN, extensive standards have been developed which, particularly since the 1960s, have been laid down in numerous conventions, declarations and resolutions, and which bring already recognised rights and matters of policy which affect human development into the sphere of human rights. Concern that a broad definition of human rights may lead to the notion of violation of human rights’ losing some of its significance has generated a need to distinguish a separate group within the broad category of
human rights. Increasingly, the terms ‘elementary’, ‘essential’, ‘core’ and ‘fundamental’ human rights are being used.

Another approach is to distinguish a number of ‘basic rights’, which should be given absolute priority in national and international policy. These include all the rights which concern people’s primary material and non-material needs. If these are not provided, no human being can lead a dignified existence. Basic rights include the right to life, the right to a minimum level of security, the inviolability of the person, freedom from slavery and servitude, and freedom from torture, unlawful deprivation of liberty, discrimination and other acts which impinge on human dignity. They also include freedom of thought, conscience and religion, as well as the right to suitable nutrition, clothing, shelter and medical care, and other essentials crucial to physical and mental health.

Mention should also be made of so-called ‘participation rights’; for instance, the right to participate in public life through elections (which is also a political right; see above) or to take part in cultural life. These participation rights are generally considered to belong to the category of fundamental rights, being essential preconditions for the protection of all kinds of basic human rights.

4.2.1.9 Other classifications

4.2.1.9.1 Freedoms

Preconditions for a dignified human existence have often been described in terms of freedoms (e.g., freedom of movement, freedom from torture and freedom from arbitrary arrest). United States President Franklin D. Roosevelt summarised these preconditions in his famous ‘Four Freedoms Speech’ to the United States Congress on 26 January 1941:

- Freedom of speech and expression;
- Freedom of belief (the right of every person to worship God in his own way);
- Freedom from want (economic understandings which will secure to every nation a healthy peace-time life for its inhabitants); and
- Freedom from fear (world-wide reduction of armaments to such a point and in such a thorough fashion that no nation would be able to commit an act of physical aggression against any neighbour).

Roosevelt implied that a dignified human existence requires not only protection from oppression and arbitrariness, but also access to the primary necessities of life.
4.2.1.9.2 Civil liberties

The concept of ‘civil liberties’ is commonly known, particularly in the United States, where the American Civil Liberties Union (a non-governmental organisation) has been active since the 1920s. Civil liberties refer primarily to those human rights which are laid down in the United States Constitution: freedom of religion, freedom of the press, freedom of expression, freedom of association and assembly, protection against interference with one’s privacy, protection against torture, the right to a fair trial, and the rights of workers. This classification does not correspond to the distinction between civil and political rights.

4.2.1.9.3 Individual and collective rights

Although the fundamental purpose of human rights is the protection and development of the individual (individual rights), some of these rights are exercised by people in groups (collective rights). Freedom of association and assembly, freedom of religion and, more especially, the freedom to form or join a trade union, fall into this category. The collective element is even more evident when human rights are linked specifically to membership of a certain group, such as the right of members of ethnic and cultural minorities to preserve their own language and culture. One must make a distinction between two types of rights, which are usually called collective rights: individual rights enjoyed in association with others, and the rights of a collective.

The most notable example of a collective human right is the right to self-determination, which is regarded as being vested in peoples rather than in individuals (see Articles 1 ICCPR and ICESCR). The recognition of the right to self-determination as a human right is grounded in the fact that it is seen as a necessary precondition for the development of the individual. It is generally accepted that collective rights may not infringe on universally accepted individual rights, such as the right to life and freedom from torture.

4.2.1.9.4 First, second and third generation rights

The division of human rights into three generations was first proposed by Karel Vasak at the International Institute of Human Rights in Strasbourg. His division follows the principles of Liberté, Égalité and Fraternité of the French Revolution.

First generation rights are related to liberty and refer fundamentally to civil and political rights. The second generation rights are related to equality, including economic, social and cultural rights. Third generation or ‘solidarity rights’ cover group and collective rights, which include, inter alia, the right to development, the right to peace and the right to a clean environment. The only third generation right which so far has been given an official human rights status - apart from the right to self-determination,
which is of longer standing - is the right to development (see the Declaration on the Right to Development, adopted by the UNGA on 4 December 1986, and the 1993 Vienna Declaration and Programme of Action (Paragraph I, 10)). The Vienna Declaration confirms the right to development as a collective as well as an individual right, individuals being regarded as the primary subjects of development. Recently, the right to development has been given considerable attention in the activities of the High Commissioner for Human Rights. Adoption of a set of criteria for the periodic evaluation of global development partnerships from the perspective of the right to development by the Working Group on the Right to Development, in January, 2006, evidence the concrete steps being taken in this area. The EU and its member states also explicitly accept the right to development as part of the human rights concept.

While the classification of rights into ‘generations’ has the virtue of incorporating communal and collective rights, thereby overcoming the individualist moral theory in which human rights are grounded, it has been criticised for not being historically accurate and for establishing a sharp distinction between all human rights. Indeed, the concept of generations of rights is at odds with the Teheran Proclamation and the Vienna Declaration and Programme of Action, which establish that all rights are indivisible, interdependent and interrelated.

4.2.1.10 Universality of human rights

In the last fifty years the principle of universality has become central to the interpretation of human rights law. The recognition and protection of fundamental rights had already to some extent been codified before Second World War, albeit primarily in national law, and especially in national constitutions. It was, however, only after the Second World War that politicians and civil society alike came to realise that national schemes for the protection of human rights did not suffice. Since then, human rights have found their way into a wide range of regional and global treaties.

The entry into force of the UN Charter on 24 October 1945 marked the formal recognition of human rights as a universal principle, and compliance with human rights was mentioned in the Preamble and in Articles 55 and 56 as a principle to be upheld by all states. In 1948, it was followed by the adoption of the UDHR, and in 1966 by the ICESCR and the ICCPR and its First Optional Protocol (see II§1.C).

The UDHR specifies over thirty rights. It regards the protection of these rights as a common standard to be ultimately achieved. Several governments and scholars maintain that a number of human rights in the UDHR have the character of *jus cogens* (a peremptory norm, which states are not allowed to derogate from; a rule which is considered universally valid). Its universality is underlined by the fact that in 1948 it was formulated and agreed upon not only by Western states, but also by representatives from countries
such as China, the Soviet Union, Chile, and Lebanon. It was moreover adopted without any objection: no votes against and only eight abstentions.

As noted above, during the 1950s and 1960s, more and more countries became independent and joined the UN. In doing so they endorsed the principles and ideals laid down in the UDHR. This commitment was underlined in the Proclamation of Teheran of 1968. The Proclamation was adopted by 85 states, of which more than 60 countries did not belong to the Western Group. The Proclamation stated: _The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community._

The Vienna Declaration and Programme of Action, the results of the 1993 Second World Conference on Human Rights (which was attended by 171 states), once more endorsed and underlined the importance of the UDHR. It stated that the UDHR 'constitutes a common standard of achievement for all peoples and all nations', using the language of the Declaration itself.

The universality of human rights has been, and still is, a subject of intense debate, including in anticipation of, during and after the 1993 World Conference on Human Rights. The Vienna document itself states that the universal nature of human rights is _beyond question_. It also says: _all human rights are universal_; adding, however, that _the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind_. This national _margin of appreciation_, as it is called, does not, however, according to the Vienna document, relieve states of their duty to promote and protect all human rights, _regardless of their political, economic and cultural systems_.

Also relevant when considering the universality of human rights is the increasing number of ratifications of international human rights conventions. In March 2010, the ICESCR had been ratified by 160 states and the ICCPR by 165 states. Several other UN conventions, as well as conventions Definitions and Classifications 39 Umbrotið FYRIR GUÐRÚNU - Nota_Layout 1 8.4.2010 11:19 Page 39 of the International Labour Organisation (ILO), have also been ratified by many states; indeed in some cases by nearly all states. Most strikingly, the Convention on the Rights of the Child (CRC), adopted in 1989, has been ratified by 193 states (March 2010)

4.2.1.11 Human rights and interference in domestic affairs

In earlier times, whenever human rights violations were openly condemned by third states, the authorities concerned countered with references to _unacceptable interference in internal affairs_. In more recent
years, this argument has lost ground when human rights are at stake. The Second World War constituted a
turning point in the way the international community regards its responsibility for the protection of and
respect for human rights. The long-standing principle of state sovereignty vis-à-vis one's nationals has in
the course of the years been eroded. The UN Charter explicitly proclaimed human rights to be a matter of
legitimate, international concern: [...] the United Nations shall promote [...] universal respect for, and
observance of, human rights and fundamental freedoms for all without distinction as to race, sex,
language or religion' (Article 55); and 'All Members pledge themselves to take joint and separate action
in co-operation with the Organisation for the achievement of the purposes set forth in Article 55' (Article
56).

These commitments were reaffirmed in the Sixth and Seventh principles of the Helsinki Final Act of the
Conference on Security and Co-operation in Europe of 1975 (see II§5), and during the Vienna World
Conference on Human Rights of 1993. The traditional (broad) interpretation of the principle of national
sovereignty has thus been limited in two crucial, and related, respects. Firstly, how a state treats its own
subjects is nowadays considered a legitimate concern of the international community. Secondly, there are
now superior international standards, established by common consent, which may be used for appraising
domestic laws, and the actual conduct of sovereign states within their own territories, and in the exercise
of their internal jurisdiction.

