Chapter-III

HUMAN RIGHTS AND CONSTITUTION OF INDIA
3.1 Introduction

A Constitution means a document having a special legal sanctity which sets out the framework and the principle functions of the organs of the government of state and declares the principles governing the operation of those organs. Constitution is not to be construed as a mere law, but as the machinery by which laws are made. A Constitution is a living' and organic thing which, of all instruments, has the greatest claim to be construed broadly and liberally. [1] Constitution of India is a suprema lex. The Constitution of India was drafted by the Constituent Assembly which had its first meeting on 9th December 1946 and finally the Constitution was adopted by the people of India on 26 November, 1949. And it came into force w.e.f. 26 January, 1950. During this whole period the Constituent Assembly took serious note of various national as well as international developments, particularly in the area of human rights. The recognition of human rights had started taking place, one may say, from the Bill of Rights of 1688 followed by American Declaration of Independence of 1766 and French Declaration of Independence in 1789. Many anti-slavery laws were also enacted in the 19th Century. On 10th December, 1948, when the Constitution of India was in the making, the General Assembly proclaimed and adopted the Universal Declaration of Human Rights, which surely influenced the framing of India's Constitution. Viewed from the Indian standpoint, human rights have been synthesized, as it were, into an integrated fabric by the preambular promises and various constitutional clauses of the National Charter of 1950. [2]

In fact, the Indian desire for civil and political rights was very much implicit in the formation of Indian National Congress in the year 1885 in the words of Austin: “Indian wanted the same rights and privileges that Britisher masters
enjoyed in India and that Britain's had among them in England ... and wanted to end the discrimination ... of colonial regime. [3]

Perhaps the first explicit demand for fundamental rights appeared in The Constitution of India Bill, 1895 which was issued under the inspiration of Lokmanya Bal Gangadhar Tilak. The demand for declaration of fundamental rights in the future Constitution of India gained impetus at the hands of political leaders with the passage of time. The Congress Resolution of 1929 also emphasised the theme of socio-economic reconstruction when it declared: “The great poverty and misery of the Indian people are due, not only to foreign exploitation in India but also to the economic structure of the society, which the alien rulers support so that their exploitation may continue. In order, therefore, to remove this poverty and misery and to ameliorate the condition of Indian masses, it is essential to make revolutionary changes in the present economic and social structure of society and to remove the gross inequalities. [4]

After the Karachi Resolution of 1931, the Sapru Committee in its "Constitutional Proposals" recommended that a declaration of fundamental rights in the Indian Constitution was absolutely necessary. It envisaged two sets of fundamental rights—one justifiable and the other non-justifiable. It was left to the constitution framing body to make a division between them.

On 13 December 1946, Jawaharlal Nehru, moved the historic Objectives Resolution in the Constituent Assembly which was adopted by it on 22 January 1947. The Objectives Resolution provided:

(1) This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;
(2) WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all; and

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

(4) WHEREIN all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and

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

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

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

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

This Resolution formed the basis for the incorporation of various human rights
values not only in various provisions of the Constitution but also in its
preamble. Nehru in' his concluding speech remarked that the Assembly was to
free India through a new Constitution, to feed the starving people and clothes,
the naked masses, and to give every Indian fullest opportunity to develop
himself according to his capacity. In fact, Nehru had warned the Constituent
Assembly in the following words: “If India cannot solve this problem soon, all
our paper Constitution will become useless and purposeless ...If India goes
down, all will go down; if India thrives, all will thrive, and if India lives all live
...”

Dr. S. Radhakrishnan, also emphasized that there must be a socio-economic
revolution not only to satisfy the fundamental needs of a common man but to
bring about a fundamental change in the structure of Indian society.

Thus, it is evident that though the Constituent Assembly was mainly
concerned with the welfare of the masses, yet there was considerable emphasis
on the ameliorative role of the State. The tryst to make the India's Constitution
a viable instrument of the Indian People's salvation, and to secure all persons
basic human rights, is implicit from the preamble promise, fundamental rights,
directive principles, and various other provisions of the Constitution. Most of
the articles of the Universal Declaration of Human Rights, 1948 and two
International Covenants are building blocks of any Indian Constitutional rights.
3.2 Preamble

The words of the preamble to the Constitution of India have been taken from clauses 1, 5 and 6 of the Objectives Resolution. The preamble to the Constitution reads:

WE, THE PEOPLE OF INDIA, were having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

In Our Constituent Assembly this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Thus, the preamble concisely sets out quintessence of human rights which represents the aspiration of the people, who have established the Constitution. The preamble to the Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the preamble.

The word 'sovereign' emphasizes that India is no more dependent upon any third outside agency or authority. It means that both internally and externally India is sovereign. India has been forthright and consistent in upholding the tradition of "self determination". The history of Indian freedom struggle for
total independence and self-determination from colonialism in itself provides the genesis of India's stand for self-determination of peoples and nations from colonial subjugation and foreign domination in favour of total independence-political, economic, social and cultural. It has been the position of India ever since its independence that adherence to self-determination is co-existent with the principle of sovereign equality. This is in consonance with article 1 of the International Covenant on Civil and Political Rights, 1966.

The word 'socialist' was added in the preamble by the Constitution (Forty second) Amendment Act, 1976. Although the amendment does not add anything new to the already existing constitutional commitment to the goal of socio-economic justice, it is significant in that it emphasizes the urgency of the achievement of the goals of socialism. In Sanjeev Coke Mfg. Co. v Bharat Coking Coal Ltd.,[5] Justice Chinnappa Reddy observed: "Though the word "Socialism" was introduced into the Preamble by late amendment of the Constitution, the Socialism has always been the goal is evident from Directive Principles of State Policy. The amendment was only to emphasize the urgency". [6] At different times, it has been emphasized that the preamble be amended to mention the Objective of socialism in it. B.R. Shukla, in this regard observed: "A developing country like India or any other developing country in the world cannot be emancipated from the centuries long poverty and ignorance...unless socialism is accepted as a goal. Therefore, if this goal was not clearly spelt out in the Constitution, although in quintessence it was contained, it is our duty to make it unmistakably clear to everybody in this country that socialism is the only system wherein lies the emancipation of the people from centuries old shackles of poverty and ignorance and that no other system can deliver the goods".

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The Constitution (Forty-fifth) Amendment Bill, 1975 sought to define the expression "socialist" to mean "a republic in which there is freedom from all forms of exploitation, social, political and economic", but the amendment was not accepted by the Council of States.

The implication of the introduction of the word "socialist", which has now become the centre of the hopes and aspirations of the people a beacon of guide and inspire all that is enshrined in the articles of the Constitution, is clearly to set up a "vibrant throbbing socialist welfare society" in the place of a "feudal exploited society". The word "socialist" read with articles 14 and 16 of the Constitution has enabled the Court to deduce fundamental right to "equal pay for equal work". The same word, when read with article 14 enables court to strike down a statute which failed to achieve the socialist goal to the fullest extent. On the other hand, it enables the Courts to uphold legislations which are aimed to remove economic inequalities; to provide a decent standard of living to the working people and to protect the interests of weaker sections of the society. All the directive principles of state policy in Part IV of the Constitution are aimed at achieving this objective of socialism.

