Constitution of India and Social Justice

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SOCIAL JUSTICE AND MINORITIES

LECTURE I

The Preamble to the Constitution of India makes it clear that the Sovereign Democratic Republic was constituted by the People of India to secure to all its citizens *inter-alia*, justice, social, economic and political. As a matter of fact, in the absence of justice in these three fields, freedom, liberty and equality have no meaning. The framers of the Indian Constitution did not aim at merely creating a free India, but also a free India in which social and economic justice would be the order of the day. In a developing country the line of democration between social justice and economic justice is very thin. It can as well be said that such a line does not exist. The framers of the Constitution created a machinery for the governance of the country on the model of the British Constitution with necessary adjustments with a view to meeting the requirements of the situation in the country. The ideals of political, economic and social justice were clearly laid down in Chapter III which includes Fundamental Rights and Chapter IV which contains the Directive Principles of State policy. Though the concept of social justice runs through all the main provisions of the Constitution, the dream of the framers of the Constitution finds expression in words in the Directive Principles of State policy. These directives as a matter of fact contain a clear statement of social revolution. The Directive Principles are contained in Arts 37 to 51. Some of the important directives from the point of view of social justice are as follows:—

(1) *Art* 38.—The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all institutions of the national life.

(2) *Art* 39.—The state shall in particular, direct its policy towards securing—

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

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

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

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women and tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength.

Provision is also made in the articles for protection of childhood and youth against expliotation and against moral and material abandonment, for equal justice to all and legal aid to those who need it.

(3) *Art* 41.—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 cases of unemployment, old age, sickness and disablement and in other cases of underserved want.

(4) *Art* 43.—The state shall endeavour to secure, by suitable legislation or economic organisati n or in any other way to all workers, a living wage, conditions of work ensuring, a decent standard of life and full employment of leisure and social and cultural opportunities and, in particular the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas.

An article also provides for participation of workers in the management of industries.

(5) *Art* 46.—The State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitations.

In addition to these articles, certain fundamental rights are included in Chapter III with a view to attaining the ideal of social justice. Art 14 provides for equality before law. Art 15 provides for making special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Caste and the Scheduled Tribes. Art 16 enables the State to make provisions for reservation of appointments or posts in favourof any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State. Art 17 abolishes untouchability and makes the enforcement of any disability arising out of untouchability a punishable offence. Traffic in human beings and forced labour are prohibited by Art 23. Art 30 confers on minorities the right to establish and administer educational institutions of their device.

Social justice would not be a reality unless political power is also available to the backward classes. Hence, Art 33 provides for reservation of seats in the House of the People for Scheduled Castes and the Scheduled Tribes. Art 332 provides for reservation for these classes in the State Legislative Assemblies. Art 335 lays down that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration. in making appointments to services and posts in connection with the affairs of the Union or of a State with a view to ensuring that the administration of the Scheduled areas is carried on properly and that the welfare of the Scheduled Tribes is achieved. Art 339 has conferred special powers on the President of India in this behalf.

These are some of the explicit provisions of the Constitution which clearly indicate the sincere desire of the framers of the Constitution to achieve the ideal of social justice. One of the most important fundamental rights

is the right to property. This right is conferred by Art 19 (1)(f). The Constitution has also conferred a right on the State to deprive a person of his property under an authority of law and for a public purpose. Provision is also made for payment of some amount to the person whose property has been taken away. This is one of the most important articles from the point of view of social justice. The concept of social justice remains incomplete without the concept of economic justice. Hence Art 31 was subjected to various amendments with a view to ensuring that the concept of social justice is complete.

The Constitution has thus conferred adequate powers on the State to enable it to realise the ideal enshrined in the Preamble. But mere provisions in the Constitution are not adequate for this purpose. In a democracy which has accepted the rule of law and the right of judicial review, the ideal is realised only when legislation is passed and it passes the test of judicial review. Sir Alladi Krishnaswami Aiyar rightly observed in the Constituent Assembly as follows:—

> 'The future evolution of the Indian Constitution will thus depend to a large extent upon the work of the Supreme Court and the directions given to it by that Court. From time to time in the interpretation of the Constitution the Supreme Court will be confronted with apparently contradictory forces at work in the society for the time being. It cannot, in discharge of its duties, afford to ignore the social, economic and political tendencies of the times which furnish the necessary background. It has to keep the poise between seemingly contradictory forces ..... on one occasion it may appear to favour individual liberty as against social control and at another time it may appear to favour social or State control. It is this great tribunal which has to draw a line between individual liberty and social control '.[1]

Sir Alladi was perfectly justified in expressing the above mentioned view. The Indian Constitution has provided for fundamental rights in Part III. These rights aim at securing individual liberty. The framers of the Constitution who were brought up in the liberal traditions of 19th century England, rightly emphasised the importance of the fundamental rights. They made the guarantee of fundamental rights as effective as possible by providing that any law passed by the appropriate legislature, if inconsistent with the provisions of the fundamental rights, would be void to the extent of inconsistency. Thus, a specific prohibition is laid down in the Constitution in order to uphold individual liberty. But, the ideal of social and economic justice is not contained only in Part III of the Constitution. Part IV lays down the directive principles. In this behalf the Constitution merely states that they are fundamental in the governance of the country. It does not say that legislation violating these principles would be void. Thus, the framers of the Constitution, gave a position of superiority to fundamental rights which provide for individual liberty, over other provisions of the Constitution dealing with the concept of social and economic justice. It was because of this position that the Supreme

1. Constituent Assembly Debates Vol. VIII, pp. 223-4.

Court of India observed in one of its earlier decisions as follows:—

"These Directive Principles of State policy have to conform to and run as subsidiary to the chapter on Fundamental Rights".

This was a very narrow construction. Probably the Court did not realise at that time, the fundamental values accepted by the framers of the Constitution G. Austin rightly pointed out the basic values in the following passage:

"The Fundamental Rights and Directive Principles had their roots deep in the struggle for independnce. And they were introduced in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India. Rights and Principles thus connote India's future, present and past, adding greatly to the significance of their inclusion in the Constitution and giving strength to the pursuit of revolution in India ..*In the Directive Principles one finds a clear statement of social revolution.* They aim at making Indian men free in the positive sense, free from passivity engendered by centuries of coercion by society and by nature, free from abject physical conditions that have prevented them from fulfilling their best selves".[3]

(emphasis added)

To what extent this concept of a social revolution was accepted by the Supreme Court and by the Legislature? As pointed above the Supreme Court took a very literal view of the relative importance of the fundamental rights and the directive principles of State policy. Later on, however, the Court changed its attitude and realised the importance of the directive principles from the point of view of social justice. Hegde J. observed as follows in a case decided by the Court in 1970[1]

"It is a fallacy to think that under our Constitution there are only rights and no duties. While rights conferred by Part III are fundamental, the directives given under Part IV are fundamental in the governance of the country. We see no conflict on the whole between the provisions contained in Part III and Part IV. They are complementary and supplementary to each other. The provisions in Part IV enable the legislatures and the Government to impose various duties on the citizens. The provisons therein are deliberately made elastic because the duties to be imposed on the citizens depend on the extent to which the directive principles are implemented. The mandate of the Constitution is to build a welfare society in which justice social, economic and political shall inform all institutions of our life. The hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of citizens are not met".[4]

Hegde J. observed at some other places as follows:—

"No judicial pronouncement has impeded the implementation of the Directive Principles contained in Articles 40 to 51....."

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2. State of Madras *V.* Champakan A I R 1951 S. C. 226.
3. Constitution, A Centershone of a Nation, pp. 50-51.
4. Chandra Bhavan Boarding *V.* State of Mysore. A I R 1970 S. C. 2042 at p. 2050.