Thus, whether a state has accepted international human rights norms, laid down in conventions, is
relevant but not the only decisive factor: human rights, as formulated in the UDHR, have become a matter
of international concern and do not fall within the exclusive jurisdiction of states. As stated in the 1993
Vienna Declaration and Programme of Action: '[T]he promotion and protection of all human rights is a
legitimate concern of the international community'. In other words: there is a right to interfere in case of
human rights violations. Interference can be defined, in this context, as any form of international
involvement in the affairs of other states, excluding involvement in which forms of coercion are used
('intervention'). The distinction between interference and intervention is relevant: the fact that the
principle of noninterference does not apply to human rights questions does not mean that states may react
to human rights violations by making use of military means. This could amount to a violation of the
prohibition of use of force, as laid down in the UN Charter (Article 2(4)). Some human rights experts
claim that the United Nations Security Council should decide that a certain human rights situation poses a
threat to international peace and security and on the basis of that decision authorise military action for
humanitarian purposes, undertaken under the auspices of the UN.

4.2.1.12 Types of state duties imposed by all human rights treaties:
4.2.1.12.1 The tripartite typology

The early 1980s gave rise to a useful definition of the obligations imposed by human rights treaties, which blurred the sharp dichotomy between economic, social and cultural rights, and civil and political rights.

Specifically, in 1980, Henry Shue proposed that for every basic right (civil, political, economic, social and cultural) there are three types of correlative obligations: ‘to void depriving’, ‘to protect from deprivation’ and ‘to aid the deprived’.

Since Shue’s proposal was published, the ‘triptite typology’ has evolved and scholars have developed typologies containing more than three levels. While there is no consensus on the precise meaning of the different levels, the ‘triptite typology’ presented by Shue is known today in more concise terms as the obligations ‘to respect’, ‘to protect’, and ‘to fulfil’.

Obligations to respect: In general, this level of obligation requires the state to refrain from any measure that may deprive individuals of the enjoyment of their rights or of the ability to satisfy those rights by their own efforts.

Obligations to protect: This level of obligation requires the state to prevent violations of human rights by third parties. The obligation to protect is normally taken to be a central function of states, which have to prevent irreparable harm from being inflicted upon members of society. This requires states: a) to prevent violations of rights by any individual or non-state actor; b) to avoid and eliminate incentives to violate rights by third parties; and c) to provide access to legal remedies when violations have occurred in order to prevent further deprivations.

Obligations to fulfil: This level of obligation requires the state to take measures to ensure, for persons within its jurisdiction, opportunities to obtain satisfaction of the basic needs as recognised in human rights instruments, which cannot be secured by personal efforts. Although this is the key state obligation in relation to economic, social and cultural rights, the duty to fulfil also arises in respect to civil and political rights. It is clear that enforcing, for instance, the prohibition of torture (which requires, for example, police training and preventive measures), the right to a fair trial (which requires investments in courts and judges), the right of free and fair elections or the right to legal assistance, entails considerable cost.

The above analysis demonstrates that there is little difference in the nature of state obligations in regard to different human rights. The three levels of obligation encompass both civil and political rights and economic, social and cultural rights, blurring the perceived distinction between them.
4.2.2 Constitutional Recognition and Enforcement of Human Rights

4.2.2.1 Social Rights in the Indian Constitution

Human rights in the Indian Constitution are divided into two separate parts. Part III of the constitution houses the ‘Fundamental Rights’, which include the right to life, the right to equality, the right to free speech and expression, the right to freedom of movement, the right to freedom of religion, which in conventional human rights language may be termed as civil and political rights. Part IV of the constitution contains the Directive Principles of State Policy (DPSPs), which include all the social, economic and cultural rights, such as the right to education, the right to livelihood, the right to health and housing.

These social rights or basic entitlements have been recognised internationally as being as important as other human rights such as the right to equality, the right against discrimination and others which can be termed as civil and political rights generally. As Michelman (2003) argues, the fact that social rights make budgetary demands or call for government action and not just forbearance does not in itself differentiate them radically from the standpoint of justiciability from constitutionally protected rights to equality before the law, right to speech and expression or to so-called negative liberties. At the very minimum social rights can sometimes even be ‘negatively protected’ by comfortable forms of judicial intervention, for example when municipal zoning and land use laws, insofar as they constrict local housing, can be open to challenge.

While Fundamental Rights mentioned in Part III are justiciable under the constitution, the Directive Principles are not justiciable rights and their non-compliance cannot be taken as a claim for enforcement against the State. The Directive Principles in Part IV have specifically been made non-justiciable or unenforceable by Article 37 of the Indian constitution, which states:

‘The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.’

4.2.2.2 Social Rights in the Drafting of the Indian Constitution

The Indian Constitution does not merely provide the apparatus for governance, but is also forward looking in envisioning what social and economic transformation India would undergo. In this sense, the vision of the drafters was very similar to what the new South African constitution is imagined to be – a transformative constitution. The Indian Constitution aimed at not only achieving political independence from colonial rule but it also resolved to establish a new social order based on social, economic and political justice. Social revolution was put at the top of the national agenda by the Constituent assembly
when it adopted the Objectives Resolution, which called for social, economic and political justice and equality of status, opportunity and before the law for all people. The DPSPs, it was thought, would make explicit the ‘socialist’ as well as the social revolutionary content of the constitution.

During the drafting of the constitution, some of the Directive Principles of State Policy were initially part of the declaration of fundamental rights adopted by the Congress party at Karachi. Among the advocates for the DPSPs in the drafting committee, were Munshi, Ambedkar, K T Shah and B N Rau. They would have made the Directive Principles, or an even more rigorous social programme, justiciable. They disliked mere precepts and in the end supported them in the belief that half a loaf was better than none. Munshi had even included in his draft list of rights, the ‘Rights of Workers’ and ‘Social Rights’, which included provisions protecting women and children and guaranteeing the right to work, a decent wage, and a decent standard of living (Austin, 2001). K T Shah supported Ambedkar in the principle believing that there must be a specified time limit within which all Directive Principles would be made justiciable.

However, ultimately the bifurcation between civil and political rights and social and economic rights was made under the Constitution because the latter, it was felt, could not be made enforceable until appropriate actions were taken by the state to bring about changes in the economy. The Directive Principles nevertheless imposed an obligation upon the State to strive to fulfil them. Ambedkar insisted on the use of the word ‘strive’ in Article 38, which seeks to promote the welfare of the people, and ensure social, economic and political justice, stating that:

_We have used it because it is our intention that even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these Directive principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfilment of these Directives … Otherwise it would be open for any government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go._

Such insightful thinking of the framers of the Constitution was futuristic since it falls in line with the ‘progressive realisation of rights’ language of the International Covenant for Economic Social and Cultural Rights (ICESCR). It also highlights the arguments that the enforceability of social rights was never thought of as being dependant only on the availability of resources. Their enforcement and the responsibility of the State to make these social rights a reality imposes an obligation to strive to realise them even when resources may not be adequate.

4.2.2.3 Statutory enforcement of human rights
Everyday, we come to know about the incidents of custodial deaths, illegal detentions, deaths in fake encounters, terrorist violence, rapes, infanticide, bonded labour, child labour, problems of refugees etc. through newspapers, radio, T.V. and other media sources. On the other hand, we find increasing awareness to prevent the violation of human rights. Periphery of enforcement mechanism developed for the protection of human rights both at Governmental and Non-Governmental level is expanding to cover all walks of life under the umbrella of human rights. This had led to the development of a mechanism at international and national level. The role of press/media and NGOs is crucial for Economic and Social Council. The Council takes jurisdiction over human rights question when it holds that international peace and security are endangered. As contained in its objectives, the U.N. System works for human rights and establishment of peace in the world.

4.2.2.4 The Economic and Social Council

The Council makes recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all men, women and children of the world.

The ECOSOC established the Human Rights Commission in 1946 and instructed it to submit proposals, recommendations and reports and suggestions regarding ways and means for the effective implementation of human rights and fundamental freedoms.

4.2.3 The Commission on Human Rights

The Commission’s terms of reference are extensive. It may deal with any matter related to human rights which are likely to impair general welfare or friendly relations among the nations. It’s members are representatives of member states elected for a term of three years. The Commission meets to transact its obligations each year for a period of five to six weeks. The Commission drafted declaration and covenants on economic, social and cultural rights as also optional protocol — civil and political rights. The proper functioning of formal mechanism and redressal of grievances arise due to the violation of human rights.

4.2.3.1 FORMAL MECHANISMS

Human beings have been conscious of their rights and are claiming them against the state or other public authority. There have been valiant attempts to extract the rights of people in different countries since ancient times. But destruction and suffering caused by second world war (1939-45) grimmed the human conscience and led the mankind to think that the protection of human rights throughout the world is
essential for securing international peace. It is stated that the United Nations shall have reaffirmation of faith in fundamental human rights as one of its objectives.

The UN charter, however, was not a binding instrument and it merely stated the ideals which were to be developed later and enforced through political obligations and legal sanctions. The first concrete step in the direction was taken by the U.N. General Assembly on December 10, 1948 by adopting the Universal Declaration of Human Rights.

4.2.3.2 The Protection of Human Rights Act, 1993

The Act provided for the Constitution of a National Human Rights Commission, State Human Rights Commissions and Human Rights Courts for better protection of human rights and for matters connected or incidental thereto.

