PART - III.

Chapter-I

NATURE AND SCOPE - PROBLEMS AND THEIR DIFFERENT APPROACHES TO SOLUTION.

8.1 Social problems guide legal evolution and public interest serving laws are the fundamental agents of legal development. Either these laws come through legislations or judge-made laws. Since laws are the yardstick of civilization, they should develop in a normal course of action without any let or hindrances and the people should have access to justice whereas the law is a subject of the ruling class and it is a combination of the rules and behaviour sanctioned by the authority of the State and as a result it is developing the relationships and procedures suitable and beneficial to the ruling parties. Accordingly, it appears that the law can afford benefit to the masses only in compatible with the policies of the ruling class. Marxism follows that 'law can never be higher than the economic order'. In India though the Constitution was enacted for 'we the people of India...' but in reality the justice is out of hands of the common poor masses. Suave assumances for law making to benefit the weaker sections have ultimately proved futile. There is no application of rigid enforcement of the beneficial laws already enacted by the executive authorities. Majority
of the sufferers are away from the access to courts for want of remedial justice, due to, inter alia, their ignorance, illiteracy, chronic penury, procedural complexities in approaching the courts. In the circumstances, the emerging need is to expand the access to justice. The history of the law is a history of the effort to mould legal institutions and doctrines to meet the felt necessities of each period in the nation's development. In our country, time is over-ripe for narrowing the gaps between the ideals of equal access to justice and the availability thereof. The scope of rendering justice in the public interest should not be restricted by (a) the traditional reluctance of the judges to disclose or discuss openly the ideological assumption underlying the administration of the law and (b) that the acceptance of the separation of power and the consequent reluctance to compete with the legislator in the application of legal policy.

8.2. The concept of public interest and the policy thereof in English common law may throw some light in the relevant discussions. We find that in Egerton -Vs- Brownlow, 113 it was decided by the House of Lords that

113. (1853) 4 HLC 1,256
the public policy is a principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good.... In terms of social, moral or political principles, the cases may be classed as follows:

a) the principle of religious tolerance be recognised Bowman Vs Secular Society\(^{114}\) in regard to secular movements.

b) the integrity of political life be protected - Egerton Vs Brownlow and Parkinson Vs College Ambulance which declared that the purchase of honours be illegal,

c) the degree to which intercourse with enemies be prohibited in War - Rodriguez Vs Speyer\(^{115}\) dissolution of Partnership for enemy character of one of the partners.

d) the court will not allow a criminal or his representative to reap by the judgment of the court the fruits of his crime (1937) 2 KB 197,\(^{116}\)

e) the extent to which the sanctity of marriage prevented freedom of action - No dissolubility unless decreed beyond doubt.

\(^{114}\) (1917) AC 406
\(^{115}\) (1919) AC 116
\(^{116}\) (1937) 2 KB 197
Lord Atkin was of the view that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable.

Lord Wright said that certain rules of public policy have to be moulded to suit new conditions of a changing world.

2) Validity of covenants in restraint of trade has been developed in Norden felts' Case - elaborated in their principles -

1A) restricted covenants from the sale of business goodwill are valid;

1B) restrictive covenants causing embargo on the freedom of labour held void.

Lord Shaw in Morris-Vs-Saxelby

iiiC) Freedom of contract (agreement relating to production prices and restrictions of economic activity) prevails over freedom of trade, unless it amounts to an excessively severe restriction of freedom of movement - Ref. Evans -Vs- Health Cote, Salt Case English Hop Growers -Vs-Dereng

The above restraints must be reasonable towards the public.

117. (1916) 1 AC 688 119. (1914) AC 461
118. (1918) 1 KB 418 120. (1928) 2 KB 174
8.3. The extent of economic control over private and group interest has been extended to legislative control in the other world.

a) The public policy has assumed new significance as a possible instrument of control over the disciplinary and quasi-judicial activities of groups. The tribunal may be the final arbiter on questions of fact but not of law which are on Courts to decide.

Rookes -Vs- Barnard\[121\] - Trade Association and Unions must be reserved to public authority.

The Court may prefer to express now ethical or social principles in terms of general equity.

b) Lord Wright "Precedents" \[122\] 1942, 92 (1942) observed -

"Law is not an end in itself. It is a part in the system of Government of the nation in which it functions, and it has to justify itself by its ability to subserve the ends of the Government, that is, to help promote the ordered existence of the nation and the good life of the people".

c) The decision of the House of Lords in Allen -Vs- Flood \[123\] to the Harris Tweed Case \[124\] and Rookes -Vs- Barnar\[125\] show the influence of changing legislative

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121. 1964 AC 1129  
122. 4 Taronto LJ 247, 271-72  
123. 1892 AC 25  
124. 1942 AC 435  
125. 1964 AC 1129 (1942)
and public opinion on judicial evolution as regards
the rights of collective bargaining.