However, the judge has not said anything about Articles 38 and 39 which are the most important articles from the point of view of social and economic justice. Legislation passed by competent legislature to give effect to the ideals contained in these articles was struck down in many cases as it violated *inter-alia* the fundamental right to property. As a matter of fact, the history of the Supreme Court from 1967 onwards *i.e.* after the retirement of Chief Justice Gajendragadkar indicates the desire of the Supreme Court to protect the right to property, even at the cost of social justice. As would be seen later during these lectures, the Supreme Court did not adopt an integrated view of life. It must be admitted that there cannot be a good social system based on socal justice unless such a system is backed by political rights. Conversely, political rights and privileges also cannot be enjoyed unless the social system is based on reason and justice. Similarly, a good economic system which aims at economic justice is not possible unless social arrangements are perfect. This was precisely the reason why the preamble makes reference to justice social, economic and political. John Rawla has brought out the point ably in the following passage:—

> "For us the primary subject of justice is the basic structure of society, or more exactly the way in which the major social institutions distribute fundamental rights and duties and determine the divisions of advantages from social cooperation. By major institutions, I understand the political constitution and the principal economic and social arrangements. Thus, the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production and the homogeneous family are examples of major social institutions. Taken together as one scheme, the major institutions define men's rights and duties and influence their life prospects..... The justice of a social scheme depends essentially on how fundamental rights and duties are assigned and on the economic opportunities and social conditions in various sections of society".[5]

The Supreme Court has remarked that ' Social justice is a very vague and indeterminate expression and no clear cut definitions can be laid down which will cover all situations '. However, the Court did lay down that the concept of social justice is a living concept of revolutionary impact, it gives sustenance to the rule of law and meaning and significance to the ideal of a welfare State.

LECTURE II

The performance of the Supreme Court during the last twenty seven years, in the field of social justice has been sometimes satisfactory and sometimes otherwise. The very concept of social justice is very vague. This

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5. ' A Theory of Justice ' John Rawls, p. 7. Muil Mills Ltd. *V.* Suti Mill Mazdoor Union, 1955, S. C. A. 321.

ideal is to be realised through legislation. This legislation has to comply with the requirements of the Constitution regarding its validity. The validity of the legislation depended upon the competence of the legislature passing the law and the consistency of the legislation with fundamental rights. It is in this latter area, the personal prejudices or opinions of the Judges prevailed. A Judge with a broad vision could easily interpret the law in such a manner as to ensure 'social justice'. While a Judge lacking such a broad vision might interpret it the other way. This is human. Oliver Wendell Holmes, a great Judge of the Supreme Court of the United States of America, rightly observed as follows:—

> "The life of law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen have a good deal more to do than the syllogism in determining rules by which men are governed. The law embodies the story of nations development through many centuries, and it cannot be dealt with as it contained only the axioms or corollaries of mathematics. We must alternatively consult history and existing theories of legislation". [6]

The highest Court in a democratic country which has accepted the ideal of a welfare State and which has imposed on the State the obligation to secure to all its citizens social and economic justice, has to play a very important role. This Court can help the executive in realising the dream or create obstacles in the way. The duty of a Judge of such a Court is not merely to interpret the laws mechanically, but to interpret the Constitution and the law in such a way as to enable the citizens to attain the goal mentioned in the Constitution. Hence,it was rightly pointed out by Professor Frankfurter that 'throughout its history, the Supreme Court has called for statesmanship the gifts of mind and character fit to rule the nation. The capacity to transcend one's own limitation, the imagination to see, society as a whole, come except in rarest instances, from wide experience. Only the poetic insight of the philosopher can replace seasonal contact with affairs".[7] "The same Professor, later on became a Judge of the United States Supreme Court. He explained the qualities which a Judge must possess as follows:" [8]

A Judge whose pre-occupation is with such matters should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demand upon him to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of the time, is the right of the imagination. It requires poetic sensibilities with which Judges are rarely endowed and which their education does not normally develop. These Judges, you will infer must have something of the creative artist in them, they must have antennae registering feeling and judgement

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6. 'Common Law' Oliver Wendell Holmes, p. 1.
7. Frankfurter 'The Business of the Supreme Court' 318.
8. Proceedings of the American Philosophical Society, Vol. 98, p. 233.

beyond logical let alone quantitative proof. Douglas, a Judge of the United States Supreme Court rightly observed that the problems before the Supreme Court require at times the economist's understanding, the poet's insight, the executive,s experience, the politicians scientific understanding, the historian's perspectives., [9]

These are the ideals, even the United States Supreme Court during its history of 200 years was not always fortunate to have Judges with these qualities. The Supreme Court of India has a similar history. Whenever the Court was fortunate to have Judges with insight and prophet's vision, laws passed for securing social and economic justice were interpreted sympathetically, otherwise such legislation was struck down. The Court was really fortunate to have sympathetic Judges in the realm of industrial law. Articles 41, 42 and 43 lay down the guiding principles of social justice in this behalf. The Supreme Court in interpreting Industrial Disputes Act and other relevant legislation adopted two basic principles :- (1) National economy must be on the path of development. Hence industrial peace which is essential for the purpose must be maintained. (2) To ensure that legitimate expectations of the labour force are satisfied. Gajendragadkar J. explained the object of industrial adjudication as follows :-

> " The concept of social justice is not narrow or one sided or pedantic and is not confined to industrial adjudication.... It is founded on the basic idea of socio-economic equality and its aim is to assist the removal of socio-economic disparities and inequalities, nevertheless in dealing with industrial matters, it does not adopt a doctrinaire approach and refuses to yield blindly to abstract notions, but adopts a realistic and pragmatic approach. It, therefore, endeavours to resolve the competing claims of employees by finding a solution which is just and fair to both parties with the object of establishing harmony between capital and and labour, and good relationship. The ultimate object of industrial adjudication is to help the growth and progress of national economy and it is with that ultimate object in view that industrial disputes are settled by industrial adjudication on the principle of fair play and justice ". [10]

Keeping the basic principle in mind, the Supreme Court held a balance between conflicting claims of the labour and the management with a view to ensuring that the progress of national economy is not hindered. Hence, it refrained from interfering in the management activities such as promotion to higher posts or transfer of an employee to another place where the employer started another business subsequent to the date of employment.

Even before the adoption of the Constitution, the Central Legislature has passed the Industrial Disputes Act in 1947. This Act has been playing a very prominent role in industrial adjudication. The Supreme Court was also called upon to decide a number of cases in the area. According to the

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9. Cornell Law Quarterly Vol. 45 (1960), p. 3.
10. J. K. Cotton Mills *V.* The Labour Appellate Tribunal A. I. R. 1964 S. C. 737, p. 743.

latest statistics available, it is pointed out that out of 5000 reported cases decided by the Supreme Court, nearly 400 cases are with reference to industrial law. In the history of industrial relations, there was a time when free collective bargaining was considered as an adepquate remedy for the solution of the problem of the employer and the employees. But this many a time resulted in denying justice to the employees. Hence, the trade union movement was encouraged. But even the trade union movement has not solved the industrial problems. Wilfred Backerman, a socialist in England observed recently as follows :-

> " But if the trade union strength is now to be an instrument through which the stronger and more ruthless unions can exploit their exceptional bargaining power, a new form of social injustice is created. This takes the form of the arbitrary income regarding distribution that accompanies inflation, and unemployment for many workers " [11].