4.2.3.3 Human Rights Courts

For the purpose of providing speedy trial of offences arising out of violation of human rights, the state government may with the concurrence to the Chief Justice of the High Court, by notification, specify for each district, ‘a court of session’ to be a Human Rights court to try the said offences. For every Human Rights Court, the State Government shall, by notification, specify a public prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a special public prosecutor for the purpose of conducting cases in the Court.

4.2.3.4 An Appraisal

Upto 31st March, 1995, the National Human Rights Commission has attended to 7,483 cases of violation of human rights related to custodial deaths, rapes, torture, bonded labour, child labour, terrorist violence etc. The Commission attended to the cases in different areas of recent or current insurgency, terrorist activity, prisons hospitals, custody homes and so on.

The Commission has taken steps to promote human rights literacy and awareness over the length and breadth of the country through publications, the media, seminars and other available means.

The phenomenal increase in the number of complaints received by the Commission, as also the number of requests from NGOs, academic institutions and others have put heavy demand on the Commission and emphasized need for the setting up, at the earliest, of State Human Rights Commission in the States. While West Bengal and Himachal Pradesh have already established State Human Rights Commissions,
some other states are actively considering the question of setting up of state level Commissions. Jammu and Kashmir, Uttar Pradesh, and National Capital Territory of Delhi have set up Human Rights Cells.

Human Rights Courts are also notified in the states of Assam and Sikkim. The commendable step taken by the Government of Kerala is to set up a mechanism for the speedy disposal of complaints relating to human rights’ violation at the district level. This will help to further decentralise the grievance redressal machinery. The District level review committee is to be headed by the District and Sessions Judge and will comprise, in addition, the Chief Judicial Magistrate, the Superintendent of Police and Revenue Divisional Officer as members. It is recommended to set up such Committees in other states as well. The Commission expects that such Committees should fit, without difficulty, into what will ultimately constitute a three tier system for the disposal of complaints relating to violation of human rights.

### 4.2.4 Human rights of special groups such as Women, Children, Aged and disabled, Scheduled castes and scheduled tribes, Minorities (religious and educational)

Vulnerable groups are the groups which would be vulnerable under any circumstances (e.g. where the adults are unable to provide an adequate livelihood for the household for reasons of disability, illness, age or some other characteristic), and groups whose resource endowment is inadequate to provide sufficient income from any available source.

In India there are multiple socio-economic disadvantages that members of particular groups experience which limits their access to health and healthcare. The task of identifying the vulnerable groups is not an easy one. Besides there are multiple and complex factors of vulnerability with different layers and more often than once it cannot be analysed in isolation. The present document is based on some of the prominent factors on the basis of which individuals or members of groups are discriminated in India, i.e., structural factors, age, disability and discrimination that act as barriers to health and healthcare. The vulnerable groups that face discrimination include- Women, Scheduled Castes (SC), Scheduled Tribes (ST), Children, Aged, Disabled, Poor migrants, People living with HIV/AIDS and Sexual Minorities. Sometimes each group faces multiple barriers due to their multiple identities. For example, in a patriarchal society, disabled women face double discrimination of being a women and being disabled.

#### 4.2.4.1 What are weaker sections?

##### 4.2.4.1.1 SCs/STs

Due to the caste system prevailing in India, the sudras have been exploited for the ages. They were denied the right to education and thus were left languishing behind, socially and economically. Such people have
been categorized into Scheduled Castes. Tribal communities, who never mixed with the main society, are similarly challenged and are categorized into Scheduled Tribes.

4.2.4.1.2 Backward Classes
The constitution does not define the term backward classes. It is up to the center and the states to specify the classes that belong to this group. However, it is understood that classes that are not represented adequately in the services of the state can be termed backward classes. Further, the President can, under Art. 340, can constitute a commission to investigate the condition of socially and educationally backward classes. Based on this report, the president may specify the backward classes.

Structural norms are attached to the different relationships between the subordinate and the dominant group in every society. A group’s status may for example, be determined on the basis of gender, ethnic origin, skin colour, etc. The norms act as structural barriers giving rise to various forms of inequality. Access to health and healthcare for the subordinate groups is reduced due to the structural barriers.

4.2.4.1.3 Structural Discrimination Faced by Groups
In India, members of gender, caste, class, and ethnic identity experience structural discrimination that impact their health and access to healthcare. Women face double discrimination being members of specific caste, class or ethnic group apart from experiencing gendered vulnerabilities. Women have low status as compared to men in Indian society. They have little control on the resources and on important decisions related to their lives. In India, early marriage and childbearing affects women’s health adversely. About 28 per cent of girls in India, get married below the legal age and experience pregnancy (Reproductive And Child Health – District level Household Survey 2002-04, August 2006). These have serious repercussions on the health of women. Maternal mortality is very high in India. The average maternal mortality ratio at the national level is 540 deaths per 100,000 live births (National Family Health Survey-2, 2000). It varies between states and regions, i.e., rural-urban. The rural MMR (Maternal Mortality Rate) is 617 deaths of women age between 15-49 years per one lakh live births as compared to 267 maternal deaths per one lakh live births among the urban population (National Family Health Survey-2, 2000). In most cases the deaths occur from preventable causes. A large proportion of women is reported to have received no antenatal care. In India, institutional delivery is lowest among women from the lower economic class as against those from the higher class.

A major proportion of the lower castes and Dalits are still dependent on others for their livelihood. Dalits does not refer to a caste but suggests a group who are in a state of oppression, social disability and who are helpless and poor. They were earlier referred as ‘untouchables’ mainly due to their low occupations i.e.,
In a caste-dominated country like India, Dalits who comprises more than one-sixth of the Indian population (160 million approx), stand as a community whose human rights have been severely violated. Literacy rates among Dalits are only about 24 per cent. They have meager purchasing power; have poor housing conditions; lack or have low access to resources and entitlements. In rural India they are landless poor agricultural labourers attached to rich landowners from generations or poor casual labourers doing all kinds of available work. In the city they are the urban poor employed as wage labourers at several work sites, beggars, vendors, small service providers, domestic help, etc., living in slums and other temporary shelters without any kind of social security. The members of these groups face systemic violence in the form of denial of access to land, good housing, education and employment. Structural discrimination against these groups takes place in the form of physical, psychological, emotional and cultural abuse which receives legitimacy from the social structure and the social system. Physical segregation of their settlements is common in the villages forcing them to live in the most unhygienic and inhabitable conditions. All these factors affect their health status, access to healthcare, and quality of health service received. There are high rates of malnutrition reported among the marginalized groups resulting in mortality, morbidity and anaemia. Access to and utilization of healthcare among the marginalized groups is influenced by their socio-economic status within the society.

Structural discrimination directly impedes equal access to health services by way of exclusion. The negative attitude of the health professionals towards these groups also acts as a barrier to receiving quality healthcare from the health system. In the case of women, discrimination increases by the complex mix of two factors-being a women and being a member of the marginalized community. A large proportion of Dalit girls drop out of primary school inspite of reservations and academic aptitude, because of poverty, humiliation, isolation or bullying by teachers and classmates and punishment for scoring good grades (National Commission Report for SC/ST, 2000). The scavenger community among the Dalits is vulnerable to stress and diseases with reduced access to healthcare. The Scheduled Tribes like the Scheduled Castes face structural discrimination within the Indian society. Unlike the Scheduled Castes, the Scheduled Tribes are a product of marginalization based on ethnicity. In India, the Scheduled Tribes population is around 84.3 million and is considered to be socially and economically disadvantaged. Their percentages in the population and numbers however vary from State to State. They are mainly landless with little control over resources such as land, forest and water. They constitute a large proportion of agricultural labourers, casual labourers, plantation labourers, industrial labourers etc. This has resulted in poverty among them, low levels of education, poor health and reduced access to healthcare services. They belong to the poorest strata of the society and have severe health problems. They are less likely to afford
and get access to healthcare services when required. The health outcomes among the Scheduled Tribes are very poor even as compared to the Scheduled Castes. The Infant Mortality Rate among Scheduled Castes is 83 per 1000 live births while it is 84.2 per 1000 per live births among the Scheduled Tribes.

4.2.4.2 Need for development of the weaker sections – the SCs STs OBCs and Minorities

The SCs STs OBCs and Minorities, have been forced to remain as the Weaker Sections of India, and the Women confined or oppressed to be the most and multiply exploited sections of the Country, for nearly four millennia. This bad situation, can not and should not continue anymore. Definitely not in the Twenty-first Century of the third millennium, in an age of fast travel and mass communication.

There is a need for the Government to do something special and tangible, to free and liberate the Weaker Sections, from the cobwebs of oppression, marginalisation and backwardness. They have to be uplifted to the levels of normal human-beings of the World.

4.2.4.2.1 Constitutional Provisions for the SC/ST/OBC and minorities

Art. 15(4) : Clause 4 of article 15 is the fountain head of all provisions regarding compensatory discrimination for SCs/STs. This clause was added in the first amendment to the constitution in 1951 after the SC judgement in the case of Champakam Dorairajan vs State of Madras. It says thus, "Nothing in this article or in article 29(2) shall prevent the state from making any provisions for the advancement of any socially and economically backward classes of citizens or for Scheduled Castes and Scheduled Tribes." This clause started the era of reservations in India.