8.4 The policies of the State should disperse
social services, public works, unemployment insurance,
pension among other services essential to the life of
the community.

a) Friedman analyses that law is expected to
safeguard the public interest by reasonable balance between
the forces with the following among others.

b) It should ensure to equal distribution of scarce
resources and with the emergence of the State as Social
service instrument, the trend of the law has been to
avoid, reduce or discard the doctrine of sovereign immunity.

c) The right of group organisation in the pursuit
of political, economic or cultural or social principles
is now fully recognised and the individual interests get
reconciled with the protection of the group action. In
Nokes-Vs-Doncaster, Amalgamated Collieries refused to
include, in an order for the amalgamation of Companies,
the transfer of the contract of personal service
Sometimes judges deliberately refuse to compel
the legislators to act.

126. (1940) AC 1014
d) In America, the principle of racial equality had become a major facet of legal policy. Civil Rights Act of 1964 and 65 enunciated constitutional principles of equality of races in terms of voting rights, housing, transportation, education and economic rights and so also in Great Britain by the Race Relations Act, 1965. Only in South Africa which is now emerging to be an independent democratic country on referendum and to a lesser extent in Portugal the White supremacy was prevalent.

8.5. In India, prior to the Constitution, the English tradition of interpretation of statutes was followed. But later, with the inclusion of the United Kingdom in the European Economic Community and ratification by her of the European Convention on Human Rights, a new approach to the interpretation of statutes envisaging a broad construction of Constitutional provision came into being. In such interpretation, Lord Denning stressed the need to look to the purpose or intent. The U.S. Supreme Court has invoked the general and wide words of the American Declaration of Independence and of the Fourteenth Amendment to develop the constitutional value far beyond letters of the Constitution.
8.6 In France, the French Constitution invoked the Declaration of Rights of Man and Citizen (1789) to uphold democracy, liberty and equality in a decision in July, 1971. In India, the Supreme Court was also similarly impressed to decide the questions of the Constitution on non-enforceable rights as in Kesavananda Bharati's Case and Indira Gandhi -Vs- Raj Narain. The decision of the majority in the former Case that there are certain basic features (basic structure) of the Constitution which are necessary to preserve its identity and which are not amendable to amendments under Art 368 of the Constitution was supported by reference, inter-alia, to the Preamble of the Constitution. The Preamble and certain other parts of the Constitution embodied the basic features or the essential structure of the Constitution, the majority holding that these basic features or the basic structure of the Constitution cannot be changed by resorting to Constitutional amendments and that means that an amendment contrary to these basic features would be unconstitutional. When constitutional values have to be preserved by judicial decisions, the basic principles embodied in these so-called non-enforceable provision will become the basis of these decisions.

126. AIR 1975 SC 2299
8.7. Individual law making in the background of the Indian Constitutional law necessarily refers to the law making by the Supreme Court of India and it is to determine all questions affecting interpretation, application, and operation of the Constitution as being the highest Court unifying the constitutional law of the country and transmitting to successive generations the people's aspirations and expectations. There should be no acrimony or conflict in between the three organs of the State and all should work in trust and harmony as being jointly responsible for ensuring the dynamic process in fulfilling the peoples wishes through the effective implementation of the constitutional objectives and directives. The Western concept of judicial review in adversarial situations associated with the doctrine of checks and balances and separation of powers has limited application in India.

8.8. We can concur with the view that in a democratic country, the processes of administration, legislation and adjudication are more clearly distinct than in a totalitarian Society, where legislative and administrative procedures tend to flow in the same
direction and the judges are merely the executants of the political ideology of the Government. Whereas in a Parliamentary form of Government as in England the Courts apply the prescriptions of the legislatures or the generalised principles deduced from a series of precedents to the individual disputes.

8.9. Sometimes, the Courts are found confused and hesitant in reforming the Laws in the face of legislative inactions but it is now common place that the courts not only of common law jurisdictions but also those which have codified statutory laws as their base, participate in the law making process by filling gaps in the statutory and decisional rules. In cases like Bosor -Vs- Musician's Union 127 or Rookes -Vs-Barnard 128 it was observed by the House of Lords that the Courts could easily carryout the reform liability of occupiers. Law was changed by legislative reform in questions of joint liability of tort feasors, the immunity of public authorities, firm liability for negligence, the rights of married women to occupancy of a matrimonial home.