Hence intervention by the Government, through a proper legislation is inevitable. The Industrial Disputes Act defines an industry. The question whether a particular activity is an industry or not was to be decided by the Supreme Court. In one case the Supreme Court, speaking through Gajendragadkar J. laid down that a hospital is an industry,[12] but this view was overruled in another case by Hidayatullah J. in Safdarjung Hospital case.[13] This difference arose because of the concepts of the Judges deciding the cases, regarding 'Social Justice'. One of the distinguishing Chief Justices of India once remarked about Justice Gajendragadkar's sympathy for the workers as follows :

> "The heart of my brother Judge Gajendragadkar bleeds profusely for the underdogs and unless something is done to stop the bleeding, the underdogs will become top dogs".

After the retirement of Gajendragadkar as Chief Justice of India in 1966, this 'bleeding sympathy' for the workers was not seen as prominently as before. The approach of the Supreme Court after 1966 was well explained by Krishna Iyer J. in the following passage.

> "Two socially vital factors must inform the understanding and application of Industrial Jurisprudence. The first is the constitutional mandate of part IV obligating the State to make 'povision for securing just and human conditions of work'. Security of employment is the first requisite of a worker's life. The second equally axiomatic consideration is that a worker who wilfully or anti-socially holds up the wheels of production or undermines the success of the business is a high risk and deserves, in industrial interest, to be removed without tears. Legislation and judicial interpretation have woven the legal fabric. " [14]

Industrial adjudication is a very sensitive area. Chief Justice Sikri once pointed out that 'No other such Court has to settle the labour disputes of a country. Our Supreme Court deals with dismissal of employees, retrenchment,

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11. The Crisis in Economy Policy, New Statesman 23rd May 1975, p. 682-84.
12. State of Bombay *V.* Hospital Mazdoor A. I. R. 1960, S. C. 610.
13. A. I. R. 1970, S. C. 1407.
14. L. Micheal *V.* Messrs. Johnson Pumps India Ltd. (1975) I. S. C. W. R. 284.

bonus, wage scales, gratuity, tiffin allowances and a host of other things'.The sympathetic attitude of the Supreme Court towards the workers has been criticised by some jurists. M. C. Setalvad a former Attorney General of India has obvserved as follows in his autobiography : [15]

"Controversies have, however, in my view been rightly raised as to the correctness and wisdom of some of the trends underlying this formidable structure of labour jurisprudence. In a number of judgements rendered by the Court, there are phrases, like 'social welfare', 'social justice' and dynamic development. Does the code of jurisprudence evolved by the Court really assist these desirable objectives? Having regard to the circumstances of our country, has not the Court gone woefully astray? We seem to have adopted ideas and maxims prevailing in certain Western countries without consideration of our own existing conditions.....Responsible persons with close knowledge of the needs of industry have expressed the view that the slant given by the jurisprudence of the Court has harmed the country".

This assessment of the work of the Supreme Court in the area of industrial jurisprudence is most unfortunate. Setalvad was one of the conservative lawyers brought up in the old common law traditions. Hence, it was not possible for him to realise the new challenges before the country. The rapid development of industries under the leadership of Jawaharlal Nehru did create new legal problems and throw new challenges. It was not possible to tackle these problems and meet the new challenges unless, the lawyers, the judges and the legislators approached them in a spirit of sympathy. India was facing the industrial revolution for the first time in her history. Hence, for the solution of the problems arising out of industrial revolution, it was but natural to look to the legal systems of other countries, which have gone through similar experience. But, the approach of the Supreme Court was not based on borrowed ideas only. The judges who decided the cases of industrial disputes stood on the firm Indian grounds of the Directive Principles of State Policy. They did not ignore the demands of national development and the national economy. As a matter of fact, both Gajendragadkar J. and Krishna Iyer J. pointed out the importance of the national development. On the background of these clear and explicit statements found in a number of judgements, one fails to understand how the Supreme Court has harmed the country by the slant given to jurisprudence. On the other hand, it is submitted that the Supreme Court of India, through its judgements helped in the establishment of industrial peace and thus played its rightful role in national development. Perhaps in no other area, the Supreme Court helped the citizens to secure 'social and economic justice' as in the area of employer-employee relations in industries.

However, from a larger point of view a question may be raised. Are the judges of the Supreme Court by their training really equipped to solve the problems of bonus, retrenchment, wage scale gratuity etc.? Even assuming that they are equipped, should such problems really go to the highest Court in the country ? Would it not be desirable to have a final Tribunal consisting of

15. Setalvad ' My Life ' (1971) 568-9.

persons who are really equipped to tackle these problems and leave all such problems to the Tribunal ? It would be necessary to amend the Constitution with a view to taking away the jurisdiction of the Supreme Court and the High Court with respect to such problems. Though such an arrangement is desirable, it appears it would not be feasible. People have more faith in the members of the judiciary than in the members of the Tribunals. This is the hard fact of our public life. Whatever may be the future pattern, it is a matter of gratification to note that the Supreme Court has played its role in securing 'social and economic justice' in industrial field.

PROTECTION OF MINORITIES

Another sensitive area from the point of view of social justice is the provision regarding the rights of the minorities. The Constitution has accepted the principle of equality before law. As a matter of fact that is the cardinal principle and is the foundation of the rule of law. Equality before law necessarily means that all are equal before law and that there will be no special privileges for any section of the society. But, the framers of the Constitution realised the peculiar composition of Indian society and the problems arising out of this composition. India is a land of all religions. Out of eight prominent religions in the world today, four religions viz. Hinduism, Buddhism, Jainism and Sikhism have their origin in India. Followers of other prominent religions, such as Islam, Christianity, Zoroastrian religions, also form a prominent part of the Indian community. Hence, the framers of the Constitution have provided for freedom of religion. Art. 25 guarantees to all persons freedom of conscience and the right freely to profess, practice and propogate religion, subject to public order, morality and health and other provisions regarding the fundamental rights. This however does not mean the State will be a silent observer regarding all religious institutions. The State has the right to regulate any economic, financial, political or other secular activity which is associated with religious practice. The State may also provide for social welfare reform or for throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Does the right to propagate one's own religion include the right to convert any person to one's own religion ? This question was decided by the Supreme Court recently. It laid down that the right to freedom of religion does not mean that there is a fundamental right to convert any person to one's own religion. [16] Legislation prohibiting conversion by force or inducement to one's own religion is valid. The Court pointed out that Art 25 guarantees freedom of conscience to every citizen and not merely to the followers of a particular religion. It is submitted that this is the correct approach consistent with freedom of religion, secular nature of our Constitution and social justice. However another judgement [17] of the Supreme Court regarding the authority of a religious denomination to ex-communicate fol-

16. Rev. Stainslaus *V.* State of MP. A. I. R. 1977 S. C. 908.
17. Saifuddin *V.* State of Bombay A. I. R. 1962 S. C. 853, 869.

lowers who do not observe the rituals etc. is an example of denial of social justice. Bombay High Court had held that legislation prohibiting ex-communication is valid. The Supreme Court, however reversed this judgement and laid down as follows :-

"Where an ex-communication is itself based on religious grounds such as lapse from the orthodox religious creed or doctrine (similar to what is considered hereby, apostacy or schism under the canon law) or break of some practices considered as an essential part of the religion by the Dawoodi Bohras in general, *ex-communication cannot but be held to be for* the purpose of maintaining the strength of the religion". Hence, the Court held that the Bombay Prevention of Ex-communication. Act 42 of 1949 is invalid. It is submitted that the Bombay High Court view was the correct view. The Supreme Court view is both against the fundamentals of the Constitution and social justice.