In the case of Balaji vs State of Mysore, the SC held that reservation cannot be more than 50%. Further, that Art. 15(4) talks about backward classes and not backward castes thus caste is not the only criterion for backwardness and other criteria must also be considered.

Finally, in the case of Indra Sawhney vs Union of India, SC upheld the decision given under Balaji vs State of Mysore that reservation should not exceed 50% except only in special circumstances. It further held that it is valid to sub-categorize the reservation between backward and more backward classes. However, total should still not exceed 50%. It also held that the carry forward rule is valid as long as reservation does not exceed 50%.

Art. 15 (5) : This clause was added in 93rd amendment in 2005 and allows the state to make special provisions for backward classes or SCs or STs for admissions in private educational institutions, aided or unaided.
Art. 16(4): This clause allows the state to reserve vacancies in public service for any backward classes of the state that are not adequately represented in the public services.

Art. 16 (4A): This allows the state to implement reservation in the matter of promotion for SCs and STs.

Art. 16(4B): This allows the state to consider unfilled vacancies reserved for backward classes as a separate class of vacancies not subject to a limit of 50% reservation.

Art. 17: This abolishes untouchability and its practice in any form. Although the term untouchability has not been defined in the constitution or in any act but its meaning is to be understood not in a literal sense but in the context of Indian society. Due to the varna system, some people were relegated to do menial jobs such as cleaning toilets. Such people were not to be touched and it was considered a sin to even touch their shadow. They were not even allowed to enter public places such as temples and shops. The constitution strives to remove this abhorring practice by not only making the provision a fundamental right but also allows punishment to whoever practices or abets it in any form. Towards this end, Protection of Civil Rights Act 1955 was enacted. It has implemented several measures to eradicate this evil from the society. It stipulates up to 6 months imprisonment or 500 Rs fine or both. It impresses upon the public servant to investigate fully any complaint in this matter and failing to do so will amount to abetting this crime. In the case of State of Kar. vs Appa Balu Ingle, SC upheld the conviction for preventing a lower caste person from filling water from a bore well.

In Asiad Projects Workers case, SC has held that right under Art 17 is available against private individuals as well and it is the duty of the state to ensure that this right is not violated.

Art. 19(5): It allows the state to impose restriction on freedom of movement or of residence in the benefit of Scheduled Tribes.

Art. 40: Provides reservation in 1/3 seats in Panchayats to SC/ST.

Art. 46: Enjoins the states to promote with care the educational and economic interests of the weaker sections, specially SC and STs.

Art. 164: Appoint special minister for tribal welfare in the states of MP, Bihar, and Orrisa.
Art. 275: Allows special grant in aids to states for tribal welfare.

Art. 330/332: Allows reservation of seats for SC/ST in the Indian Parliament as well as in state legislatures.

Art. 335: Allows relaxation in qualifying marks for admission in educational institutes or promotions for SCs/STs.

In the case of State of MP vs Nivedita Jain, SC held that complete relaxation of qualifying marks for SCs/STs in Pre-Medical Examinations for admission to medical colleges is valid.


Art. 340: Allows the president to appoint a commission to investigate the condition of socially and economically backward classes and table the report in the Indian Parliament.

4.2.4.2.2 Constitutional Provisions for Women

Art. 15(3): It allows the state to make special provisions for women and children. Several acts such as Dowry Prevention Act have been passed including the most recent one of Protection of women from domestic violence Act 2005.

Art. 23: Under the fundamental right against exploitation, flesh trade has been banned.

Art. 39: Ensures equal pay to women for equal work.

In the case of Randhir Singh vs Union of India, SC held that the concept of equal pay for equal work is indeed a constitutional goal and is capable of being enforced through constitutional remedies under Art. 32.

Art. 40: Provides 1/3 reservation in panchayat.

Art. 42: Provides free pregnancy care and delivery.
Art. 44: It urges the state to implement uniform civil code, which will help improve the condition of women across all religions. It has, however, not been implemented due to politics. In the case of Sarla Mudgal vs Union of India, SC has held that in Indian Republic there is to be only one nation i.e. Indian nation and no community could claim to be a separate entity on the basis of religion. There is a plan to provide reservation to women in Indian Parliament as well.

4.2.4.2.3 SC /ST welfare schemes-

4.2.4.2.3.1 NGOs Schemes-
- Scheme of Grant in Aid to Voluntary Organisations working for Scheduled Castes

4.2.4.2.3.2 Ministry’s Schemes-
- Central Sector Scheme of ‘Rajiv Gandhi National Fellowship’ for Providing Scholarships to Scheduled Caste Students to pursue Programmes in Higher Education such as M.Phil and Ph.D (Effective from 01-04-2010)

- Interviews for final Selection of awardees under the Scheme of National Overseas Scholarship for SC etc. Candidates for the Selection Year 2009-10.

- Centrally-sponsored Pilot Scheme of PRADHAN MANTRI ADARSH GRAM YOJANA (PMAGY)

- State, District and Block wise abstract of villages selected under PMAGY

- Babu Jagjivan Ram Chhatrawas Yojana (Letter, Annexures, and National Allocation for 2009-10)

- Post-Matric Scholarship for SC Students

- Pre-Matric Scholarships for the Children of those Engaged in Unclean Occupations

- Central Sector Scholarship Scheme of Top Class Education for SC Students (Effective from June 2007)

- Self Employment Scheme for Rehabilitation of Manual Scavengers

- National Overseas Scholarships for Scheduled Castes (SC) etc. Candidates for Selection Year 2010-2011
· Form for the Scheme of National Overseas Scholarship for SC etc. Candidates for the Selection Year 2010-11.

· Special Educational Development Programme for Scheduled Castes Girls belonging to low Literacy Levels

· Upgradation of Merit of SC Students

· Scheme of free Coaching for SC and OBC Students

· National Scheduled Castes Finance & Development Corporation (NSFDC)

· National Safaikaramcharis Finance & Development Corporation (NSKFDC)

· Assistance to Scheduled Castes Development Corporations (SCDCs)

· Supporting Project of All India Nature of SCs

· National Comission for Safai Karamcharis

4.2.4.2.3.3 The major schemes/programme of the Ministry of Tribal Affairs are-

· Special Central Assistance & Grants Under Article 275(1) Of The Constitution

· Scheme Of Development of Primitive Tribal Groups(Ptgs)

· Tribal Research Institutes

· Girls / Boys Hostels for Sts

· Ashram Schools In Tribal Sub-Plan Areas

· Vocational Trainig Centres in Tribal Areas

· Grants-in-aid to State Tribal Development Cooperative Corporations and others
4.2.4.3.4 Major schemes for Women-
· Indira Gandhi Matritva Sahyog Yojana (IGMSY)
· Rajiv Gandhi Scheme for Empowerment of Adolescent Girls (RGSEAG)
· Swadhar Yojna
· STEP (Support to Training and Employment Programme for Women) (20th October 2005)
· Stree Shakti Puraskaar Yojna
· Short Stay Home For Women and Girls (SSH)
· UJJAWALA : A Comprehensive Scheme for Prevention of trafficking and Rescue, Rehabilitation and Re-integration of Victims of Trafficking and Commercial Sexual Exploitation
· General Grant-in-Aid Scheme in the field of Women and Child Development.

4.2.4.3 Street children and orphans
Street children are those for whom the street more than their family has become their real home, a situation in which there is no protection, supervision, or direction from responsible adults. Human Rights Watch estimates that approximately 18 million children live or work on the streets of India. Majority of these children are involved in crime, prostitution, gang related violence and drug trafficking.

4.2.4.3.1 Status of Orphans/ Street Children in India
· India is the world’s largest democracy with a population of over a billion-400 million of which are children.

· Approximately 26% of the Indian population lives below the poverty line and 72 % live in rural areas.

· Even though the percentage of the Indian population infected with HIV/AIDS is 0.9%, (5) it has the second largest number of people infected with HIV/AIDS in the world, the first being South Africa.
Despite the many recorded gains in the recent past, issues such as gender inequity, poverty, illiteracy and the lack of basic infrastructure play an important role in hindering HIV/AIDS prevention and treatment programs in India. The impact of the AIDS crisis has not begun to fully emerge in India and AIDS related orphaning has not been documented.

Yet, it is estimated that India has the largest number of AIDS orphans of any country and this number is expected to double in the next five years.

Out of the 55,764 identified AIDS cases in India 2,112 are children.

It is estimated that 14% of the 4.2 million HIV/AIDS cases are children below the age of 14.

A study conducted by the ILO found that children of infected parents are heavily discriminated-35% were denied basic amenities and 17% were forced to take up petty jobs to augment their income.

Child labor in India is a complex problem and is rooted in poverty.

Census 1991 data suggests that there are 11.28 million working children in India.

Over 85% of this child labor is in the country’s rural areas and this number has risen in the past decade.

Conservative estimates state that around 300,000 children in India are engaged in commercial sex. Child prostitution is socially acceptable in some sections of Indian society through the practice of Devadasi. Young girls from socially disadvantaged communities are given to the 'gods' and they become a religious prostitute. Devadasi is banned by the Prohibition of Dedication Act of 1982. This system is prevalent in Andhra Pradesh, Karnataka, Tamil Nadu, Kerala, Maharashtra, Orissa, Uttar Pradesh and Assam. More than 50% of the devadasis become prostitutes: of which nearly 40 per cent join the sex trade in urban brothels and the rest are involved in prostitution in their respective villages. According to the National Commission on Women an estimated 250,000 women have been dedicated as Devadasis in Maharashtra-Karnataka border. A study conducted in 1993 reported that 9% of the devadasis are HIV positive in Belgaum district in Karnataka.