The word "secular" was also added in the preamble by the Constitution (Forty-second) Amendment Act, 1976. This expression highlights that the State has no religion of its own and all persons shall have the right to profess, practice and propagate religion of their own and they shall be equally entitled to freedom of conscience. Before this change, the liberty of "belief, faith and worship" was promised in the preamble. This has been further guaranteed by the fundamental rights in articles 25 to 28. Thus, secularism is given pride of place III the Constitution. This is in consonance with the spirit of article 18 of the Universal Declaration of Human Rights, 1948 and also article 18 of the International Covenant on Civil and Political Rights, 1966. If the Constitution
requires the State to be secular in thought and action, the same requirement
attaches to political parties as well. The Constitution does not recognize, it
does not permit, mixing religion and State power. Both must be kept apart.
This is the Constitutional injunction. [9] The Constitution (Eightieth
Amendment) Bill, 1993 was introduced in the Parliament on 25.7.93 for
separating the religion from politics.

Secularism is thus more than a passive attitude of religious tolerance. It is
positive concept of equal treatment of all religions. The concept of the secular
state is, essential for successful working of the democratic form of
government. There can be no democracy if anti-secular forces are allowed to
work dividing followers of different religious faith flying at each other's
throats. The constitutional culture and political morality based on healthy
conventions are the fruitful soil to nurture and for sustained growth of the
federal institutions like ours set down by the Constitution. Secularism enables
the people to see the imperative requirements for human progress in all aspects
and cultural and social advancement and indeed the human survival itself. It
also not only improves the material conditions of human life, but also liberates
human spirit from bondage of ignorance, injustice and oppressive exploitation.

The term "democratic" indicates that the Constitution has established a
form of government which gets its authority from the will of the people.
Justice, Liberty, Equality and Fraternity, which are essential characteristics of a
democracy, are declared in the preamble to the Constitution. The expression
"democratic republic" in the preamble assures the people of the right of equal
participation in the polity. The quality of democracy envisaged by the
preamble does not only secure the equality of opportunity but of status as well,
to all citizens.[10] The goal of every civilized democratic society is
maximization of human welfare and happiness which would be best served if the human rights of the people are protected in the real sense.

The preamble also contains the promise of promoting "Fraternity assuring the dignity of the individual and unity and integrity of the Nation". The words "and integrity" after unity were also added by the Constitution (Forty-second) Amendment Act, 1976. "Fraternity" means brotherhood, the promotion of which is absolutely essential for our country, which is composed of many races, languages and religions and which has so many disruptive forces of regionalism, communalism and linguistic. It is also necessary to emphasize and re-emphasize that the unity and integrity of India can be preserved only by a spirit of brotherhood. [11] The spirit of brotherhood assuring the dignity of the individual and unity and integrity of the nation is sought to be achieved by abolition of untouchability, abolition of titles, prohibition of traffic in human-beings and many other provisions in the fundamental rights. Having used the words "liberty and equality", the framers of the Constitution felt that the use of the word "Fraternity" in the Indian context would be more suitable and appropriate, particularly when they were thinking of a social order in which the human rights of all the people were to be respected and protected. It was not only to raise the status of the many that were looked down on by the privileged castes about also to bring about harmony and understanding between various segments of the Indian society so that the country appeared to be one for all intents and purposes.[12]

It must be re-emphasized here that the preamble to the Indian Constitution assures all among other things "dignity of the individual". Human rights are part and parcel of human dignity. Individual dignity cannot be measured by single factor. It is the combination of all aspects—moral, economic, social and political etc. of life. Democracy starts with the basic tenet that every human
being is a moral entity, and, therefore, confers upon him both the freedom to develop his personality and the responsibility for doing so. It may also be mentioned that the importance of the concept of human "dignity" is well exemplified by its inclusion in the Universal Declaration of Human Rights, 1948. It mentions "dignity" twice in its preamble and thrice in its articles, i.e., in articles 1, 22 and 23.

Similarly, the International Covenant on Economic, Social and Cultural Rights, 1966 has mentioned it twice in its preamble and also in article 10. The International Covenant on Civil and Political Rights, 1966 also mentions "dignity" twice in its preamble. It is heartening to note that democracy, secularism, liberty, equality and dignity of the individual, as they appear in the preamble, are considered as the basic feature of the Indian Constitution which cannot be taken away or amended, to deprive them of their significance, even by a constitutional amendment. [13]

Thus, the preamble to the Constitution of India is aimed at to protect and promote the human rights of all the people. Various objectives of the preamble find their elaborate expression in various provisions of the fundamental rights and the directive principles respectively.

3.3 Fundamental Rights

Many of the human rights and freedoms in the Universal Declaration of Human Rights, 1948 and in the International Covenant on Civil and Political Rights, 1966, are guaranteed in Part III of the Indian Constitution as fundamental rights. Recognition of the human dignity of the individual is elevated to the status of the fundamental rights. In fact, Part III of the Constitution is characterized as the Magna Carta of India. [14] Part III embodies and sanctifies certain fundamental, individual, justifiable rights
which are primarily meant to protect and promote the basic human rights of the
time among the people and protect the individual against the state action by imposing negative
obligations. They are limitations upon all the powers of the government,
legislative as well executive and they are essential for the preservation of
human right. The declaration of fundamental rights in the Constitution serves
as reminder to the government in power that certain liberties and freedoms
are essential for by the people and assured to them by the fundamental law of the
land are to be respected. Speaking about the importance of fundamental rights,
Bhagwati, J. observed: “These fundamental rights represent the basic values
cherished by the people of this country (India) since the Vedic times and they
are calculated to protect the dignity of the individual and create conditions in
which every human being can develop his personality to the fullest extent. They weave a 'pattern of guarantees' on the basic structure of human rights,
and impose negative obligations on the State not to encroach on individual
liberty in the various dimensions”. [15]

However, absolute and unrestricted individual rights do not, and cannot exist
in any modern State. Unrestricted liberty and freedom tends to become license
and jeopardizes the liberty and freedom of others. The result would be chaos,
ruin anarchy. On the other hand, if the State has the absolute power to
determine the extent of personal liberty the result would be tyranny. Hence it is
very important to make a just balance between the conflicting Interests of the
individuals and the Society. The Constitution of India permits the reasonable
restrictions to be imposed on individual’s liberty in the interest of the society.
Thus, the State can limit the freedom and liberty of the individuals on those
grounds which are prescribed in the Constitution. Anything beyond that will be
ultra virus of the Constitution.
The fundamental rights are guaranteed in Part III of the Indian Constitution consisting of articles 12 to 35. Since these rights are a guarantee against "state action", they have to be distinguished from violation of such rights by the private parties. Private action is protected by the ordinary law of the land. Article 12 defines the expression "State" as under: "12 Definition. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of the India or under the control of the Government of India".