In the context of the freedom of religion and social justice, two questions are important from the point of view of the Indian society, the one about uniform Civil Code and the other relating to establishment and administration of educational institutions by the minorities. In India, we have a uniform system of law in the area of contract, criminology, industrial law, banking law etc. But, in the area of personal law relating to marriage, divorce, adoption, succession, etc., we have personal systems of law such as Hindu Law Muslim Law, etc. This is purely a historical accident. Social reformers and judges have been pleading for a uniform civil code applicable to all Indians in the realm of marriage, adoption, succession, etc. This demand was put forth in the Constituent Assembly also. Such a uniform civil code is necessary from the point of view of social justice. Hence, the framers of the Constitution have provided in the chapter on the Directive Principles of State of Policy for the adoption of a uniform civil code (Art 44). However, it is a matter of great regret that upto now no attempts are made for enacting a uniform civil code. When Hindu law relating to marriage, divorce, minority, guardianship, succession, adoption, etc. was codified in 1955-56, it was expected that a uniform civil code would follow soon. As a matter of fact, it was pointed out that *the codification of Hindu law was the first step in the* direction of the adoption of the uniform civil code. But no steps have been taken upto now. The law of divorce among the Muslims is a great denial of social justice to Muslim women. Hence, at least in the area of marriage and divorce, an urgent action is needed. No religious sentiments should be allowed to come in the way of such an enactment.

Art 30 of the Constitution confers on all minorities, based on religion or language the right to establish and administer educational institutions of their choice. It also lays down that the State shall not in granting aid to educational instutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. These provisions are necessary in order to enable the minorities to conserve their culture. The exact implication of this right was considered by the Supreme Court in a number of cases. One of the important cases is the St. Xaviers'

College V/s. State of Gujarat. [18] Following principles were laid down by the Supreme Court in this case.

1. The minorities have a right to establish and administer educational institutions of their choice and impart not only religious but also secular education. They have no fundamental right to recognition or to receive aid from the state. However, in granting recognition, no condition should be laid down which will be inconsistent with the right guaranteed by Art 30. The minority institutions are not free from regulatory measures laid down by the University. The Court also laid down that the right to administer is not a right to maladminister. The right of the minority institutions to administer institutions imples the obligation and duty of the minority institutions to render the very bes to the students. In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The Court, however, struck down the provisions of the Gujarat Act contained in Section 52 (A) which provided for Constition of a Tribunal of Arbitration for deciding disputes between the governing body and the members of the staff. Ray C. J. who represented the majority laid down as follows :

> "These references to arbitration will introduce an area of litigious controversy inside the educational institution. The atmosphere of the institution will be vitiated by such proceedings. The governing body has its domestic jurisdiction. This jurisdiction will be displaced. A new jurisdiction will be created in administration. The provisions contained in this section (52 A) cannot, therefore apply to minority institutions". (p-1400)

As the Supreme Court laid down the principle it is the law binding on all Courts. It is submitted that if the constitution of the Tribunal of Administration is not legal in case of minority institution, it cannot be legal in case of other educational institutions as it would amount to discrimination and denial of equality before law. Hence, it would appear that provisions in various University Acts regarding Tribunals of Arbitration, are unconstitutional, unless the Supreme Court holds that there is a reasonable classification. Beg J. differed from the majority judgement regarding the rights of the minority and laid down as follows :

> This article (30) (1) meant to serve as a shield of minority educational institutions against the invasion of certain rights protected by it and declared fundamental so that they are not discriminated against, cannot be converted by them into a weapon to exact unjustifiable preferential or discriminatory treatment for minority institutions, so as to obtain the benefits but to reject the obligations of statutory rights. (p. 1451).

It is submitted that these are refreshing remarks, though they are not consistent with the opinions expressed by the Supreme Court in a number of cases from the Bombay Education Society's case decided in 1954. [19] The dissent of Beg J. who incidently belongs to a minority reminds one of the dissent of

18. A. I. R. 1974 S. C. 1389.
19. A. I. R. 1954 S. C. 560.

Frankfurter J. of the United States Supreme Court, who also belonged to a religious minority. In the Barnettee case, Frankfurter J. observed as follows :

> "And so Jafferson and those who followed him wrote guarantees of a religious freedom into our Constitution. Religious minorities as well as religious majorities were to be equal in the eyes of the political State. But Jefferson and others also knew that minorities may disrupt society. It never would have occured to them to write into the Constitution the subordination of the general civil authority of the State to sectarian scruples".

These observations were made by Frankfurter even when the Constitution of the United States does not contain a provision similar to the one contained in Art (30) (1).

A series of decisions of the Supreme Court on the rights of the religious and linguistic minorities from the Kerala Education Bill 1957.[20] Rev Sidhrajbhai bhai V. State, [21] The State of Kerala V. Very Rev. Mother Provincial, [22] have laid down that the supervisory control of Universities on institutions established by religious and linguistic minorities is limited. The decisions are correct in law. However, they appear to be unsatisfactory from the point of view of social justice. Hence, it was rightly pointed out by Dr. P. B. Gajendragadkar that this view needs to be reconsidered. Dr. Gajendragadkar observed as follows :

> "If this view is not reconsidered and colleges started all over the country by societies consisting of members belonging to religious or linguistic minorities in different regions begin to claim protection of Art 30 (1) it would introduce confusion and chaos in the administration of University life".[23]

It is submitted that the St. Xavier's College case was heard by a Bench of nine judges because this very view of Dr. Gajendragadkar was pressed before the Constitution Bench of the Supreme Court. Thus, the suggestion made by Dr. Gajendragadkar was acted upon by the Supreme Court. But the Court came to the same conclusion as laid down in earlier cases. Hence from that point of view of social justice the position as obtained today is not very satisfactory. Dr. Gajendragadkar reverted to this problem in another lecture. In his Jawaharlal Nehru Memorial lecture, he observed as follows :

> "May I earnestly suggest that the University Grants Commission and the Union and State Education Ministers should, with the co-operation of Vice-Chancellors and the I.U.B. evolve a healthy consensus after a frank and full discussion of the pros and cons of the problem, failing that, the said authorities may consider whether it would be appropriate and advisable to move the Supreme Court to reconsider its decision or to move the Parliament for a suitable amendment of Art 30 (1), which may

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20. 1959 S. C. R. 995.
21. 1963-3 S. C. R. 833.
22. 1971—XLIV SCJ 641.
23. Indian Parliament and the Fundamental Rights, Taged Law Lectures (1972), p. 57.

save the present suprevisory and regulatory jurisdiction of all the Universities in respect of colleges affiliated to them".

The Supreme Court has reconsidered its earlier decisions and reaffirmed the same. It is submitted that the amendment is also not possible at present because the Supreme Court has laid down in Keshvananda Bharati Case. that parliament has no power to amend the basic features of the Constitution Rights of minorities do constitute a basic feature of the constitution.

These articles have been a part of the Constitution since 1950. During the last twenty seven years, not many cases came before the Supreme Court. The existence of these articles also did not affect very much the functioning of Universities and other educational institutions. Hence, it is submitted that there is no need for any amendment. The success of any system of law including the constitutional law depends upon the spirits in which it is worked and it is matter of satisfaction, that the religious and linguistic minorites, by and large have been working the Constitution in the proper spirit. What Prof. Julius Stone observed in relation to law and justice is most appropriate in this behalf also Prof. Stone wrote:–

> "When we think of human law in relation to justice, we must be careful, moreover, not to think merely of fulfilment or frustration of 'demands' by allocation of available 'resources'. We must look also to outlets for the tensions and dissatisfactions unavoidably arising from the situation. This third aspect is as capital as the others and the fact that it was often very predominent in less developed legal orders should not deceive us into thinking that it is in any sense obsolete in more complex and developed ones. The legislative, administrative and judicial processes are hemmed in with rules, conventions and procedures, embroidered by controversies, providing for this release of tension within the ongoing order in which men seek justice. The Supreme Court of the United States, in those very aspects at which British lawyers sometime look askance, offers a supreme example of this provision. The very varied outlooks and talents and capacities of its members often spell discord. Yet this very discord may symbolise the will of so richly complex a people to live under broadly agreed principles and also to sublimate the bitter disagreements which broad principles, so often yield in application". [24] It can safely be said that this is true of the Supreme Court of India also.