4.2.4.4 Schemes for children

The Integrated Child Protection Scheme (ICPS)
- National Awards For Child Welfare
- National Child Awards For Exceptional Achievements
- Rajiv Gandhi Manav Seva Award For Service To Children
- Balika Samriddhi Yojana (BSY)
- Kishori Shakti Yojana (KSY)
- Nutrition Programme for Adolescent Girls (NPAG)
- Early Childhood Education for 3-6 Age Group Children Under the Programme of Universalisation of Elementary Education.
- Scheme for welfare of Working Children in need of Care and Protection
- Central Adoption Resource Agency (CARA)
- Rajiv Gandhi National Creche Scheme For the Children of Working Mothers
- UJJAWALA : A Comprehensive Scheme for Prevention of trafficking and Rescue, Rehabilitation and Re-integration of Victims of Trafficking and Commercial Sexual Exploitation
- General Grant-in-Aid Scheme in the field of Women and Child Development.

4.2.4.1 Constitutional Provisions for children

Art. 19 A: Education up to 14 yrs has been made a fundamental right. Thus, the state is required to provide school education to children.

In the case of Unni Krishnan vs State of AP, SC held that right to education for children between 6 to 14 yrs of age is a fundamental right as it flows from Right to Life. After this decision, education was made a fundamental right explicitly through 86th amendment in 2002.

Art. 24: Children have a fundamental right against exploitation and it is prohibited to employ children
below 14 yrs of age in factories and any hazardous processes. Recently the list of hazardous processes has been update to include domestic, hotel, and restaurant work.

Several PILs have been filed in the benefit of children. For example, MC Mehta vs State of TN, SC has held that children cannot be employed in match factories or which are directly connected with the process as it is hazardous for the children.

In the case of Lakshmi Kant Pandey vs Union of India, J Bhagvati has laid down guidelines for adoption of Indian children by foreigners.

Art. 45: Urges the state to provide early childhood care and education for children up to 6 yrs of age.

Age, and high levels of economic dependence and/or disability combine to create high levels of vulnerability to chronic poverty. While old age pension schemes are in place neither the small amounts made available nor the hassle of accessing them make this a solution to the problem of chronic poverty among the elderly. With the high incidence of chronic ailments and health care needs of the elderly, declining family size, migration and breakdown of traditional family structures that provided support, this group of the population is extremely vulnerable to poverty.

The 1991 census showed that approximately 7.6% of India's rural and 6.3% of India's urban population was above the age of 60. 7.8% males and 7.4% females in rural and 6.2% males and 6.6% females in urban areas were in the category of the aged. The proportion of old-old (70 plus) in India is expected to increase from 2.40 percent in 1991 to 3.75 percent by 2021. The total number of elderly persons in India is projected to increase to 136 million by 2021 from the current level of 55 million in 1991. This has significant implications for social security policies.

The NSS data show that in both rural and urban areas, roughly 50% of aged persons were fully dependent on others, 13 to 16% were partially dependent and only 30% were economically independent. Economic independence was far greater among males than among females. Close to half the elderly males and only 12% of elderly females were economically independent. In contrast, more than 70% of older females and only about 30% of older males were fully dependent on others. High levels of economic dependence at low household income levels mean that meager resources need to be stretched thinner and thereby increase vulnerability to poverty of physically and financially dependent older persons. Inadequate financial resources are a major concern of the Indian elderly (Desai 1985 cited in Rajan et. al., 2000) and more so among the female elderly (Dak and Sharma 1987 cited in Rajan et. al., 2000). In many situations,
the rural elderly continue to work though their number of working hours comes down with increasing age (Singh, Singh and Sharma 1987 cited in Rajan et.al.,2000). Financial problems are more common among widows and among the elderly in nuclear families. Economic insecurity was the sole concern of the elderly in barely sustainable households in rural India (Punia and Sharma 1987 cited in Rajan et. al.,2000).

4.2.4.5 Constitutional provisions for aged-

In Constitution of India, entry 24 in list III of Schedule IV deals with the —Welfare of Labour, including conditions of work, provident funds, liability for workmen’s compensations, invalidity and Old age pension and maternity benefits.

Further, Item No. 9 of the State List and Item No. 20, 23 and 24 of the Concurrent List relates to old age pension, social security and social insurance, and economic and social planning.

Article 41 of the Directive Principle of the State Policy has particular relevance to Old Age Social Security. According to this Article, —he State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in case of undeserved want.”

4.2.4.5.1 Schemes for aged-

National Social Assistance Programme (NSAP)
The National Social Assistance Programme (NSAP) which came into effect from 15th August, 1995 represents a significant step towards the fulfillment of the Directive Principles in Article 41 and 42 of the Constitution. It introduces a National Policy for Social Assistance benefit to poor households in the case of old age, death of primary bread-winner and maternity. The Programme has three components, namely:-

* National Old Age Pension Scheme (NOAPS)
* National Family Benefit Scheme (NFBS)
* National Maternity Benefit Scheme (NMBS)

These Schemes were partially modified in 1998 based on the suggestions received from various corners and also on the basis of the feedback received from the State Governments.

4.2.4.5.2 Other schemes-
Technology Interventions for Elderly (TIE) | Concessions and Other incentives
---|---
Programme for Older Persons | Insurance Policies and Benefits
Annapurna Scheme | Mediclaim/Health Insurance
Free Legal Aids | National Policy on Older Person
Rebates | Health Facilities

### 4.2.4.6 Persons with disabilities

According to the Census 2001, there are 2.19 crore people with disabilities in India who constitute 2.13 per cent of the total population. This includes persons with visual, hearing, speech, locomotor and mental disabilities. Seventy five per cent of persons with disabilities live in rural areas, 49 per cent of disabled population is literate and only 34 per cent are employed. The earlier emphasis on medical rehabilitation has now been replaced by an emphasis on social rehabilitation. The Disability Division in the Ministry of Social Justice & Empowerment facilitates empowerment of the persons with disabilities.

#### 4.2.4.6.1 Constitutional Provisions for disabled persons

The Constitution of India ensures equality, freedom, justice and dignity of all individuals and implicitly mandates an inclusive society for all including the persons with disabilities. The Constitution in the schedule of subjects lays direct responsibility of the empowerment of the persons with disabilities on the State Governments Therefore, the primary responsibility to empower the persons with disabilities rests with the State Governments.


A multi-sectoral collaborative approach, involving all the Appropriate Governments i.e. Ministries of the Central Government, the State Governments/UTs, Central/State undertakings, local authorities and other appropriate authorities is being followed in implementation of various provisions of the Act.

India is a signatory to the Declaration on the Full Participation and Equality of People with Disabilities in the Asia Pacific Region. India is also a signatory to the Biwako Millennium Framework for action towards an inclusive, barrier free and rights based society. India signed the UN Convention on Protection
and Promotion of the Rights and Dignity of Persons with Disabilities on 30th March, 2007, the day it opened for signature. India ratifies the UN Convention on 1st October, 2008.

4.2.4.6.2 Government schemes-

Assistance to Disabled Persons for Purchase/ Fitting of Aids and Appliances (ADIP Scheme)

The main objective of the Scheme is to assist the needy disabled persons in procuring durable, sophisticated and scientifically manufactured, modern, standard aids and appliances that can promote their physical, social and psychological rehabilitation, by reducing the effects of disabilities and enhance their economic potential. The aids and appliances supplied under the Scheme must be ISI.

The quantum of assistance and income limit under the ADIP scheme is as follows:

<table>
<thead>
<tr>
<th>Total Income</th>
<th>Amount of Assistance</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Up to Rs. 6,500/- per month</td>
<td>(i) Full cost of aid/appliance</td>
</tr>
<tr>
<td>(ii) Rs. 6,501/- to Rs. 10,000/- per month</td>
<td>(ii) 50% of the cost of aid/appliance</td>
</tr>
</tbody>
</table>

The scheme is implemented through implementing agencies such as the NGOs, National Institutes under this Ministry and ALIMCO (a PSU).

4.2.4.6.3 Scheme of National Scholarships for Persons with Disabilities

Under the Scheme of National Scholarships for Persons with Disabilities, every year 500 new scholarships are awarded for pursuing post matric professional and technical courses of duration more than one year. However, in respect of students with cerebral palsy, mental retardation, multiple disabilities and profound or severe hearing impairment, scholarships are awarded for pursuing studies from IX Std. onwards. Advertisements inviting applications for scholarships are given in leading national/regional newspapers in the month of June and also placed on the website of the Ministry. State Government/ UT Administrations are also requested to give wide publicity to the scheme.