127. (1956) AC 104
128-. (1964) AC 1129
8.10. The Courts by their decisions are required to adjust rights and liabilities in accordance with the changing canons of public policy; Chief Justice Traynov like Justice Bristol is convinced of the need for major and continuous participation of courts in the law making and law reforming processes. In Brown Vs Board of Education the Supreme Court recommended the implementation of its decision to the District Courts prescribing guide line that in fashioning and effectuating the decrees, the Courts will be guided by equitable principles. Further in Baker Vs Carr the Supreme Court went further and held the allegations of Tennesseans, alleging that they have been deprived of federal constitutional rights by legislation classifying Voters with representations in the General Assembly, to be justiciable and denial of equal protection guaranteed by the Constitution.

8.11. In democratic countries there is need to balance legal stability and certainty against development of law as an instrument of Social evolution and Judges should not disturb by their independence the modern progressive legislative trend through a rigid interpretation of the Constitution and rather the Courts should hold checks in

110. 347 US 483 (1954)
111. 349 VS (1955)
112. 369 US 186 (1962)
matters of violations of natural justice, unreasonableness, ultra-vires etc. through intelligent guessing of intention.

a) Judicial restraint in the invalidation of the statutes and Acts of the Government is required to be observed by the Courts and they should be more positive and constructive in determination of the statutes and precedents applicable to their decisions.

b) The growing use of law as an instrument of social control and policy by the people of the land through public interest litigations has made them more aware from the semi-conscious stages to the conscious one helping the State to function towards fulfilment of its Constitutional objectives.

8.12. It was noticed earlier that Article 141 makes the Supreme Court's decision binding on all Courts in India and Article 142 makes its orders and decrees enforceable throughout India "in such manner as may be prescribed by or under any law made by Parliament". Article 13 provides that laws inconsistent with the fundamental rights are void and Article 32 provides for enforcement of such fundamental rights through Supreme Court besides similar provisions under Article 226 of the Constitution. Directive Principles
as provided in the Constitution are fundamental in the
governance of the Country and for which it is the duty
of the State to apply through laws (Articles 37 of the
Constitution). The Courts as part of the State are required
to observe whether a law or even executive action confirms
to or is consistent with Directive Principles of the
Constitution, even though they are not judicially enforceable. The idea being that to enable the State to perform
the Constitutional duty in the best possible manner the
Courts having constitutional Writ jurisdiction are requi­
red to feed compliance with the objectives of the
Constitution through their declarations in line with the
Directives of the Constitution like declaratory judgment
in Public Law in the Anglo American law which is legally
binding even though not enforceable in itself. This is
an alternative approach to legal reform. Sir IVOR Jennings
pointed to the importance of declaratory judgment in his
book on it. The attempt to simplification and moderni­
sation of law compatible with the requirement of law is
the task of the Law Commission. Representative Law suits
or Social action litigation e.g., action against a local
authority or the State brought on behalf of the people
affected, without going into the rigid procedural
formalities as applicable in case of adversarial cases, and the Writ Courts' declaration on it in compliance with directives of the Constitution, is now a great leap forward in ameliorating the sufferings to neglected mass.

8.13. Judges should always see to meet their Constitutional obligations that how best the social and economic objectives of the Constitution be advised and that too after the Forty Second amendment, which extended the scope of Article 31C to include this whole part on Directive Principles and not merely 39(b) or (c). As we are aware that the Twenty Fifth amendment introduced Article 31(C) and provided, inter-alia, that the State policy to give effect to provisions 39(b) or (c) dealing with social and economic justice could not be questioned in any court. In Kesavanda Bharati's case a constructive view was adopted upholding the validity of the amendments considered in Golak Nath's Case, and further it held unconstitutional the part of the Article 31C which took away the power of judicial review by the Court. Later in Minerva Mills Ltd. - Vs Union of India113 where Bhagwati J dissented, it was held that any of the fundamental rights

113. AIR 1980 SC 1789
rights could not be taken away by amendments and that the means to achieve the objectives contained in the Directive Principles must be pure. Here the petitioners whose firms were taken by the State on the authority of the Sick Textile Undertakings (Nationalisation) Act, 1974 and under an order made in pursuance of the Industries (Development and Regulation) Act, 1957, challenged the constitutional validity of the 42nd Amendment on the ground that it infringed their right to freedom of business and trade. The Court affirmed the limited nature of the amending power of the Parliament, and the basic structure test in that regard enunciated in Kesavananda Bharati's case was agreed upon. This really meant that a Constitutional amendment which damaged the basic structure of the Constitution by the total exclusion of challenge to any law on the ground that it was inconsistent with or took away or abridged any fundamental rights, was beyond the amending power, even if the law was forgiving effect to the policy of the State towards securing directive principles.