24. Social Dissensions of Law and Justice, Julius Stone, p. 795.

PROTECTIVE DISCRIMINATION, PROPERTY RIGHTS AND SOCIAL JUSTICE

LECTURE II

The Constitution of India is based on the rule of law and has accepted the doctrine of equality before law. This doctrine is contained in Art 14 of the Constitution. From an ideal point of view it is desirable that all persons must be equal before law and law should treat all persons with the same yard-stick. Such a principle is essential for every democracy. But, it is not always possible to translate ideal into real. Even the doctrine of equality before law is modified by the principle of reasonable classification, a principle borrowed from the working of the Constitution of the United States of America. This principle is the first limitation of the doctrine of equality before law. This limitation has been introduced by judicial interpretation. But, there are other limitations on the doctrine of equality before law, contained in the Constitution itself. These limitations are in the form of protective discriminations provided in the Constitution from the point of view of social justice. They refer to special provisions for the Scheduled Castes and the Schedule Tribes and the Backward Classes.

Art 15 prohibits the State from discriminating against any citizens on the ground only of religion, race, caste, sex, place or birth or any of them. It further lays down that no citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them shall 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, balling ghats, roads, and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public. After having stated the broad principle of equality before law, the article confers authority on the State to protect the weaker sections of the community. Such a protection is essential for ensuring social justice. Clause (4) of the article lays down ' nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes '.

These special provisions which the State is authorised to make, took the form of reservation of seats for students from the backward classes in professional Colleges. Provisions made by the State in the form of orders etc. were challenged and in a large number of cases, the Supreme Court had no alternative but to strike down such orders. In two cases from the State of Madras, the Supreme Court struck down the orders of reservation as reservations were made on the consideration of caste only and not on. the consideration of class. These cases were decided before the inclusion of

clause (4) in Art 15.[1] The clause uses the expression 'Backward Classes'. What exactly is the meaning of this expression ? The expression backward classes is further qualified by the words 'socially' and 'educationally backward.' Hence, the Supreme Court was called upon to decide the exact implication of the expression 'socially and educationally backward classes'. As special provisions were to be made only for these classes and the special provisions were a limitation on the fundamental principle of equality before law, the Supreme Court was very critical in its approach. No doubt, it approached the problem with broad sympathy for the classes, but it did not want the State to abuse this power.

The Court laid down that socially and educationally backward classes of citizens are groups other than groups based on castes. The expression 'classes of citizens indicate a homogeneous section of the people who are grouped together because of certain likeness or common traits and who are identifiable by some common attributes. The Homogeneity of the classes of citizens is social and educational backwardness. Neither caste nor religion nor place of birth will be the uniform element of common attribute to make them a class of citizens. From an economic point of view, the classes of citizens are backward when they do not make effective use of resources. Where large areas of land maintain a sparse disorderly and illiterate population whose property is small and negligible the element of social backwardness is observed. When effective territorial specialisation is not possible in the absence of means of communication and technical process as in the hill and Uttarkhand areas the people are socially backward classes of citizens. Educational backwardness is ascertained with reference to these factors. Where people have traditional apathy for education on account of social and environmental conditions or occupational handicaps, it is an illustration of educational backwardness'.

Caste alone cannot be the determining factor in order to decide 'social and educational backwardness'. Gajendragadkar J. was absolutely right when he laid down in Balaji V. State of Mysore as follows:

"Social backwardness is in the ultimate analysis, the result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically became socially backward.... (and this) is likely to be aggravated by considerations of caste. But that only shows the relevance of both caste and poverty in determining the backwardness of citizens". Subha Rao J. observed in Chitralekha 3 case as follows :-

"The juxtaposition of the expression 'backward classes and scheduled castes' also leads to a reasonable inference that the expression "classes" is not synonymous with castes. It may be that for ascertaining whether a particular citizen or a group of citizens belong to a class or not, his or their caste may have some relevance, but it cannot be either the sole

1. Madras *V.* Champkan A I R 1951 S. C. 226 and Venkatraman *V.* Madras A I R 1951 S. C. 229.

2. A I R 1963 S. C. 649.

3. A I R 1964 S. C. 1823.

or dominant criterion for ascertaining the class to which he or they belong. Caste is only relevant circumstance is ascertaining the backwardness of a class, there is nothing in the judgement of the Court, which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to a caste".

Wanchoo J. however observed in another Madras case, Rajendran V. Madras that 'it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservations can be made in favour of such a caste on the ground that it is socially and educationally backward class of citizens within the meaning of Art 15 (4). Thus, it appears that caste alone would be an adequate ground in some cases for making reservation. This view however appears to be a minority view in so far as in a number of cases the Supreme Court laid down that caste alone cannot be the determining factor in this behalf. In a case decided in 1973, the Supreme Court observed as follows : (4)

> "In India, social and educational backwardness is further associated with economic backwardness and it is observed in Balaji case .. that backwardness, socially and educationally is ultimately and primarily due to poverty. But if poverty is the exclusive test, a very large proportion of population in India would have to be regarded as socially and educationally backward and if reservations are made only on ground of economic consideration an untenable situation may arise even in sections which are recognised as socially and educationally advanced".

Thus, neither caste alone, nor poverty alone can be the determining factor. It is both caste and poverty and probably some other factors which would determine the social and educational backwardness. A very important decision was given by the Supreme Court in the context of reservation for the the socially and educationally backward class and social justice. Art 15 (4) authorises reservation for socially and educationally backward classes. Can the State make a distinction among these classes on the basis of financial position of the members of these classes? The Kerala Government, on the recommendation of a Commission appointed for the purpose laid down that reservation of seats in medical collges for the members of the socially and educationally backward classes would be open only to those who are members of families which have an aggregate income of less than Rs. 10,000 per annum. This rule was challenged by K. S. Jayashree who secured 372 in optional subjects but did not get a seat in a medical college under the reserved quota, though candidates getting even 357 marks secured admission. The reason was, that the aggregate annual income of the members of Jayashree family was Rs. 10,000/- while of the families of other candidates was less than that. All candidates belonged to socially and educationally backward classes. In a very refreshing and a creative, judgement Ray C. J. laid down that both poverty and caste are relevant in determining the social backwardness though poverty

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4. A I R 1968 S. C. 1012.

4A. Janaki Prasad *V.* State of Jammu & Kashmir, AIR 1973 S. C. 930.

itself cannot be the determining factor. It is a revolutionary judgement. The promise of social justice to the socially and educationally backward classes of citizens can be fulfiled only by helping the members of such classes who are economically backward. It is submitted that no reservations in educational institutions should be available to the economically advanced members of these classes. Reservations should go to the economically backward citizens from amongst the socially and educationally backward classes. It is further submitted that the same principle should be made applicable even to the members of the Scheduled Castes and the Scheduled Tribes. It is only then that social justice will be done to the economically backward citizens from among the socially and educationally backward classes and the Scheduled Castes and the Scheduled Tribes. If this is not done, then all the benefits of reservations and other similar protective provisions are likely to be monopolised by the advanced sections from among these classes and castes and the backward sections from these classes and castes may remain backward probably for a long time to come.

EXTENT OF RESERVATION

The ideal of social justice is to be attained consistent with the rule of law and equal opportunities to all citizens of India. We have seen that protective discrimination is a limitation on the doctrine of equality before law.