Students with 40% or more disability whose monthly family income does not exceed Rs. 15,000/-are eligible for scholarship. A scholarship of Rs. 700/- per month to day scholars and Rs. 1,000/- per month to hostellers is provided to the students pursuing Graduate and Post Graduate level technical or professional courses. A scholarship of Rs. 400/- per month to day scholars and Rs. 700/- per month to hostellers is provided for pursuing diploma and certificate level professional courses. In addition to the scholarship, the students are reimbursed the course fee subject to a ceiling of Rs. 10,000/- per year. Financial assistance under the scheme is also given for computer with editing software for blind/ deaf.
graduate and postgraduate students pursuing professional courses and for support access software for cerebral palsied students

### 4.2.4.7 Migrants

Internal migration of poor labourers has also been on the rise in India. The poor migrants usually end up as casual labourers within the informal sector. This population is at high risk for diseases and faces reduced access to health services. In India, 14.4 million people migrated within the country for work purposes either to cities or areas with higher expected economic gains during the 2001 census period. Lakh number of migrants are employed in cultivation and plantations, brick-kilns, quarries, construction sites and fish processing (NCRL, 2001). Large numbers of migrants also work in the urban informal manufacturing construction, services or transport sectors and are employed as casual labourers, head loaders, rickshaw pullers and hawkers. The rapid change of residence due to the casual nature of work excludes them from the preventive care and their working conditions in the informal work arrangements in the city debars them from access to adequate curative care. In India, there are a large number of international women migrants. Female migration to India constitutes 48 per cent of the total immigration from other countries.

Among the migrants who are vulnerable, the Internally Displaced People (IDPs) deserve mention. In India, the Internally Displaced People are estimated to be around 6 lakhs (IDMC, 2006). Internal displacement arises out of ethnic conflicts, religious conflicts, political reasons, development projects, natural disaster etc. The Internally Displaced People are vulnerable to access government social security schemes.

### 4.2.4.7.1 Schemes-

The Inter-State Migrant Workmen (Regulation Of Employment And Conditions Of Service) Act, 1979 - An Act to regulate the employment of inter-State migrant workmen and to provide for their conditions of service and for matters connected therewith.

### 4.2.4.8 Sexual minorities

Another group that faces stigma and discrimination are the sexual minorities. Those identified as gay, lesbian, transgender, bisexual, kothi and hijra, experience various forms of discrimination within the society and the health system. Due to the dominance of heteronomous sexual relations as the only form of normal acceptable relations within the society, individuals who are identified as having same-sex sexual preferences are ridiculed and ostracized by their own family and are left with very limited support structures and networks of community that provide them conditions of care and support. Their needs and
concerns are excluded from the various health policies and programmes. Only the National AIDS Prevention and Control Policy recognize sexual minority and homosexuals in the context of identifying "high risk behaviour". But pervasive discrimination from the health providers delays or deters their health seeking. Hence they remain excluded from the process of government surveillance carried among the high risk population in the context of HIV/AIDS. The surveillance amongst "MSM" or men who have sex with men, is usually carried out by NGOs and through "support groups", i.e. amongst males who are accessible to NGOs and who are willing to identify with categories, such as kothi, around which support groups are structured. They also undergo considerable amount of psychological stress.

4.2.4.8.1 Constitutional Provisions for sexual minorities

Art. 15(1): The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

4.2.4.8.2 Other-

National AIDS Prevention and Control Policy.

4.2.4.9 Conclusion

In the Constitution of India, the three pillars of human rights are (a) the right to equality including the prohibition of discrimination in any form, (b) the six vital freedoms of citizens (including the right to speech and expression) and (c) the right to life guaranteed to all persons. These rights have been recognized to be inalienable, unalterable and part of the basic structure of the Constitution, which cannot be abrogated. India’s Supreme Court has interpreted the right to life as including the right to live with dignity, right to health, education, human environment, speedy trial and privacy, to name a few. Much of the focus of governmental activity has been to improve the provision of services through grass-roots local self-governance institutions, particularly in rural areas. India has taken an important initiative for the empowerment of women by reserving one-third of all seats for women in urban and local self-government, bringing over one million women at the grassroots level into political decision-making. India has guaranteed human rights to all persons in India including the protection of minorities. India has secured their right to practice and preserve their religious and cultural beliefs as a part of the Chapter on Fundamental Rights. Legislative and executive measures have been taken for the effective implementation of safeguards provided under the Constitution for the protection of the interests of minorities. India has been deeply conscious of the need to empower the SC and ST is fully committed to tackle any discrimination against them at every level. The Constitution of India abolished —untouchability” and forbids its practice in any form. There are also explicit and elaborate legal and
administrative provisions to address caste-based discrimination in the country. India stated that at independence, after the departure of the colonizers, all the people, including its tribal people, were considered as indigenous to India. This position has been clarified on various occasions, including while extending India’s support to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples at the Human Rights Council and the General Assembly.

**4.2.5 Collective Rights such as Right to clean environment, Right to development, Right of self-determination**

**4.2.5.1 Right to Clean Environment**

Every human has a right to live in a clean and healthy environment. This is a general right which is inalienable. Much constitution all over the world has guaranteed a healthy environment and they also take appropriate measures to prevent any kind of environmental harm so as to maintain a healthy environment. They not only prevent any kind of environmental destruction but also aim to preserve the nature and its natural resources. All the constitution adopted since 1992 also recognizes right to clean environment as open right. About 200 treaties are registered under the UN environmental program register.

Stockholm Declaration was the first international conference on human environment held on 1972 which emphasis on right to healthy environment. Principle 1 of the Stockholm Declaration established a foundation for linking human rights and environmental protection, declaring that man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being. The resolution called for enhanced efforts towards ensuring a better and healthier environment.

The conference issued the Declaration on the Human Environment stating 26 principles. An Environmental Agency was also developed known as 'UNEP'. Attended by the representatives of 113 countries, 19 inter-governmental agencies, and more than 400 inter-governmental and non-governmental organizations, it is widely recognized as the beginning of modern political and public awareness of global environmental problems.

**4.2.5.1.1 Principles of the Stockholm Declaration:**

1. Human rights must be asserted, apartheid and colonialism condemned
2. Natural resources must be safeguarded

3. The Earth's capacity to produce renewable resources must be maintained

4. Wildlife must be safeguarded

5. Non-renewable resources must be shared and not exhausted

6. Pollution must not exceed the environment's capacity to clean itself

7. Damaging oceanic pollution must be prevented

8. Development is needed to improve the environment

9. Developing countries therefore need assistance

10. Developing countries need reasonable prices for exports to carry out environmental management

11. Environment policy must not hamper development

12. Developing countries need money to develop environmental safeguards

13. Integrated development planning is needed

14. Rational planning should resolve conflicts between environment and development

15. Human settlements must be planned to eliminate environmental problems

16. Governments should plan their own appropriate population policies

17. National institutions must plan development of states' natural resources

18. Science and technology must be used to improve the environment

19. Environmental education is essential

20. Environmental research must be promoted, particularly in developing countries

21. States may exploit their resources as they wish but must not endanger others

22. Compensation is due to states thus endangered
23. Each nation must establish its own standards

24. There must be cooperation on international issues

25. International organizations should help to improve the environment 26. Weapons of mass destruction must be eliminated.

The Rio Declaration on Environment and Development also known as Earth Summit consists of 27 principles intended to guide future sustainable development around the world. Some of the Rio Declaration principles may be regarded as Third Generation Right. In the first principle of Rio Declaration, 1992 the people were given the right to healthy and productive life in harmony with nature. This is not the same as a human right to a healthy and clean environment. Principle 10 of the Rio Declaration on Environment and Development proclaims as follows: Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

There are two basic conceptions of environmental human rights in the current human rights system. They are:

(i) the right to a healthy or adequate environment is itself a human right

(ii) the idea that environmental human rights can be derived from other human rights, usually – the right to life, the right to health, the right to private family life and the right to property.

African Charter on Human and Peoples' Rights:- The African Charter on Human and Peoples' Rights also known as Banjul Charter is the first international human rights instrument to adopt right to environment that is intended to promote and protect human rights and basic freedoms in the African continent. The African Charter states in Article 24 that “all peoples shall have the right to a general satisfactory environment favourable to their development”. Art. 24 ACHPR is a so-called “third generation human right” and that ACHPR entitles a right to environment, which should be “general”, “satisfactory” and “favorable to development.”

San Salvador Protocol, 1988:- Article 11 of the San Salvador Protocol states that “everyone shall have the right to live in a healthy environment and to have access to basic public services” and that states “shall
promote the protection, preservation and improvement of the environment'. The San Salvador Protocol
distinguishes between the right of individuals to 'live in a healthy environment' and the positive
obligations of the state to protect, preserve and improve the environment.

International Covenant on Economic, Social and Cultural Rights:- Article 12(b) of the International
Covenant on Economic, Social and Cultural Rights.

It says as follows:

The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this
right shall include those necessary for: (b) The improvement of all aspects of environmental and industrial
hygiene;

Environment right in India:- More than 100 constitution around the world has adopted and included
'Right to Environment'. And India is one of the country which also give importance as the constitution
makers were aware that to promote the welfare of people and their health, clean environment should be
maintained. Though environmental rights in India do not really exist in written form, they are guaranteed
under Part III and Part IV of the constitution. But they are not directly enforceable on individuals or
groups.

In Koolwal v. Rajasthan, the Rajasthan High Court even decided in favor of environmental rights,
although no injuries to the population were alleged in the particular case. This shows how serious Indian
courts take environmental issues.

The Environment (Protection) Act:- It was enacted in 1986 with the objective of providing for the
protection and improvement of the environment. It empowers the Central Government to establish
authorities [under section 3(3)] charged with the mandate of preventing environmental pollution in all its
forms and to tackle specific environmental problems that are peculiar to different parts of the country. Its
aim is to protect the environment.