Thus, a very wide definition of the expression "State" has been given by article 12. The Supreme Court of India has further expanded the scope of the expression "State" by holding that any agency or instrumentality of the government will also be covered in the expression "other authorities" under article 12 of the Constitution.[30] The Supreme Court has held that with the changing role of the State from merely being a police state to a welfare state it is necessary to widen the scope of the expression "other authorities" in article 12 so as to include all those bodies which are, though not created by the Constitution or by the statute, yet are acting as agencies or instrumentalities of the government. Thus, the government may function through the legal device of corporation but by doing so the government cannot be allowed to play truant with the basic human rights of the people.

Article 13 makes any law inconsistent with or in derogation of the fundamental rights as void to the extent of inconsistency. In this regard it is relevant to note the language of article 13(2) which provides: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void".
This clause, in fact, provides for "judicial review" of all legislations in India. The main object of article 13 is to secure the paramount of the Constitution in regard to fundamental rights which represent the basic human rights of the people. This is done by prohibiting the State from making a law which either takes away totally or abrogates in part a fundamental right. However, article 13 does not apply to the constitutional amendment and the validity of the constitutional amendment cannot be challenged under article 13. But, of course, any constitutional amendment can be challenged if it violates the "basic structure" of the Constitution. And most of the human rights which find their reflection in Part III of the Indian Constitution such as right to equality, freedom and life constitute as the "basic structure" of the Constitution and hence they cannot be abrogated even by a constitutional amendment.

The fundamental rights as incorporated in Part III of the Constitution can be classified as under:

(a) Right to equality (Articles 14-18)
(b) Right to freedoms (Articles 19-22)
(c) Right against exploitation (Article 23-24)
(d) Right to freedom of religion (Articles 25-28)
(e) Cultural and educational rights (Articles 29-30)
(f) Right to Constitutional Remedies (Articles 32-35)

(a) Right to Equality

The right to equality is the faith and creed of our democratic republic; it forms the foundation of socio-economic justice. Article 14 embodies the idea of
equality as expressed in the preamble. The succeeding articles 15, 16, 17 and 18 lay down specific application of general rule laid down in article 14 of the Constitution. Article 14 provides: “The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India”.

This provision is like the provisions of articles 1 and 7 of the Universal Declaration of Human Rights, 1948. Articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights, 1966 also talk about equality among men and women. Articles 3 and 26 of the International Covenant on Civil and Political Rights also mention about the equal rights of men and women and equality before law and equal protection of laws respectively. The reference to the principles of equality and non-discrimination is also found in the Charter of United Nations. Other basic instruments adopted by the United Nations and specialized agencies which expressly provide for equality and the prevention of discrimination are, International Covenant on the Elimination of All Forms of Racial Discrimination; the International Covenant on the Suppression and Punishment of the Crime of Apartheid; the Discrimination (Employment and Occupation) Convention, 1958 (No. III) Of ILO; the Convention against Discrimination in Education of UNESCO, the Equal Remuneration Convention, 1951 (No. 100) of ILO and the Declaration on the Elimination of Discrimination against Women.

In article 14 of the Constitution the first expression "equality before the law" is somewhat negative concept implying the absence of any special privilege in favor of individuals and the equal subjection of all classes to the ordinary law. The other expression "equal protection of the laws" is more positive concept implying equality of treatment in equal circumstances. However, dominant idea common to both the expressions is that of equal justice. "Equality before
the laws" means that among equals the law should be equal and should be equally administered; that like should be treated alike. This can be equated with the Dicey's concept of "Rule of Law". In fact, the quintessence of our Constitution is the "Rule of Law". The executive officers of the State cannot interfere with the human rights of individuals unless they can point to same specific law which authorizes their acts. Rule of Law requires that no person shall be subjected to harsh, uncivilized or discriminatory treatment even when the Object is the securing of the paramount exigencies of law and order. [18]

The Supreme Court of India has rightly pointed out what Dicey also remarked:

"That the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within defined limits. The rule of law from this point of view means that decision should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizens should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is antithesis of a decision taken in accordance with the rule of law".[19]

Rule of law also imposes duty upon the State to protect the human rights of the people and take special measures to prevent and punish brutality by police methodology.

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades article 14 like a brooding omnipresence. Article 14 strikes at arbitrariness in State action and ensures fairness in equal treatment. [20]
The principle of equality as enshrined in the Constitution is not a mere guideline or recommendation but a strict and fundamental provision which imposes on the judiciary the obligation to find out if the legislative, executive and administrative authorities have respected the equality of all individuals. If the Court finds that this principle has been violated then to order that such laws, acts, ministerial decisions or administrative regulations involved should not be imposed. [21]

However, equal protection of the laws guaranteed by article 14 does not mean that all the laws must be general in character. In certain cases the States are obliged to adopt laws or take administrative measures which differentiate between individuals and they cannot be said to be discriminatory, for example, national tax legislation, which must necessarily differentiate between taxpayers according to their capital or income. Thus, article 14 permits reasonable classification but prohibits class legislation. It must always be remembered that the classification must not be arbitrary, artificial or evasive but must be based on some real and substantial distinction having rational relation with the object to be achieved.

Applying the general principle of equality, article 15 of the Indian Constitution specifically prohibits discrimination on grounds of religion, race, caste, sex or place of birth. It provides:

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

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of
birth or any of them, be subject to any disability, restriction or condition
with regard to-

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

(b) the use of wells, tanks, bathing ghats, roads and places of
public resort maintained wholly or partly out of State
funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any
special provision for women and children.

(4) Nothing in this article or in clause (2) 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.

This fundamental right is available to all the citizens. The corresponding
provision to article 15(1) of the Indian Constitution can be found in article 2 of
the Universal Declaration of Human Rights, 1948; article 2(1) of the
International Covenant on Civil and Political Rights, 1966 and article 2(2) of
the International Covenant on Economic; Social and Cultural Rights, 1966.

Once the principle of equality is accepted, it becomes impossible to
discriminate against any person or group of persons. The principle of non-
discrimination is based on equality and dignity. Discrimination can be said to
be the denial of the fundamental and universally accepted rights of all human
beings to persons or groups of persons who are excluded. It is submitted that
the various grounds of discrimination mentioned in various international
instruments' are not exhaustive. In the fast changing world, new grounds for
discrimination may also appear, for example, HIV/AIDS infection. Such new grounds have to be tackled carefully without violating the principle of equality.

Article 15(3) permits the state to make special provision for women (on the ground of sex) and children. This is so because women and children require special treatment on account of their very nature. Thus, the Constitution permits positive discrimination in the above two cases. The reason is that women's physical structure and the performance of maternal functions place her at a disadvantaged position. Maternity Benefit Act of 1961 has been enacted to provide maternity benefit to women employees.

Clause (4) of article 15 further permits the State to make special provision for the advancement of disadvantaged groups such as "socially and educationally backward classes" of citizens, "Scheduled Castes" or "Scheduled Tribes". In India this provision has been exploited by the politicians from time to time by making reservations in various educational and professional educational institutions. The issue of reservation saw many young students immolating in 1990 when the Government of India implemented the Mandal Commission Report granting 27% of reservation to the other backward classes. The real problem is in identifying the people who deserve the real benefit of this clause under the banner of "socially and educationally backward" classes. Also many castes are identified as such Scheduled Castes and Scheduled Tribes. So the real intended benefit does not reach the real deserving people.