Art 15 (4) refers to special provisions for the advancement of any socially and educationally backward class of citizens and for the Scheduled Castes and the Scheduled Tribes, while Art 16 (4) enable the State to make any provision for reservation of appointment 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. Such special provisions and reservations were made by various State Governments from time to time and some of them were challenged before the Supreme Court as being excessive. The Court was faced with a dilemma. Should it accept the reservations made by the state or should it subject it to judicial review? As there is no expression similar to the expression 'reasonable' used in Art 19, it was argued that the Court should accept the reservations and refuse to interfere with the opinion of the State. However, considering the peculiar rigid caste structure of the Hindu society which is reflected in political parties and the existence of religious minorities, it appears that the court decided to exercise its power of judicial review from the point of view of social justice. Hence, Gajendragadkar J. rightly observed in Balaji's case as follows :-

> "Reservations should and must be adopted to advance the prospects of the weaker sections of society, but in providing for such special measures in that behalf care should be taken not to exclude admission to higher educational centre to deserving and qualified candidates of other communities".

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5. K. S. Jayashree *V.* State of Kerala, 'AIR 1976 S.C. 2381.

In the Balaji's case, the Government had declared 90% of the population of the State as belonging to backward class. The order divided the population into 'most advanced' class and the 'rest'. The rest of population was further sub-divided into two categories of 'backward' and 'more backward'. The Court held that such a classification is not supported by the Constitution. The Court also laid down that 68% reservation is plainly inconsistent with the concept of special provision authorised by Art 15 (4). The impugned order is a fraud on the constitutional power conferred on the State. The Court also laid down that 'what is true in regard to Art 15 (4), is equally true in regard to Art 16 (4) and while making reservations under Art 16 (4) care should be taken not to provide for unreasonably exersive or extravagant reservation for that would be eliminating general competition in a large field and by creating wide spread dissatisfaction among the employees materially affect efficiency. Hence the Court laid down that reservations should not exceed 50%.

As regards Art 16 (4), the Court adopted a similar policy and struck down excessive reservations. In one case, the Court struck down the 'carry forward' rule framed by the Government for making appointments of the members of the Scheduled Castes. In this case, Government made 45 appointment out of which 29 were from the Scheduled Castes and the Scheduled Tribes due to the 'carry forward'. The effect of this rules would have been that in the third year, the reservation would have been 90% of the total seats. This would definitely be unjust. Hence the Court observed—

> "If the reservation is so excessive that it practically denies a reasonable opportunity for employment to members of other communities, the position may well be different and it would be open then for a member of more advanced classes to complain that he has been denied equality by the State".

"Not more than 50% reservation rule laid down by Gajendragadkar J. in Balaji case for reservation in educational institution was accepted by Mudholkar J. who laid down that even in case of reservation in services it should not be more than 50%. In another case the Supreme Court laid down that Art 16 cannot be confined to the initial employment but includes other matters relating to employment such as provision about salary and periodical increments etc. .. **It also includes promotion to selection posts.** (It alies added) It is submitted that this is a correct view, Consistent with the basic features of the Constitution regarding equality before law and the securing to all its citizens social justice, the Supreme Court had no alternative but to uphold reservations, but that in a limited way. The attitude of the Court was expressed in Balaji case rightly when the Court observed-

"Therefore, like the special provision improperly made under Art 15 (4), reservations made under Art 16 (4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution".

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6. T. Devadasan *V.* Union of India, A I R 1965 S. C. 179.
7. General Manager *V.* Rangachari, A I R 1943 S. C. 384.

RIGHT TO PROPERTY AND SOCIAL JUSTICE

The most important part of the Constitution from the point of view of social justice is the guarantee of the right to property. Art 19 (1) (f) guarantees to all citizens the right to acquire, hold and dispose of property. This right is however subject to the authority of the State to make any law imposing reasonable restrictions on the exercise of this right in the interest of the general the Constitution, while guaranteeing the right to property which is made a fundamental right—also provides for social control of this right in the interest of social justice. Provisions for further social control are contained in Arts 31 A, 31 B, 31 C and the Ninth Schedule to the Constitution. The borad principle of social control underlying Art 31 is, that the State shall have the authority to deprive a person of his property either by way of compulsory acquisition or requisitioning of the property subject to the following conditions (1) there must be a law in that behalf, (2) such acquisition or requisitioning must be for a public purpose, (3) and the law must provide for payment of an amount for the property acquired or requisitioned. This amount may be fixed by law or may be determined in accordance with such principles and given in such manner as may be specified in law. This article was one of the last articles adopted by the Constituent Assembly, as the members found it difficult to have a consensus on the exact wording of the article. This article was subjected to a series of amendments. First amendment was made in 1951, second amendment in 1955, third amendment in 1964 and the fourth amendment in 1971. The result of all these amendments is the present articles relating to the right to property. All these amendments were made with a view to securing social justice and implementing the directive principles of State policy Modern jurisprudence points out that if social change is to be brought about, law relating to property and contract has to be amended. What has become more important in the concept of property is, its social obligation. The framers of the Constitution were conscious of this aspect of property. Hence, after having guaranteed the right to acquire, hold and dispose of property, they provided for compulsory acquisition or requisitioning of the property by the State. They however laid down that such acquisition or requisitioning must be under a law passed by appropriate legislature, must be for a public purpose and must provide for compensation for the property acquired or requisitioned. One of the first difficulties experienced by the Government was that the interpretation of any Statute passed for the purpose of acquisition or requisitioning of property is bound to be based not merely on Art 31, but also on other articles guaranteeing fundamental rights. The Patna High Court in Kameshwarsing's case,[8] struck down the Bihar Land Reforms Act is as much as the Act provided for different scales of compensation to different categories of land owners. Similar views were expressed in a Calcutta case.[9] Thus, the attempts of State Legislature to introduce agrarian reforms with a view to making the tiller of

8. A I R 1951 Patna 91.

9. Bella Banerjee's case, AIR 1951 Cal. III.

the soil, the owner of the same, were defeated because of the judicial interpretation. Hence, in 1951, the First Amendment Act was passed and a new Arts 31 A and Art 31 B and the Ninth Scheduled were inserted in the Constitution. The idea was to ensure that Zamindari system is abolished, but the State finances are not subjected to heavy burden for the payment of compensation. This amendment was mainly for the purpose of bringing about the agrarian reforms with a view to ensuring social and economic justice to thousands of villages working on lands of the rich Zamindars. But, this amendment did not solve all difficulties. A series of new difficulties arose subsequently. Art 31 (2) lays down that the State must provide for 'compensation' for the property acquired or requisitioned. The word 'compensation' was interpreted by the Supreme Court. *In State of West Bengal V. Mrs. Bela Banerjee*[10] Pantajali Shastri C. J. interpreted the expression 'compensation' as follows :

> "While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, *that is a just equivalent of what the owner has been deprived of* ....whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected *in a justiciable issue to be adjudicated by the Court*". (emphasis added)

Thus, the Supreme Court, laid down that compensation must be just equivalent and whether it is just equivalent or not is for the Court to decide. Hence, Parliament thought it fit to amend the Constitution. The Constitution Fourth Amendment Act was passed in 1955 and the material change introduced in Art 31 (2) was as follows :—

(a) 'and no such law (law for acquisition or requistioning of property) shall be called in question in any Court on the ground that the compensation provided by the law is not adequate'.

(b) (2A) where a law does not provide for the transfer of the Ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State, it shall not be deemed to provide for compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

Thus, the amendment took the question of adequacy of compensation outside the purview of judicial scrutiny.