According to the Act, Environment 'includes water, air, and land and the interrelationship which exists
among and between water, air and land and human beings, other living creatures, plants, microorganism
and property. —Environmental Pollutant” means any solid, liquid or gaseous substance present in such
concentration as may be, or tend to be injurious to environment.'

—Environmental pollution” means imbalance in environment. The materials or substances when after
mixing in air, water or land alters their properties in such manner, that the very use of all or any of the air
water and land by man and any other living organism becomes lethal and dangerous for health.
—Occuper— It means a person who has control over the affairs of the factory or the premises, and includes, in relation to any substance, the person in possession of the substance.

Conclusion:- Clean environment is important for health of humans. Every country must ensure that its citizen lives in a better and healthy environment. And it is also the duty of citizen to protect and preserve environment. Indian courts have recognized this right and Constitution also protects this right.

### 4.2.5.2 Right to development

The right to development was first recognized in 1981 in Article 22 of the African Charter on Human and Peoples' Rights as a definitive individual and collective right. Article 22(1) provides that: "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."

The right to development was subsequently proclaimed by the United Nations in 1986 in the "Declaration on the Right to Development," which was adopted by the United Nations General Assembly resolution 41/128. The Right to development is a group right of peoples as opposed to an individual right, and was reaffirmed by the 1993 Vienna Declaration and Programme of Action.

The concept of the Right to Development is controversial, with some commentators (See All Souls Exam Essay II Topics for one reference.) disputing whether it is a right at all. The meaning of the right to development has been elaborated in a number of sources.

The right to development is now included in the mandate of several UN institutions and offices.

The Preamble of the Declaration on the Right to Development states "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 therefrom."

### 4.2.5.2.1 The Vienna Declaration and Programme of Action

The Vienna Declaration and Programme of Action states in Article 10 "The World Conference on Human Rights reaffirms the right to development", as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. As stated in the Declaration on the Right to Development, the human person is the central subject of development. While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to
justify the abridgement of internationally recognized human rights. States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development. Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level."

4.2.5.2 The Rio Declaration

The Rio Declaration on Environment and Development, also known as Rio Declaration or the G.R.E.G, recognizes the right to development as one of its 27 principles. Principle 3 of the Declaration states "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

4.2.5.2.3 Declaration on the Rights of Indigenous Peoples

The Declaration on the Rights of Indigenous Peoples recognizes the right to development as an indigenous peoples' right. The declaration states in its preamble that the General Assembly is "Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."

Article 23 elaborates "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions."

4.2.5.3 Right of self-determination

India was among those countries that had insisted on adding recognition of right of all people to self-determination to the International Bill of Human Rights which the United nations adopted in 1976 to give a legal form to the rights set forth in the Universal Declaration of Human Rights proclaimed by the General Assembly in 1948. By virtue of this right people "freely determine their political status and pursue their economic, social and cultural development."

As long as this principle was applied to the liberation struggle of the colonies, there was not much controversy. For colonial rule had lost its moral and political legitimacy in the post war period.
Thereafter, gradually colonial powers conceded independence to the colonies either voluntarily or after violent or non-violent struggles of the people of the colonies; in pursuit of their right of self-determination. Till then the right was synonymous with independence. But ethnic consciousness, inequitable growth, concentration of political power and other real or perceived grievances, have encouraged some communities in many nations to seek a distinct and separate identity; which in some cases assert their right of self-determination. The phenomenon is particularly pronounced in case of geographically and emotionally peripheral communities away from the centre of power. But after decolonisation, their pursuit of the right, through constitutional or non-constitutional means, with or without support of a foreign power, became a source of controversy.

Today India is among those countries where official position -- as also its dominant non-official opinion - is no longer committed to the right of determination of peoples within the country. Its emphasis has shifted to the sovereignty and territorial integrity of the nations. The shift is most pronounced in case of application of the right of self-determination to Kashmir. Or is it because of movement for self-determination in Kashmir? Leaders of Indian nationalist movement, particularly the Marxists, had championed this right of its people before independence. It was one of the main reasons which attracted them towards India in 1947 as Pakistan had refused to recognise it. Their later alienation from India tempted Pakistan to become its champion. It can be argued that if India had consistently respected the spirit of the right, the alienation may not have taken place. It could not resolve the dilemma of choosing between national integrity and right of self-determination of a part of the nation. In this context it may be pertinent to quote Hurst Hannum who maintains that neither sovereignty nor self-determination is an absolute right. For "sovereignty is limited not only by the right of other states and the innumerable political and economic ties that bind them but also by a legitimate international interest in human rights, the environment, and other issues formerly considered the sole jurisdiction of the state." (Autonomy, Sovereignty and self-determination). International community refuses to accept right of a sovereign state to, for instance, ethnic cleansing. If nation states voluntarily share a part of their sovereignty in a larger supra national identity, sub-national identities may be better satisfied. Globalisation and localisation reinforce each other. European Union has facilitated the process of regional autonomies in countries like UK, Spain, Italy and France. Likewise, SAARC may be at least a partial answer to assertion of transnational and ethnic identities within India, Pakistan, Sri Lanka, Bangladesh, Bhutan and Nepal.

That sovereignty and territorial integrity are not absolute and permanent rights was amply demonstrated by the disintegration of the Soviet Union, Yugoslavia, Czechoslovakia, Ethiopia and emergence of Bangla Desh after split of Pakistan. But elsewhere right of self-determination has not worked. It, too, is not
absolute, not only from the point of view of practical possibility but also on moral and political grounds. In no case it is synonymous with independence. For attainment of this right, which the Covenant on Civil and Political Rights, quoted above defines, "to freely determine their political status and pursue their economic, social and cultural development," freedom is more important than independence.

There are many independent countries, where people are not free to pursue their economic, social and cultural development. Mere change of political status may not ensure their freedom for these pursuits. Would there still be urge for self-determination if people in such countries are able to get freedom? Particularly if the self-determination movement does not believe in values of freedom and, as it happened in some cases, become intolerant, fascist and terrorist in character. In such cases democracy and federalism can satisfy the urge of self-determination better than secession or independence. It was through democracy and federalism that Tamil nationalism, which was more fierce and which had sought secessionist outlet earlier than Kashmir nationalism, got reconciled with Indian nationalism. Above all, it was failure of Indian democracy and federalism in Kashmir.

Ethnic identities are not only ascriptive but also evolved and constructed. Some dialects, in the process of growth, acquire status of languages. For geographical, cultural and other reasons, some regions acquire self-consciousness. Over time, such emerging identities may seek self-determination and separate identity within every nation. As no identity can be perfectly homogeneous and contains potential new identities, shouldn't the process of separateness of ethnic identities be endless?

Meanwhile should not right of the dominant ethnic identity be limited to the extent it respects the rights of sub-identities and freedom of individuals within it? When the question of Quebec secession became a real possibility, Mathew Coon-Come asserted the right of the natives and indigenous peoples. He argues, their rights are as compelling and justifiable as those of Quebec. According to him the internal right of self-determination of the natives "basically provides for a people to be able to have a full voice within the legal system of overall nation state, control over natural resources, the appropriate ways of preserving and protecting their culture and way of life and to be able to be a visible partner or participant with strong powers within the overall national polity". If this concept is not accepted, Coon-Come asserts, right to full sovereignty comes into play. In other worlds if Quebec does not concede adequate autonomy to the area of indigenous people, they would secede from Quebec. Thus there are layers of right of self-determination, which can be exercised within or outside the larger polity.

The Quebec case also reminds that the Apex Court of Canada conceded its right of self-determination in the form of secession only if a substantial majority supports it. Though the court did not specify the
concept of substantial majority, it is obvious that a bare majority at a particular moment is not entitled to take the vital decision about all the future generations. For at another moment, under the influence of some other event, the popular mood may be different. The popular mood in Kashmir is known to have varied widely between pro-India and anti-India. Is there any sanctity for a particular moment, the popular mood of which should be made binding forever? Should in such cases the right of self-determination in the sense of secession be reversible? Can a people exercise this right repeatedly? Again stated and articulated demands of a people need not reflect their real urges. The crudest method of understanding the urges of the people is through posing the option in yes and no form which polarizes and provokes public opinion into extremes but which through patient dialogue may be found to be compatible and reconcilable and closer to their real urges.

Another difficulty of conceding right of self-determination in the sense of independence is in the case of identities, which have no territorial base. The demand for Pakistan, as a right of self-determination for the Muslim "nation" of whole India could not meet its logical end. For it culminated into a separate state of North-West provinces of the united India only and did not provide for homeland for the Muslims who were left in the rest of India. However, it is not a decisive argument against right of self-determination for the non-territorial identities. But it is certainly a decisive argument against equating right of self-determination with independence or secession for such identities. Adequate constitutional and institutional arrangements within a larger framework may in many cases safeguard the rights of territorial as well as non-territorial identities better than can be done through secession. Such cases include communities whose independence may not be viable from defence or economic point of view. They may need a broader federal polity to protect their identity and interest against outside threats. But the federal polity must ensure their legitimate claims of autonomy.