Article 16 of the Indian Constitution aims at providing equality of opportunity to all citizens in matters of public employment. Article 16 provides:

16. Equality of opportunity in matters of employment:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. (2) No citizen
shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment of office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government or any local or other authority within, a State or Union Territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Article 21(2) of the Universal Declaration of Human Rights, 1948 also says that "everyone has the right to equal access to public services in his country".

Under the Indian Constitution, equality of opportunity is assured to the citizens in matters relating to employment or appointment to any office. Article 16(4) permits the State for making any provision for the reservation in appointments or posts in favour of any backward class of citizens which in the opinion of the State are not adequately represented in the services of the State. The issue of reservation has resulted in the conflict between the people and social milieu of
India. The politicians have been using reservation as a potent weapon for assuring their votes and paying little respect to the human rights. The Mandal Commission agitation in the year 1990 is a clear example of this. Thus, article 16 embodies the particular application of general rule of equality laid down in article 14 with special reference to appointment and employment under the State.

Article 17 of the Constitution abolishes untouchability and forbids its practice in any form. Article 17 provides:

Abolition of untouchability—"Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law.

Thus, the enforcement of any disability arising out of untouchability has been made an offence punishable in accordance with law. Article 17 is a very important and significant provision from the point of view of equality before the law. It guarantees social justice and dignity of man, the twin privileges which were denied to a vast section of Indian Society for centuries together. The word "untouchability" occurring in article 17 of the Constitution has not been used in literal or grammatical sense but as understood by practice developed historically in India. [23]

Article 17 of the Constitution is on the lines of the provision of article 2 of the Universal Declaration of Human Rights. Even article 15(2) of the Constitution helps in the eradication of untouchability as on the grounds of untouchability no person can be denied access to shops, public restaurants, hotels and places of entertainment or the use of wells, tanks, bathing ghats, roads and places of public resort which are maintained wholly or partly out of State fund. The Parliament of India, in exercise of the powers conferred by article 35(ii) has
enacted the untouchability (Offences) Act, 1955. The basic Object of this enactment is to ban the practice of untouchability in any form. This Act of 1955 was amended in 1976 by the untouchability (Offences) Amendment Act, in order to make the law more stringent for removing un touch ability from the Society. This Act has now been renamed as "The Protection of Civil rights Act, 1955." Under the amended Act any discrimination on the ground of untouchability is considered as an offence. It imposes the duty on the public servants to investigate such offences. The expression "civil right" is defined as "any right accruing to a person by reason of the abolition of untouchability by article 17 of the Constitution". The Supreme Court of India' has held that the fundamental right under article 17 of the Constitution is available against private individual also and it is the constitutional duty of the State to take necessary steps and ensure that this fundamental right is not violated. [24]

(b) Right to freedom

Personal liberty is one of the most important of all human rights. Articles 19 to 22 of the Indian Constitution deal with different aspects of this basic right. The principle that "all human beings are born free" is found in articles 1 and 2 of the Universal Declaration of Human Rights. The next 19 articles of the Declaration deal with different fundamental freedoms. To be born free and having right to liberty pre-supposes that each human being has the freedom of choice in the conduct of his or her life. Freedom, next to life itself, is viewed as the most precious human value, closely linked to human dignity and to the worth of human life. Article 19 of the Indian Constitution provides six basic fundamental freedoms to all its citizens. It provides:

Protection of certain rights regarding freedom of speech etc.-

(1) All citizens shall have the right-
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India.

(1) Freedom to acquire holds and dispose of property. This has been omitted by Constitution (Forty-forth) Amendment, Act, 1978 w.e.f. 20.6.1979

(g) to practice any profession, or to carry on any occupation, trade or business

Freedom of speech and expression is indispensable in a democracy. In fact, freedom of speech and expression and of press lay at the foundation of all democratic organizations. Article 19(1)(a), which provides fundamental freedom of speech and expression to all the citizens, corresponds to article 19 of the Universal Declaration of Human Rights, 1948. Similar provision is also found in article 19 of the International Covenant on Civil and Political Rights, 1966.

The freedom of speech and expression also includes the freedom of press, which has not been specifically mentioned in the Indian Constitution. Because one can express his opinion through visible representation or by words of mouth, writing, printing or any other mode. However, no person can publish anything concerning the privacy of any other person, his family, marriage, procreation, motherhood, child-bearing and education etc. Because every citizen also has a right to privacy. Recently the Supreme Court of India has held in *R. Rajagopal vs. State of T.N* [25] that publication in regard to above mentioned aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it
becomes a legitimate subject for comment by press and media among others. However, the human rights conscious Supreme Court has further carved out an exception to the above mentioned rule, *i.e.*, a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not be further subjected to the indignity of her name and the incident being publicized in press/media. The Supreme Court has further held that right to privacy is also not available with respect to acts and conducts of public officials relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. But where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. So far as the government, local authority and other organs exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them. It is submitted that this new approach of the Supreme Court has strengthen the hands of people and now they can ventilate their views on human rights violation more freely particularly when such violation is done by the officials of the government. This freedom of publicity will not only bring the guilty officials to books but also it will have deterrent effect on the public officials from indulging in human rights violation. Article 19(1) (b) of the Constitution guarantees all citizens freedom of peaceful assembly without arms. The corresponding provision is found in article 20(1) of the Universal Declaration of Human Rights, 1948. The right of peaceful assembly is also recognized in article 21 of the International Covenant on Civil and Political Rights, 1966. The right of peaceful assembly is also implied in the very idea of the democratic government.
Article 19(1) (e) of the Constitution guarantees to all citizens right to form associations or unions. This right corresponds to article 23(4) of the Universal Declaration of Human Rights, 1948. Such a provision has also been incorporated in article 22 of the International Covenant on Civil and Political Rights, 1966 and article 8 of the International Covenant on Economic, Social and Cultural Rights, 1966.

Corresponding to article 13 of the Universal Declaration of Human Rights, 1948, the Indian Constitution guarantees to all its citizens right to move freely throughout the territory of India in article 19(1)(d) and right to reside and settle in any part of the territory of India in article 19(1)(e). In this regard article 12 of International Covenant on Civil and Political Rights, 1966 is also relevant.

Right to acquire, hold and dispose of property under article 19(1) (f) has been deleted from the fundamental rights and it appears as a constitutional right under article 300-A of the Constitution. This newly inserted provision in the Constitution of India corresponds to article 17(2) of the Universal Declaration of Human Rights, 1948.

Article 19(1) (g) of the Indian Constitution gives its citizens right to practice any profession, or to carry on any occupation, trade or business. So the State cannot compel a citizen to carry on business against his will.