The Fourth Amendment also referred to reforms in urban areas regarding property owned by Corporations, rights of managing agents, property required for searching of minerals and mineral oil or even taking over the management of property for a limited period. The amendment laid down that any such law shall not be deemed to be void, even it contravenes the provisions of Art 14, Art 19 or Art 31. This is a very revolutionary amendment. A law dealing with the subjects mentioned above may deny equality before law,

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10. A I R 1954 S. C. 998 p. 563-4.

may impose even unreasonable restrictions on the right to property and may not even provide compensation. Hence, Hidayatullaha J. observed in Golaknath case—'If I were free, I should say that the amendment of Art 31 (A) was not legal and certainly not justified by the reasons given in the case of the Court'.

The basic idea behind the amendment was to bring about reform in industrial property law also, with a view to securing social and economic justice to the people in urban areas. But this amendment also did not solve all the problems. Though Parliament categorically laid down that 'no such law shall be called in question in any Court on the ground that the compensation provided by the law is not adequte' the Supreme Court did subject such laws to judicial scrutiny. Chief Justice Subba Rao in Vajravelu case[11] laid down that inspite of the amendment, the Court can consider whether the principles laid down by the law are connected to the value of the property acquired and secondly whether the compensation is illusory. He observed as follows :

> "If the compensation is illusory or if the principles prescribed are irrelevant to the value of the property at or about the time of acquisition, it can be said that the legislature committed a fraud on power, and, therefore, the law is bad. It is a use of the protection of Art 31 in a manner which the Article hardly intended". (p. 627-28)

The judgement put the clock back and obliterated the effects of the Fourth Amendment Act. Thus another obstacle was created in the path of social justice. For, if compensation was to be just equivalent and subjected to judicial scrutiny, it would be impossible, atleast very difficult to implement legislation aiming at agrarian reforms and also reforms in urban property. The judgement of the Supreme Court in Bank Nationalisation[12] case created further difficulties. Turning to the question of compensation to the share holders who had shares in the fourteen Banks which were nationalised under the Act or Parliament, Chief Justice Shah observed as follows :

> "The broad object underlying the principle of valuation is to award to the owner the equivalent of his property with *its existing advantages and its potentialities*". (emphasis added)

Thus, the Court introduced a new concept in compensation i.e. the concept of the potentialities of the property acquired. This would not only be a vague concept but would also increase the financial burden of the State in making payment of compensation. Is it desirable from the point of view of social justice ? For, ultimately the State can raise the required amount by way of taxation. The concept of acquisition or requisitioning of property by the State is based on the authority of the State to take property for 'public good.' Hence, payment of compensation in the terms of just equivalent is inconsistent with this concept, particularly, in a developing country like India. Moreover, the Indian Constitution aims at changing the old feudal society

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11. 1965 S. C. R. 614.

12. (1970) I S C R 248.

into a modern society. This transformation is possible not by accepting ideas of judical interpretation prevalent in developed and affluent societies. The problem of social justice in the area of property rights is not so acute in such societies as in India. Hence it is submitted that the attitude of the Supreme Court is not consistent with Indian conditions.

There was another development in judicial interpretation. In 1967, the Supreme Court, by a majority of 6:5 decided that Parliament has no power to abridge any of the fundamental rights. This view was laid down by Chief Justice Subha Rao in *Galak Nath case*.[13] This view was contrary to the view adopted by the Supreme Court from 1950 onward. In *Shankari Prasad case*[14] decided in 1952 and in *Sajjan Singh cases*[15] decided in 1965, the Supreme Court accepted the authority of Parliament to amend any part of the Constitution including the part dealing with fundamental rights. But this view was, all of a sudden, abandoned and that too by a slender majority. This judgement is an epoch-making judgement. I do not wish to discuss all the aspects of this judgement here. One aspect is important and that is with reference to social justice. If the implementation of the directive principles of State policy which are fundamental in the governance of the country is to be achieved, amendment of the Constitution including the curtailment of some of the fundamental rights was necessary. The Golak Nath judgement created an obstacle in its way. As a matter of fact, amendments made till 1967, did curtail fundamental rights. These amendments were upheld as valid by the Supreme Court and even the *Golak Nath* judgement laid down that all previous amendments which curtailed fundamental rights will remain valid even for future purposes. It is only from the date of the judgement that Parliament will have no power to abridge fundamental rights. The reason why the majority laid down the view becomes clear from the following passage from the judgement of Hidayatullah J. :—

> "I am apprehensive that the erosion of the right to property may be practised against other Fundamental Rights.... I am of the opinion that any attempts to abridge or take away fundamental rights even through an amendment of the Constitution can be declared void. This Court has the power and jurisdiction to make the declaration".

Thus, the right to property was beyond the power of amendment of Parliament. If agrarian reforms needed curtailment of the right to property, the reforms must wait. Strangely enough, this view of the Supreme Court was abandoned by the Supreme Court itself in 1973 in *Keshavananda Bharati case*.[15A] In this case, *Golak Nath* case was overruled and though the Court laid down that Parliament has no power to amend the basic features of the Constitution, the Court did not lay down that the right to property constitutes

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13. Golak Nath *V.* State of Punjab (1967) 2 S. C. R. 762.

14. Shankari Prasad *V.* Union of India (1952) S. C. R. 89.

15. Sajjan Singh *V.* State of Rajasthan (1965) S. C. R. 933.

15A. A. I. R. 1973 S. C. 1961.

the basic feature of the Constitution. Hence, it is submitted that the right to property, though a fundamental right, may not come in the way of agrarian reforms or even slum reforms, necessary for the purpose of social justice. One is reminded of the observations made by Sir Alladi Krishnaswami at the time of the framing of the Constitution. He observed,

> "Law, according to me, if it is to fulfil it larger purpose, must serve as an instrument of social progress. It must reflect the progressive and social tendencies of the age. Our ancients never regarded the institution of property as an end in itself. Property exists for a Dharma. Dharma and the duty which the individual owes to society form the whole basis of our social framework. Dharma is the law of social well being and varies from Yuga to Yuga. Capitalism as it is practised in the West came in the wake of the Industrial Revolution and is alien to the foot ideai of our civilisation. The sole end of property is Yagna and to serve a socal purpose, an idea which forms the essential note of Mahatma Gandhi's life and teachings".[16]

Even in modern days, the concept of property has undergone many changes. Friedman describes these changes as follows :

> "To Locke and the makers of the French and American Revolutions, to Bentham, Spencer and the whole earlier liberal movement, freedom of property or 'estate' constiututed a cardinal principle. The same, however, applied to Kant and Hegel (but not Fichte) and to catholic legal theory, as expressed in the Papel Eneyelical and, in its most uncompromising form, by Catherine. The justification for this theory was, with all these thinkers, the mingling of man's labour with an object, but the ideology persisted despite the increasing dissociation of property and labour. As Renner has shown, property has, in modern conditions, often become a means of control over other people's labour and life. Another aspect of the same development is revealed by Thurman's Arnold's 'myth of corporate personality'. The application of the original American constitutional idea of inviolability of property—conceived for the pioneer farmer and settler—to the modern company which controls vast resources and numbers of men by Counts, in law, as an individual. The recognition of freedom of property as a basic right would still be generally considered as a principle of democracy, as distinct from socialism, which recognises it only in so far as it does not convey power over the means of production, and subject to the needs of the community."