8.14. In the above case, the majority emphasised that directive principles were not subordinate to fundamental rights and that both were at par with each other and termed
fundamental rights as "Mark of the Constitution". Although in effect, it treated the fundamental rights as being superior to the directive principles and failed to strike a balance on the 'parity theory' evolved by them and thus it stands self contradictory in effect when it avows preservation and promotion of fundamental rights at any cost even by frustrating the implementation of directive principles in some cases. It is all the more unconstitution- onal and against the principles of equity, and justice. Justice Bhagwati pointed out that the majority in the above case overlooked that it is only in the framework of the socio-economic structure envisaged by directive principles that fundamental rights could have real context and are intended to operate.

8.15. Further, it failed to trace the real identity of the Constitution of India in its philosophical back- ground, and what it held was the damage or destruction of the basic structure of the Constitution and not its adap- tation to new social and economic conditions in the light of the philosophy of the Constitution. Here the subs- tantive ideas e.g., secularism, democracy, socialism, sovereignty, republicanism, social and economic justice, unity in diversity, personal freedom etc. ought to be the real test for determining whether an amendment is
consistent with the existence or identity of the constitution. In the context of the right to equity guaranteed by Article 14 of the Constitution, Bhagat J. was of the view that "a law for giving effect to social and economic justice in pursuance of directive principles might conflict with a formal and doctrinaire view of "equality before the law guaranteed and yet it would always conform to the principle of equality before the law in its total magnitude and dimension, because this guarantee did not speak of mere formal equality not embodied in the concept of real and substantive equality which struck at inequalities arising on account of vast social and economic differentials and was consequently an essential ingredient of social and economic justice".

8.16. On some aspects of Indian social justice, I quote below some observations of Hon'ble Justice V.R. Krishna Iyer -

"It is likely that in any discussion of social justice, however academic, the focus will be turned on national planning and poverty, the dynamics of development and the fossil techniques of the Constitutional Triumvirate, the politics of corruption, and white collar criminals (political, professional and commercial)
performance audit of social welfare legislation, legislative slow motion and people's cause, bureaucratic betrayal through non-implementation justice in the book and the like. The spectrum of social justice spreads out beyond the jural canvas into the politico-economic and socio-cultural. However, my emphasis is essentially on the Justice System although scattered light may fall on cousin subjects.

Law and life are symbiotic and the realities of the latter mould the processes of the former. At this stage, I will abbreviate my observations. Social Justice to the millions to wipe every tear from every eye - will be subverted by soft justice to the millionaires. DR. Ambedkar's warning to the Constituent Assembly makes us feel guilty.

By independence we have lost the excuse of blaming the British for anything going wrong. If hereafter things go wrong, we will have nobody to blame except ourselves.

The obvious inadequancies of Indian Justice have received public attention and, occasionally, aroused popular consternation, and judicial fatalism. The colossal backlog of cases in Courts is one such; the
expensiveness of litigation, with a pyramid-style processional institution is another. The time consuming complexities of adjectival law—the handmaid behaving like a mistress—diverting judicial attention from the justice of the case to procedural irrelevancies are also notorious. Judicial action whittling down welfare projects is an accusation on which legal historians will pronounce. Anyway, for a choice of the great makers of modern India judges have offered no competition—although politicians have been included and excluded by turns depending on who pro-tempore wields the Sceptre! (O Man, Proud Man, dressed in a brief little authority!).

On the executive side those who care to know, know that human problems are drowned in heaps and files and delayed orders marked by callous correctness. Indifference to the immediate solution of human injustice or community crisis is characteristic of fossil secretariat fastidiousness. What is more calamitous is that pharisaic formalism obscures a clearer, creative curative view of the little Indian and his social maladies, which is his desideratum.

The Parliamentary process—a British transplant
- is subtly alienated from the people. Representatives, elected periodically on adult franchise, are expected to be sensitized and attuned to the crying needs of indigent communities and even individual miseries. In a rule-of-law country, back-up law for executive action is a requisite; and inquest into administrative injustice is also a parliamentary function. Therefore benignant programmes, developmental schemes and social welfare projects require broad legislative sanction and performance audit by committees of members. These aspects emphasise the pervasive importance of thoughtful legislation geared to social justice in its manifold aspects and constant vigilance about effective execution. And yet two things are well known about legislative blundering. Law is never made in time or at all where it is badly needed. And where it is made, it is so lacunously drafted - unwittingly, let us assume that while the small fish get caught, the big sharks escape through the meshes. That is what I call soft justice aptly put by an anonymous poet (quoted by me at the beginning).