But all the freedoms provided in article 19(1) (a) to (g) are not absolute. Absolute freedoms cannot be guaranteed in any modern state. If the people are given absolute freedom without any control, the result would be ruin. However, the Constitution of India does not leave the complete discretion of limiting these freedoms or imposing restrictions on these freedoms in the hands of the State. Article 19(2) to (6) of the Constitution mentions the grounds on the basis of which these freedoms can be restricted. Thus, the restriction of any
freedom on grounds other than those mentioned in the Constitution is simply not permissible.

Article 19(2) to (6) provides as under:

(1) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(2) Nothing in sub-clause (c) of the said clause shall affect the operation or any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(3) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.
(4) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

The corresponding restrictions are also found in article 29 (2) of the Universal Declaration of Human Rights, 1948 and articles 12(3) and 19 (3) of the International Covenant on Civil and Political Rights, 1966.

The restrictions which can be imposed under article 19 (2) to (6) on the fundamental freedoms guaranteed under article 19(1) (a) to (g) of the Constitution cannot be arbitrary. They must satisfy the following twin test:

(i) They can be imposed only on the grounds mentioned in clauses (2) to (6) of article 19 of the Constitution.

(ii) The restrictions must be reasonable restrictions. With regard to the standard of reasonable restrictions the Supreme Court laid down:

The expression "reasonable restriction" signifies that limitations imposed on a person in enjoyment of the right should not be arbitrary or of an excessive
nature, beyond what is required in the interest of the public. The list of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable in all cases. The restrictions which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between freedom guaranteed in article 19(1)(g) and the social control permitted by cl.(6) of article 19, it must be held to be wanting in that quality. [26]

Thus, the phrase "reasonable restrictions" is wide in its scope and implies to intelligent care and deliberation which reason dictates. It is for the courts and not for the legislators to determine whether the restriction is reasonable or not. In other words, the word "reasonable" before "restrictions" widen the scope of judicial review. There is no exact standard or pattern of reasonableness which can be laid down for all cases. Each case has to be judged on its own merit. But the restriction must be reasonable from the substantive as well as procedural point of view. The courts are also required to determine the reasonableness of restrictions by Objective standards and not by subjective one. A restriction to be reasonable must have a rational relation with the Object which the legislature seeks to achieve and must not be in excess of that Object.

The courts have taken the view that if the restriction is imposed for securing the object laid down in the directive principles of state policy, given in Part IV of the Constitution, then that restriction may be regarded as a reasonable restriction."[27] While imposing restrictions under clauses (5) and (6) of article 19 of the Constitution, it is also necessary that they are in the "interest of the general public" [28]
From the language of clause (2) of article 19 of the Constitution it is clear that there are eight grounds on the basis of which restrictions can be imposed. The term "security of State" refers to only serious and aggravated forms of public disorder and not ordinary breaches of public order and public safety. The words "in the interest of" before the words "security of the State" imply that the actual result of the act is immaterial. The ground of "friendly relations with foreign country" is unique to our Constitution. The object of this ground is to prohibit the malicious propaganda against a foreign friendly State.

The term "public order" is something more than ordinary maintenance of law and order. It is synonymous with public peace, safety and tranquility. It may be mentioned here that the meaning and scope of the term "public order" was among the most controversial questions discussed during the elaboration of the Universal Declaration of Human Rights and the International Covenants on Human Rights. [29]

The words "morality or decency" are words of wide meaning. The ground of morality also appears in article-29(2) of the Universal Declaration of Human Rights. Morality being the noblest product of culture, it is the duty of all to respect it.

The other grounds appearing in article 19(2) are contempt of Court, defamation, incitement to an offence and integrity and sovereignty of India. Freedom under article 19(1) (b) can be restricted by imposing restrictions on the ground of public order and in the interest of sovereignty and integrity of India. Freedom under article 19(1)(c) can be restricted under article 19(4) on the grounds of public order, morality and the integrity of India. Freedom of movement under article 19(1)(d) and freedom of residence under article 19(1)(e) can be restricted under article 19(5) in the interest of
general public and for the protection of the Interests of Scheduled Tribes. The Object of restricting the flight of movement in the interest of "Scheduled Tribes" is to protect the culture, language and customs of certain original tribes in India. It is feared that mixing of tribal people with other people from other areas in an uncontrolled manner might produce undesirable effect upon the tribal people. And right under article 19(1) (g) can be restricted under article 19(1) (6) by imposing reasonable restrictions in the interest of general public.

Thus, it is clear that the scheme of article 19 of the Indian Constitution considered as a whole furnishes a very satisfactory and rational basis for adjusting the claims of individual rights of freedoms and the claims of public good.

Article 20 of the Indian Constitution contain certain safeguards to persons accused of crimes. It provides:

Protection in respect of conviction for offences-(1) no person shall be convicted of any offence except for violation n of a law in force at the time of the commission of the act charged as an offence nor be subjected to penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.
The corresponding provision is article 11(2) of the Universal declaration of Human Rights. A provision similar to article 20 (1) is also found in article 15 (1) of the International Covenant on Civil and Political Rights.

Article 20 (1) of the Constitution of India provides protection against *ex post facto* law and thus prohibits the legislature to make retrospective criminal law. This clause protects the basic human right of the people that no person can be punished for an act which was not an offence at the date of its commission. It further protects the person by providing that no person could be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. On the contrary the accused can take advantage of the beneficial provision of the *ex-post facto* law. For example, if by a subsequent Act, the duration of the punishment is reduced, the accused can take the benefit of such reduced punishment.

Under clause (2) of article 20 of the Constitution, protection is provided to persons against double jeopardy. This clause is based on the Common Law principle of *nemo debet vs vexari*, which means that no man should be put twice in peril for the same offence. This protection is available to the person who is accused of an offence and who is prosecuted and punished for the same offence more than once by the court or judicial tribunal. If a person is prosecuted and acquitted, then subsequent proceedings are not a bar. In other words, to claim the protection of this article "prosecution" as well as "punishment" must be there in regard to the same offence. The object of this clause is to avoid the harassment which must not be caused to a person for succeeding criminal proceeding where only one crime has been committed. The fundamental rule of criminal jurisprudence against self-incrimination has been raised to a rule of constitutional law in article 20 (3). This protection
extends to any person accused of an offence and prohibits all kinds of compulsions to make him a witness against himself.

Thus, we find that article 20 is directly relevant to the criminal process. While article 20 (1) is concerned with the substantive law of criminal liability and penalty, article 20 (2) and (3) are concerned with the stage of procedure.

Right to life and personal liberty is most fundamental of all fundamental rights. Article 21 of the Constitution secures this right to all persons. It provides:

No person shall be deprived of his life or personal liberty except according to procedure established by law.

This article advances the Object of article 3 of the Universal Declaration of Human Rights. Similar provision is also found in article 6 of the International Covenant on Civil and Political Rights.