But modern democracy by the same process which had led to the increasing modification of individual rights by social duties towards neighbours and community, has everywhere had to tamper freedom of property with social responsibilities attached to property. The limitations on property are of many different kinds. The State's right of taxation, its police power, and the

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16. Constituent Assembly Debates Vol. X, P. 1274.

power of expropriation subject to fair compensation are examples of public restrictions on freedom of property which are new universally recognised and used."[17]

The framers of the Constitution wanted to create a society where in both the enjoyment of the traditional fundamental rights and social and economic justice will be ensured. This was an uphill task. The Supreme Court also found it difficult to interpret such a Constitution in a manner that will satisfy everyone. Moreover by training, the judges and lawyers were more equipped to understand the importance of the fundamental rights then the directive principles of State policy.

The Golak nath judgement created a public controversy regarding the power of Parliament to amend the Constitution and the extent of judical review. Parliament amended the Constitution in 1971. The Twenty Fourth Amendment Act made it clear that the power of amendment is a constituent power and Parliament can amend any provision of the Constitution. The Twenty Fifth Amendment Act amended Art 31 of the Constitution which made it clear that a law authorising compulsory acquisition or requisitioning of property must provide for payment of an 'amount' which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in law. It also provided that no such law can be called in question on the ground that the amount so fixed is not adequate.

Parliament attaches great significance to the implementation of directive principles of State policy mentioned in Art 39. As the directives were held by the Court as subordinate to the fundamental rights, any legislation passed with a view to implementing the directives was likely to be void because of it inconsistency with either article 14 or article 19 or article 31. Directives mentioned in Art 39 primarily relate to the right to property. This right is provided in Arts 19 and 31. It was also apprehended that a law passed with a view to implementing the directives might be struck down as discriminatory and thus violating the provisions of Art 14. Hence, with a view to saving laws passed for the purpose of implementing the directive principles mentioned in Art 39, from such a challenge a new article 31. was added by Twenty Fifth Amendment Act. The Article laid down that 'Notwithstanding anything contained in article 13 no law giving effect the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by article 14, article 19 or article 31 and *no such law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such a policy.* The validity of this amendment was challenged in *Keshavananda Bharati*[18] case and the Supreme Court held that this new article is valid except the portion underlined above.

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17. 'Legal Theory' W. Friedmann 4th edition, p. 374.

18. A. I. R. 1973 S. C. 1961.

This part of article 31C was struck down as it deprived the Court and its right to consider the validity of the laws and made a mere declaration by the legislature binding on the judiciary. It is submitted that the judgement is the correct judgement. The amendment thus places the directives mentioned in clause (b) and (c) of article 39 on a higher pedastal than the fundamental rights enumerated in articles 14, 19 and 31. This indeed is a great advance from the point of view of social justice. This new article 31C was further amended with a view to giving protection to all the directive principles by the 42nd Amendment Act. But as this amendment is at present under reconsideration of the Government of India no comments are made on the implication of this amendment.

The exclusion of Art 19 as far as the laws passed for implementing the directive principles of contained in art 39 (b) and (c) was rather wide. Art 19 confers several freedoms. Out of these freedoms, the freedom to assemble peaceably and without arms or to move freely throughout the territory of India or to reside and settle in any part of India has nothing to do with the implementation of the policy contained in art (39 (b) and (c). Hence, it is submitted that this amendment is very wide. However, as the Supreme Court has uphold the validity of this amendment, it is a clear indication that both the Parliament and of the Supreme Court attach great significance to the securing of social and economic justice.

During the last twenty seven years many laws were passed by Parliament and by State Legislatures for securing to the citizens of India, social and economic justice and for implementing the directive principles of State policy. Though the attitude of the Supreme Court, regarding the inter relations of the fundamental rights and the directive principles was strictly technical at the commencement of the constitution, later on the Supreme Court accepted the principle of harmonious construction and upheld legislation implementing the directive principles, whenever it was possible for the Court to do so. This was made clear by the Supreme Court in *Chandra Bhavan case.*

In India the concept of social and economic justice is linked with planning. The programmes undertaken in the various plans aimed at securing social and economic justice. The first Five Year Plan primarily aimed at initiating the process of a planned economic development. The terms of reference to the Planning Commission specifically mentioned Three directive principles of state policy viz. 1) that citizens, men and women equally have the right to an adequate means of livelihood; (2) that the ownership and control of the material resources of the country are so distributed as best to subserve the common good, and (3) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. In the second Five Year Plan the socialistic pattern of society was accepted as the ideal and agriculture was given a high priority. At the same time, it was realised that for the capital enrichment of Indian economy, industrialisation was also essential. It was speci-

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19. 1970 2 S. C. R. 600.

fically stated in the draft outline of the plan that the pattern of development and structure of socio-economic relations should be so planned that they result not only in appreciable increase in national income and employment but also in greater equality in incomes and wealth. The third Five Year Plan defined the task of next three plans as follows:—

(i) to lay down foundations of self-reliant economic growth,

(ii) to provide avenues and opportunities for employment to all those who seek it, and

(iii) to ensure a minimum level of lifiing to every family in the country while narrowing down the eeconomic and social disparities.

The Fourth Five Year Plan sought to consolidate and carry forward the achievements of the three earlier plans. In this plan greater emphasis has been laid on the problems of weaker sections and social integration of the Scheduled Castes with rural economy. It also aimed at reduction of concentration and a wider diffusion of wealth, income and power, social services like free and compulsory education, vocationalisation of education at secondary stage family planning and medical services at the primary health centre have received due priority.

Various laws were passed to give concrete shape to the ideas in the various plans. Some of these laws were found to be inconsistent with the provisions in the Constitution relating to fundamental rights. Hence Parliamment amended the Constitution for the purpose of saving such laws. It is true that there is no mention of Planning Commission in the Constitution. It appears to be a lacunca. But, the Parliament accepted these plans, probably without realising the difficulties in the way. Some of these difficulties were pointed out by G. Myrdal in his Asian Drama. He observes as follows:--

> "Economic planning in Western countries was thus a consequence of industrialisation and social and economic changes related t› the emergence of a mature industrial society. In under developed countries of South Asia Planning is instead applied before or at a very early age of industrialisation. Furthermore, in South Asia, planning in principle and in approach is thought to precede organised acts of control and interference with markets. Planning cannot be left to grow pragmatically as in the Western countries by a 'natural' process (however different from the 'natural' economic processes of the classical economists) through cumulative and *ad hoc* adjustments caused by gradual compromise between the interest groups in the national community, and drive forward by necessity to reach some reasonable coordination of all the existing private interferences and public policies. Planning in South Asia is thus not the result of development, but is employed to foster development. It is envisaged as a precondition-indeed is motivated by the assumption that spontaneous development cannot be expected. The under developed countries are thus compelled to undertake what in the light of Western history appears to be a short cut".[20]

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20. P. 738-39.

The problem of social justice is thus linked with the planning programmes which as pointed out by G. Mrydal is a short cut. Short cuts are not always safe roads; they are strewn with stone and thorns. These are the obstacles in the path of Parliament and consequently in the path of judiciary also Moreover the Constitution was adopted by a generation of Indians who were brought up in liberal traditions, while the goal of the Constitution is to create a society where social and economic justice will prevail along with equality. Considering all these limitations, it may be stated that in India something has been achieved in the realm of social and economic justice. Much more is still to be achieved. It is a long journey, probably a journey on an endless path. But we have to march on. In this journey, we will have to reconsider our constitutional framework if necessary. We may be required to reconsider our population policy, our economic priorities. We may be asked to accept new ideas of jurisprudence. Our aim is casteless and class-less, society which is the concrete form of the concept of social and economic justice. We must be equipped with proper tools and proper spirit for achieving the goal. The proper spirit is the spirit of service. May I conclude these lectures with the inspiring words of Jawaharlal Nehru who may be rightly described as the architect of modern India.

"The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest men of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering so long work will not be ever".