The law locks up both man and woman.
Who steals the goose from off the common
But lets the greater felon loose
Who steals the common from the goose.
And about drafting shortcomings leading to legislative fiasco, another jingle leading to British Parliamentary drafting on which our system is closely modelled, is a fitting comment:

I am the Parliamentary Draftsman
I compose the Country's laws,
Aid of half the litigation
I am undoubtedly the cause. *

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"We, in India, since 1947 have had a dynamic, down-to-earth, people-oriented conceptualisation of social justice and socialist expressions, with an egalitarian slant, anti-feudal, anti-exploitative bias and an urgent summons for action with hints of Future Shock Versus Human Tomorrow. The tragic fact is that great words and sour deeds, the claws of the past and the caresses of the present, the periodic electoral avalanches, the
phrase mongering parliamentarian exercises and the logomachies justice processes, have hidden, through their cumulative ballyhoo, the near bankrupt balance sheet of the nation in terms of distributive justice, basic heads of the largest and lowliest human segments and the distressing distance between the rags and the riches. The contradiction or dilemma, so far as my principal concern in these lectures compels me, related to the limited why and how of the failure of the three instrumentalities. The real answers will arise only if we lift the veil behind the curtain, without fear or favour vis-a-vis the elite, the tycoon and the latifundist and with total commitment to that ubiquitous species found on Indian Earth whom Ghandhiji symbolised when he desperately wrote in Young India.

There is on the face of the earth no other country that has the problem that India has of Chronic starvation and slow death - a process of dehumanisation. The solution must, therefore, be original. In trying to find it, we must discover the cause of the tremendous tragedy". *

*Supra note - V.R.Krishna Iyer - Page - 40
8.17. In this connection, I feel inclined to bring to light the translated version of a letter written at Shelaidah by Rabindra Nath Tagore as back as May 10, 1893 carrying a feeling of socialist humanism in him.

"Here come black, swollen masses of cloud; they soak up the golden sun shine, from the scene in front of me like great pads of blotting paper. Rain must be near, for the breeze feels moist and tearful.

Over there, on the sky piercing peaks of Simla, you will find it hard to realise exactly what an important event the coming of the clouds is here, or how many are anxiously looking up to the sky, hailing their advent.

I feel a great tenderness for these peasant folk - our ryots- big, helpless, infantile children of Providence, who must have food brought to their very lips or they are undone, when the breasts of Mother Earth dry up they are at a loss what to do and can only cry. But no sooner is their hunger satisfied than they forget all their past sufferings.

I know not whether the socialistic ideal of a more equal distribution of wealth is attainable, but
if not, the dispensation of Providence is indeed cruel and man a truly unfortunate creature. For if in this world misery must exist, so be it; but let some little loopholes, some glimpse of positivity at least, be left, which may serve to urge the nobler portion of humanity to hope and struggle unceasingly for its alleviation.

They say a terribly hard thing who assert that the division of the World's production to afford each one a mouthful of food, a bit of clothing, is only an utopian dream. All these social problems are hard indeed; Fate has allowed humanity such a pitifully meagre coverlet, that in pulling it over one part of the world, another has to be left bare. In allaying our poverty we lose our wealth, and with this wealth what a world of grace and beauty and power is lost to us.

But the sun shines forth again, although the clouds are still banked up in the West.

* Rabindra Nath Tagore - Glimpses of Bengal Pages 101-104
Now, the traditional theory of 'laissez faire' has been given up by the State and it has now become a 'Welfare State'. Because of this philosophy governmental functions have increased with discretionary powers in accordance with policy or expediency avowed by the State. Formalistic approach to things for justice should not be given dominance over the realistic approach for common benefit of the masses. The public interest litigation for the protection of the weaker sections of the people in India can only serve the humanitarian concept of the protection of the weaker sections of the people. It should be free from political intervention, the higher aspiration of the career makers and the rigid and closed interpretation of the laws rather it should weigh heavily the outcome of Social relief that could be ensured with the justice having a broad and liberalised outlook towards the requirement of 'standing', 'locus standi' 'proper party plaintiff' and 'aggrieved person' etc. that deters the way of implementing the constitutional objectives.

It is already said that the Science of Law has its roots in Greek Philosophy. In their ideology, the legal control is not different from other agencies of the social control and it used to mean ethical and commercial custom including law in general, a rule of law and social control. They held that the end of law was an orderly maintenance of an idealised social status-quo.

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