This brings us to the concepts of internal and external right of self-determination. While right of self-determination has been universally accepted, the same cannot be said about secessionist movements in non-colonial states. Even in extreme cases of proven popular backing, the claims for independence by, say, Taiwan, Tibet, Chechens, Kurds, and Sri Lankan Tamils lack any international support, notwithstanding lip sympathy for their urges. Dissolution of east European countries was voluntary while in Bangladesh, under exceptional circumstances, local upsurge, with the support of Indian army, brought about its secession from Pakistan. While secession is an exception, claims of national sovereignty no longer prevents international support and even intervention for protecting internal right of self-determination; which includes right of ethnical groups, minorities, dissent, fundamental rights, empowerment of the people through federalism and non-centralisation, gender justice, egalitarian economy and cultural autonomy. Some of the secessionist movements, which deny these rights, lack moral legitimacy to that extent. However, while legitimacy for external right of self-determination in the
sense of secession and independence may not be ruled out in extreme cases, it may not be considered desirable and necessary if internal rights are implemented in letter and spirit.

4.2.6 Role of press and the media

Campaigning is always the first step to a noble cause and aims at building awareness among the masses. In a great country like ours, the largest democracy of the world, campaign is the authentic way to social change. The mass media can be an instrument for educators, educational institutions and Governmental and Non-Governmental Organisations for the emancipation of Human Rights.

Information systems are increasingly becoming important in the dissemination of knowledge. Electronic media like Radio and TV have impact on young people, and, as such has the ability to shape values, attitudes and perceptions of issues pertaining to human rights. For example, in 1994, UNICEF made an effective use of media to advocate the human rights of the victims of war and natural calamities at global level. It organised Press Conferences and media briefs, issued press releases, kept National Committees informed of the latest developments, arranged media interviews and provided strong local information. UNICEF efforts in mass communications and social mobilisation during 1994 have led to a popular demand of raising the age limit from 15 to 18 years for military recruitment. Effective use of the media has also shown encouraging results in tackling issues related to women and child health, in general and HIV/AIDS prevention in particular.

In India, between 5% and 30% of the 340 million children under the age of sixteen are estimated to fall under the definition of child labour.

For the last two decades media and various NGOs had been pressing the government to protect the child against such exploitation through enactment of new laws or by enforcing the existing laws more effectively. Following media exposure, Asian carpets in European countries are being boycotted by consumers. A child labour free trademark — RUGMARK) should soon be appearing on the carpets produced by Indian manufacturers. So far 25 manufacturers have been licensed to use the label and another 35 are finalising their applications. The Ministry of Textiles and Carpets Exports Promotion Council (CEPC) have recently announced a plan to introduce a similar certificate system more widely in the industry.

Burning issues like dowry deaths, where so many women have been sacrificed on the altar of greed of their in-laws and some evil practices like human sacrifice, Sati Pratha with special reference to Roop Kanwar Case; dilemma of Muslim Personal Law with special reference to Shah Bano Case have been highlighted so strongly by the media that government has been forced to take corrective measures.
4.2.6.1 NGO

4.2.6.1.1 Mode of Function

In every part of the globe, there are Non-Governmental Organisations (NGOs) working every hour of the day to document the injustices heaped upon women, children and the under-class, standing beneath the bottom rung of the society. There is no aspect of human life beyond their reach. They make their case with unanswerable force. By their active campaigning, they remind Governments to keep their promise in order to give practical shape to goals set by various national and international conventions on human rights. They make available to Governments statements of concrete facts and not just another list of pious intentions enabling them to initiate appropriate action. Through their relentless efforts, they ensure the protection of human rights in the following ways:

4.2.6.1.2 Involving people from all walks of life

Being voluntary organisations, Non-Governmental Organisations (NGOs) are well represented by people from the different strata of the society who join them on their own. Hence the programmes taken up by them have social sanctions, as against the programmes taken up by the Government which are often met with a lot of resentment, scathing criticism and opposition from public in general and lobbies with vested interest in particular. This is especially true of the target oriented programmes e.g. programmes on family planning, despite being the need of the hour, incurred the wrath of the public and created hostile atmosphere.

4.2.6.1.3 Developing indicators for judging the standard and status of human rights

Non-Governmental Organisations (NGOs) conduct various kinds of research programmes, the findings of which work as indicators of status of human rights in a particular society. Their findings regarding widespread violations of human rights act as indicators of social status of human rights. Thus, the annual reports on the progress of nations published by UNICEF, Amnesty International etc. throw ample light on the current status of human rights in all the countries of the world. Authenticity of these reports make them a sure indicator, thereby making the Governments aware of their weak areas and simultaneously motivating and compelling the erring Governments to take corrective measures.

4.2.6.1.4 Acting as effective instruments of preventive diplomacy

By acting as effective instruments of "Preventive Diplomacy", NGOs create awareness in public on the vital issues like changes required in education, health and family planning etc. by giving early warnings. This technique/system of early warning has been developed by United Nations and is an important aspect
of its activities. The system is designed to collect accurate data and issue early warnings (based on the data) on impending crises and disasters like environmental pollution, famine, population-control and epidemics threatening the human race and nuclear accidents. Such warnings develop a preparedness in the people to face the problems and impel the Governments to take up timely preventive measures before the problems grow out of proportions. Such measures help create a psychological environment which are conductive to the protection of human rights.

4.2.6.1.5 Lobbying for better legislative measures

By critically interacting with the Government on the planning, decision-making and implementation of various policies and programmes regarding human rights, NGOs can ensure better legislation, so that the rights enshrined in the national Constitutions, the Human Rights Declaration and other International Legal Instruments are taken care of. For example, organisations connected with child labour in India are persuading the Government of India to unconditionally ratify Article 32 of the Convention on the Rights of the Child. In this regard they are preparing an Alternative Report to the United Nations Convention on Rights of the Child. This would provide the scope for continuous monitoring of the Rights of the children in the country and would strengthen the efforts for eliminating child labour.

4.2.6.1.6 Monitoring implementation of various schemes

NGOs work as watchdogs by monitoring the various schemes being implemented by the Government towards the protection of human rights. They assess the extent to which the most acclaimed welfare programmes initiated by the Government in the prevention of child labour, upliftment of women, employment schemes for the socially and economically disadvantaged sections of the society are implemented. Any discrepancy in the implementation of welfare programmes is brought to the notice of the public through effective use of mass media and thereby creating public awareness. By their constant efforts like organisation of seminars, workshops, public meetings or media coverage, they ensure the proper implementation of such programmes for the benefit of the concerned people.

4.2.6.2 International Level

At the international level, the status of human rights is watched by many NGOs. Amnesty International is one such organisation. This Organisation is dedicated to publicising violation of human rights, especially freedom of speech and religion and right of political dissent. It also works for the release of political prisoners and, when necessary, for the relief of their families. Apart from generally publicising governmental wrong doings in newsletters, annual reports and background papers, Amnesty International relies heavily on the worldwide distribution of adoption groups. Each of these "adoption groups" takes a
limited number of cases of "prisoners of conscience" and barrages the offending governments with letters of protest until the prisoners are released. For its commendable services in the field of human rights, Amnesty International was awarded the Nobel Prize for peace in 1977.

4.2.6.3 National Level

There are many NGOs playing a vital role in the field of human rights in India. Some of the important organisations doing a commendable job towards this end are as follows:

1. **Sulabh Movement**: It is a major social movement in the country for the betterment and welfare of Dalits, in a generic sense, and in particular for the liberation and social mainstreaming of scavengers.

2. **Child Relief and You (CRY)**: It is a voluntary organisation committed to the upliftment of millions of children who have been deprived of their childhood due to various reasons.

3. **Campaign Against Child Labour (CACL)**: The campaign against child labour is a joint initiative of Youth for Voluntary Action (YUVA), Pune and Tere des Hommes (Germany) India Programme. The Campaign is currently supported by ILO and is actively working for progressive eradication of child labour through provision of education, organisation of awareness programmes, promotion of legislative changes and rescuing children in bondage or victims of abuse.

4. Organisations like **Saheli** and **Chetna** are actively involved in the protection of Women's Rights. They provide free legal aid to women to fight for their rights against gender bias and discrimination.

5. **Butterflies** is an NGO with a programme for street and working children. It was started in 1988 and its activities include non-formal education, saving schemes for children, vocational training, holding Bal Sabhas, and creating awareness for children’s rights, Bal Mazdoor Union, networking with other NGOs and research and documentation.

4.2.6.2 Role Of Media

The list of NGOs is by no means exhaustive. There are many other organisations working for the cause of human rights. The work of five organisations is reported here by way of illustration only.

Around the world, the media is the most effective avenue for spreading human rights awareness and acceptance. While spreading messages through schools and community forums can be effective at reaching dozens or even hundreds of people at the time, they can't match the reach and scope of the media. For instance, one radio station in the Congo can reach hundreds of thousands of people
simultaneously with information about women's rights. A website featuring photographs of rights abuses in North American Aboriginal communities may get millions of hits a day.

Increased awareness about human rights is the first, and most necessary, step to ending human rights abuses. The more people know and care about human rights standards:

- The more people are empowered to defend their own rights (think FGM victims in the DRC)
- The more people are inspired to come to the defense of others (think of interventions in spousal abuse situations in North America)
- The more governments and civil society leaders are forced to improving their practices (think of the improved government rights record in Ghana or the US under Obama)

The more human rights norms are injected into the fabric of society, the less likely rights abuses will be committed or tolerated when they do occur.

Other methods of improving human rights-namely creating legal frameworks (United Nations) or sparking international public pressure (Amnesty International)-can be effective, but only when the general public in the countries in question understand, accept and embrace their human rights first.
“The lesson content has been compiled from various sources in public domain including but not limited to the internet for the convenience of the users. The university has no proprietary right on the same.”