The right guaranteed under article 21 is available to citizens as well as non-citizens. To begin with, the Indian Supreme Court interpreted the words "personal liberty" narrowly to mean nothing more than the liberty of the physical body, i.e., freedom from arrest and detention, from false imprisonment or wrongful confinement.[30] But in the later years the Supreme Court gave the widest possible meaning to the expression "personal liberty" so as to include within itself all the varieties of rights which go to make up the personal liberty of man other than those dealt with in article 19(1) of the Constitution. In other words, while article 19(1) deals with particular species or attributes of that freedom, "personal liberty" in article 21 takes in and comprises the residue. [31]

In Maneka Gandhi vs. Union of India [32] Bhagwati, J, while expanding the scope and ambit of article 21 observed: "The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go
to constitute the personal liberty of men and some of them have been raised to
the status of distinct fundamental rights and given additional protection under
Art. 19”.

He was further of the opinion that the attempt of the Court should be to expand
the reach and ambit of the fundamental rights rather than attenuate their
meaning and content by a process of judicial construction. [33] Justice
Bhagwati also observed that the expression "procedure" under "procedure
established by law" must mean as "just, fair and reasonable" procedure. In
other words, the "procedural due process" was interpreted as implicit in article
21. Justice Krishna Iyer in the same case took the view that even the "law"
under article 21 must also be "just, fair and reasonable". Thus, according to
Justice Krishna Iyer, even "substantive due process" is also implicit in article
21 of the Constitution.

This new interpretation of article 21, expanding its scope and ambit has
resulted in the development of a new human rights constitutional
jurisprudence. Now a variety of rights are interpreted in article 21 of the
Constitution and thus made enforceable in the court of Law. The right to 'live'
is not merely confined to physical existence but it includes within its ambit the
right to live with human dignity. This right is not restricted to mere animal
existence. In Francis Coralie v. Union Territory of Delhi,[34] the Supreme
Court observed that the right to 'live' is not confined to the protection of any
faculty or limb through which life is enjoyed or the soul communicates with
the outside world but it also includes "the right to live with human dignity"
and an- that goes along with it, namely, the bare necessities of life such as,
adequate nutrition, clothing and shelter and facilities for reading, writing and
expressing ourselves in diverse forms, freely moving about and mixing and
communicating with fellow human beings. The Supreme Court observed: "The
expression "personal liberty" occurring in article 21 is of the widest amplitude and it includes the right to socialize with members of the family and friends subject, of course, to any valid prison regulations and under articles 14 and 21, such prison regulations must be reasonable and non-arbitrary.

The Supreme Court has held that several un-enumerated rights fall within article 21 since "personal liberty" is of widest amplitude. The right to "personal liberty", inter-alia, covers the right to go abroad; [35] the right to privacy;[36] the right against solitary confinement[37] the right against bar fetters;[38] the right to legal aid;[39] the right to speedy trial;[40] the right against handcuffing;[41] the right against delayed execution.[42] the right against custodial violence[43] the right against bar fetters[44] the right to doctor's assistance[45] the right to shelter[46] and protection against use of third degree methods by the police.[47]

The Supreme Court has also given very wide interpretation to the expression "life" in article 21 of the Constitution of India. The right to "livelihood" has been held to be implicit in the expression "life" in article 21 of the Constitution. In Olga Tellis v. Bombay Municipal Corporation,[48] the Supreme Court observed:

The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of living that is the means of livelihood. If the right to livelihood is not treated as a part of Constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of
his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. [49]

The Supreme Court has also regarded as right to live in healthy environment [50] and right to maintenance and improvement of public health as a part of the right to live with human dignity enshrined in article 21 of the Constitution. [51]

Recently, the Supreme Court in the case of Mohini Jain vs. State of Karnataka [52] has interpreted the "right to education" as implicit in right to life under article 21 of the Constitution. The Court observed:

"Right to life" is the compendious expression for all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life. The right to education flows directly from right to life. The right to life under article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. [53]

This new interpretation of article 21 of the Constitution will help in achieving the objective of corresponding provision, i.e., article 26 of the Universal Declaration of Human Rights as enforceable right. The right to education is also recognized in articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights. India is a party to the Covenant and the status of this new right will be a useful reminder of the problems inherent in any attempt to create a social right of this kind for individuals against their states.

Thus, article 21 of the Constitution is the heart of human rights and has rightly received expanded meaning from time to time by the Apex Court.

Article 22 of the Constitution deals with protections against arrest and detention in certain cases. In fact, article 22 of the Constitution supplements
Article 21. Article 22 prescribes the minimum procedural requirements that must be included in any law enacted by the legislature in accordance with which a person may be deprived of his life, or personal liberty. Article 22 of the Constitution corresponds to article 9 of the Universal Declaration of Human Rights. Article 9 and 14(3) of the International Covenant on Civil and Political Rights also contain similar protections.

Article 22 of the Constitution deal with two distinct matters clauses (1) and (2) of article 22 provide protection to persons arrested under the ordinary law of the crimes. These clauses provide:

(1) No person who is arrested shall be detained in custody without being informed as soon as may be of the grounds for such arrest nor shall he is denied the right to consult and to be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to court of the magistrate and no such person shall be detained in custody beyond the period without the authority of a magistrate.

Thus, there are four rights which are available to persons who are arrested under an ordinary law. These rights are:

(i) the right to be informed "as soon as may be" of grounds of arrest;

(iii) the right to consult and to be represented by a lawyer of his own choice;

(iii) the right to be produced before the magistrate within 24 hours; and
(iv) freedom from detention beyond the said period except by the order of the magistrate.

These protections are available to all persons, i.e., to both citizens as well as non-citizens. These grounds afford a possibility, if not an opportunity, for immediate release in case the arrest is not justified.

Clause (3) of article 22 of the Constitution provides two exceptions i.e.

(i) These protections under clauses (1) and (2) of article 22 will not apply to any person who for the time being is an enemy alien; and

(ii) to any person who is arrested or detained under any law providing for preventive detention.

The "preventive detention" can be distinguished from "arrest". A person is arrested when he is "accused of an offence". But in detention a person is detained merely on suspicion in the mind of an executive authority. The preventive detention is thus based on suspicion or anticipation and not on proof. In such a detention the past act is merely the material for inference about the future course of probable conduct on the part of the detainee. The word "preventive" is also used in contradiction of the word "punitive". It is not a punitive but a precautionary measure. [54] The object of preventive detention is not to punish a man for having done something but to intercept him before he does anything and prevent him from doing it. The possibility of launching a criminal prosecution, or absence of it, is not an absolute bar to an order of preventive detention. Preventive detention is devised to afford protection to society. The compulsion of the primordial need to maintain order in society, without which the enjoyment of all rights, including the right to life and personal liberty would lose all their meaning, are the true justifications for the
law of preventive detention. The pressures of the day in regard to the imperatives of the security of the state and public order might, it is true, require the sacrifice of personal liberty of individuals. Laws that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of State provides grounds for a satisfaction for a reasonable prognostication of possible future manifestations of similar propensities on the part of the offender. This jurisdiction has been called a jurisdiction of suspicion; but the compulsions of the very preservation of the values of freedom, or democratic society and of social order might compel curtailment of individual liberty. [55] In A.K Gopalan v. State of Madras [56] Patanjali Sastri, J., while explaining the necessity of preventive detention law, observed: “This sinister-looking feature, so strangely out of place in a democratic Constitution, which invests personal liberty with sacrosanctity of a fundamental right, and so incompatible with the promise of its preamble, is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic”.

The provision for preventive detention has not been unknown in other democratic countries like England and Canada, but only as a war-time, and not a peace-time measure. In spite of all the emphasis on individual liberty it has been found necessary in India to resort to preventive detention even during the peace time because of its unstable law and order situation. [57]

Under the Constitution of India, a law for preventive detention can be enacted by Parliaments as well as State Legislatures of the different States. A law for preventive detention can be enacted exclusively by the Parliament under entry 9 of list of (Union List), for reason connected with defense, foreign affairs, or the security of India. Under entry 3 of List III (Concurrent List), Parliament as
well as State Legislature can concurrently make a law for preventive detention for reasons connected with security of a State, maintenance of public order, or maintenance of supplies and services essential to the community. [58] From the above mentioned scheme it is evident that the Parliament has a wider legislative jurisdiction in matters of preventive detention as it can legislate or enact a law providing preventive detention for reasons connected with all the six heads mentioned in Lists I and III. Whereas State Legislatures can enact law for preventive detention only for reasons connected with the three heads mentioned in List III. Further, if a law for preventive detention for reasons connected with any of the heads mentioned in List III is enacted by the State Legislature as well as by the Parliament, then the law enacted by the Parliament will override the State law in the event of a conflict between the two. [59] In addition to this, the Parliament is also having "residuary power of legislation" under Art. 248 read with entry 97 of List I (Union List) of the Seventh Schedule and hence can make any law (including a law providing for preventive detention) with respect to any matter on any other ground.

Though the Constitution-makers had recognized the necessity of laws as to preventive detention which could be made by the Parliament or State Legislatures, it has also provided in clauses (4) to (7) of Art. 22 certain safeguards to mitigate their harshness by placing fetters on legislative power conferred on Parliament/State Legislature and to prevent misuse of the power by the executive. Art. 22 clauses (4) to (7) provide for minimum procedure, which must be observed in any preventive detention matter. If any law providing for preventive detention or administrative action relating thereto infringes safeguards/procedure prescribed in clauses (4) to (7) of Art. 22, then that law or action would be invalid as violating fundamental right of the detainee. It is immaterial whether this safeguards/procedure are incorporated or
not in the law providing for preventive detention because if they are not incorporated, they would still be deemed to be part of the law of preventive detention as a super imposition by the Constitution which is the supreme law of the land. Thus, some semblance of natural justice has been woven into the fabric of preventive detention by these constitutional provisions. [60] The intention of the framers of the Constitution in incorporating Art. 22 were actually to curtail the legislative powers to legislate on preventive detention and render them subject to certain specific limitations. [61]

Clauses (4) to (7) of article 22 were amended by the Constitution (Forty-fourth) Amendment Act, 1978. After the Amendment these clauses provide as under:

(4) No law providing for preventive detention shall authorize the detention of a person for a longer period than two months unless an Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the said period of two months that there is in its opinion sufficient cause for such detention.

Provided that an Advisory Board shall consist of a chairman and not less than two other members, and the Chairman shall be a serving judge of an appropriate High Court and the other members shall be serving or retired Judges of High Court;

Provided further that nothing in this clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (a) of clause (7).

Explanation: In this clause, "appropriate High Court" means,

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(i) in the case of the detention of a person in pursuance of an order of detention made by the Government of India or an officer or authority subordinate to that Government, the High Court for the Union Territory of Delhi;

(ii) in the case of detention of a person in pursuance of an order of detention made by the Government of any State (other than a Union Territory,) the High Court for the State; and

(iii) in the case of detention of a person in pursuance of an order of detention made by the administrator of a Union Territory or an officer or authority subordinate to such administrator, such High Court as may be specified by or under any law made by Parliament in this behalf.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making an order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers being against the public interest to disclose.

(7) Parliament may be law prescribe—

(a) the maximum period for which any person may in any class or classes of cases be detained under any law for providing for preventive detention; and
(b) the procedure to be followed by an Advisory Board in any inquiry under clause (4).

It may be pointed out here that article 22 is not a complete and self-contained code. In fact, articles 21 and 22 constitute an integrated Code in matters relating to personal liberty and preventive detention. Article 22, to some extent advances in a way the purpose of article 21 when it specifies certain procedural safeguards which are available to a person who is arrested or detained. The law of preventive detention is also subject to other constitutional limitations enumerated in Part III of the Constitution dealing with fundamental rights. Any law of preventive detention can be tested on the grounds of "reasonableness" in articles 14 and 19 of the Constitution.

The following protections/safeguards have been provided to the detainee in clauses (4) to (7) of article 22 of the Constitution.

(i) No person can be detained for a period more than three months unless the Advisory Board duly constituted for the said purpose authorize for a longer detention on the basis of some sufficient cause.

(ii) The authority making the order of detention must "as soon as may be" communicate to the person detained the grounds of arrest. It is necessary that the grounds must be communicated in the language known to the detune.

(iii) The detune must be given "the earliest opportunity" of making a representation against the order of detention. The detune is to be furnished with sufficient particulars to enable him to make a representation.
even an advocate with ten years standing was eligible to be appointed on the Board. The change was made to make Advisory Board independent of the executive.

c) Art. 22(7) (a), under which the government could prescribe the circumstances and class or classes of cases in which a person could be detained for a period longer than three months without the approval of Advisory Board was deleted.

The Constitution (Forty-fourth Amendment) Act, 1978 received the assent of the President on 30 April 1979. Most of the amending provisions of the 44th Amendment Act were brought into force from 20 June 1979 and the rest with effect from 1 August 1979 by issuing a notification. However, section 3 of the Amendment Act, 1978, which amended Art. 22(4) to (7) was not brought into force by the said notification. It was to come into force as and when official notification is issued by the Government of India. And the government did not issue notification bringing into force the said section 3 of the Amending Act, 1978. In 1980, the National Security Ordinance was promulgated by the President in order "to provide for preventive detention in certain cases and matters connected therewith". Clause 9 of this Ordinance provided for the constitution of Advisory Board strictly in accordance with the provisions of section 3 of the 44th Amendment Act, 1978, in spite of the fact that the aforesaid section was not brought into force. The National Security Ordinance was replaced by the National Security Act, 1980 retrospectively. Section 9 of the National Security Act, 1980 made a significant departure from clause 9 of the Ordinance providing for the constitution of Advisory Boards in accordance with Art. 22(4) in its original form and not in accordance with the amendment made to that article by section 3 of the Constitution (Forty-fourth Amendment) Act, 1978.
This was challenged before the Supreme Court in *A.K Roy vs. Union of India*, [66] (popularly known as the *National Security Case*). One of the most important question raised before the Constitution Bench of the Supreme Court in *A.K Roy case*, was whether a writ of mandamus should or should not be issued to the Central Government to bring section 3 of the Constitution (Forty-fourth Amendment) Act, 1978 into force. It was argued that section 1(2) of the Constitution (Forty-fourth Amendment) Act, 1978 which conferred power on the Central Government to bring into force different provisions of the Amendment Act on different dates, is unreasonable, arbitrary and unguided power on the executive and it violated Arts. 14 and 21 which are integral parts of the basic structure of the Constitution. It was also argued that the failure of the Government to issue the notification was *mala fide* and the Government was obligated to bring the whole of the Amendment into force within a reasonable time, since the executive cannot veto or nullify or negate the constitutional amendment by not bringing it into force for an indefinite time.

The majority judgment was delivered by Chandrachud, C.J., for himself, Bhagwati and Desai and rejected the above arguments by holding that section 1(2) of the Amendment Act is constitutionally valid. Gupta, J. gave a dissenting judgment and Tulzapurkar J., agreed with him on this point. Thus, according to majority opinion *mandamus* couldn't be issued to the Central Government to bring into force section 3 of the Amending Act, 1978.

Since the question involved in this case was of great importance and had direct bearing on the "personal liberty" of the people, it is necessary to analyze the majority and minority opinions of the Court. [67]

The first question which arises for our consideration is that why was power conferred on the Central Government to fix the same date or different dates for...
bringing the provisions of the Amending Act into force. The only probable answer to this is that since Constitution (Forty-fourth Amendment) Act, 1978 had brought some significant changes in whole of the Constitution, therefore, sometime might be needed to make suitable arrangements to implement its numerous provisions. For example, under section 3 of the Amending Act, New Advisory Boards were to be constituted and it required appointment of sitting as well as retired judges of the High Court. But it has to be remembered that power to bring into force the provisions of Amending Act was not conferred by Parliament but by a constituent body exercising a constituent power. [68]

Therefore, the next question which arises is that could the executive nullify the will of the constituent body by not bringing into force certain provision of the Amendment Act, 1978? And should not the mandamus be issued to the Central Government to bring into force the said provisions?

Though the majority view refused to issue mandamus to the Central Government to bring into force section 3 of the Amendment Act, 1978, the following observations of Chief Justice Chandrachud, who delivered the majority opinion are worth noting:

"We have said at the very outset of the discussion on this point that our decision on the question as to whether a mandamus should be issued as prayed for by the petitioners, should not be construed as any approval on our part of the long and unexplained failure on the part of the Central Government to bring Section 3 of the 44th Amendment Act into force. We have no doubt that in leaving it to the judgment of the Central Government to decide as to when the various provisions of the 44th Amendment should be brought into force, the Parliament could not have intended that the Central Government may exercise a kind of veto over its constitutional will by not even bringing the Amendment
or some of its provisions into force ... it is not open to the Central Government to sit in judgment over the wisdom of the policy of that section". It is submitted that the above observations make it amply clear that Section 1(2) of the Amending Act imposed upon the Central Government "duty" and not "discretion", to bring into force the provisions of the Amendment Act, 1978. After not approving the "long and unexplained failure" on the part of Central Government in not bringing Section 3 of the Amendment Act into force one wonders as to why the majority felt helpless in issuing the writ of mandamus to the Central Government to enforce a "duty". More so particularly because in the instant case the "duty" related to bringing into force a provision which was to assure the detainee that his case will be considered by an impartial tribunal fairly and objective. It is settled law that where an act is to be done or a duty is to be discharged and no time is specified for it, the law implies that the act must be done or the duty must be discharged with a reasonable time having regard to the facts and circumstances of each case. The writ of mandamus is a writ of justice and it can be issued whenever justice is denied or delayed. It is used to compel the public body to do its public duty which it neglects or refuses to do.[69] In the instant case the Central Government was charged with a public duty affecting a section of the people for whom the constituent body had further provided some safeguards before he could be preventively detained. In fact, Chandrachud, C.J. himself pointed out that "it is difficult to appreciate what practical difficulty can possibly prevent the Government from bringing into force the provisions of Section 3 after the passage of (more than a decade now)" and hoped that "Central Government will without further delay" bring Section 3 into force. Hence, delay in implementing the will of the Parliament may justifiably raise many an eyebrow, and there was sufficient material before the Court to sustain a finding of mala fide, not in the sense of
malice or dishonesty but in the sense of acting unreasonable and using the power the achieve the Object other than that for which the authority believed the power had been conferred, even if the intention may be to promote another public interest. Therefore, it is submitted that the majority opinion in not issuing the writ of *mandamus* is wrong and not well founded. Let us remember that if we have to have a "government of laws and not of men", the men who interpret and enforce the laws must possess social insight, practical sense and intellectual resourcefulness of measure up to the challenge of their office, and integrity and courage so necessary for the exercise of judicial power.[70]

However, a ray of hope emerged from the dissenting opinion of AC. Gupta, J., to which Tulzapurkar, J. agreed. Justice Gupta rightly explained that the non-implementation of Section 3 of the Amendment Act, 1978 was not due to practical or administrative difficulty of the Government. Because Section 9 of the National Security Ordinance, which was promulgated in 1980, had provided that Advisory Board will be constituted in accordance with Art. 22 as amended by the Constitution (Forty-fourth Amendment) Act, 1978. Had there been some practical or administrative difficulty in implementing Section 3 of the Amending Act 1978, the Ordinance of 1980 could not have provided for constitution of Board in accordance with amended Art. 22.

Therefore, and rightly so, Gupta J. issued the writ of *mandamus* directing Central Government to issue notification under Section 1(2) of the Constitution (Forty-fourth Amendment) Act, 1978, bringing into force the provisions of Section 3 of the Act within *two months*. [71] It is submitted that the minority opinion is in consonance with the settled principles of constitutional jurisprudence. It is hoped that the majority view will be overruled by the Supreme Court so as to settle the controversy finally.
In *Attorney General For India vs. Amrat lal Prajivandas*, [72] once again the question was raised before the Supreme Court whether failure of the Central Government to specify the date for the enforcement of amended clauses (4) to (7) of article 22 amounted to abdication of or delegation of essential constituent power and therefore bad. The Supreme Court did not consider necessary to decide this question in the context of that case and held that the applicability of A.K. Roy case decision also need not be considered. It is submitted that the non-enforceability of the amended article 22 gave a blow to the personal liberty of the people of India. However, the judiciary has shown its concern in the individual cases and has reviewed various cases of preventive detention, whenever challenged before it, under its power of judicial review.[73]

(c) Freedom against Exploitation

Article 23 of the Indian Constitution prohibits the traffic in human beings and beggar and other similar forms of forced labour. It provides: “Prohibition of traffic in human beings and forced labour”

(1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

This provision corresponds to article 4 of the Universal Declaration of Human Rights. Article 8 of the International Covenant on Civil and Political Rights
and also article 8 of the International Covenant on Economic, Social and Cultural Rights, contain the similar provision.

"Traffic in human beings" means selling and buying of men and women and includes immoral traffic in women and children for immoral or other purposes. Though the word "slavery" is not found in article 23 of the Constitution yet the aspect of "traffic in human beings" is inter-twined with and common to the problems of forced labour, Slavery and servitude. Second part of article 23(1) makes any contravention to this protection as an offence punishable in accordance with law. The Parliament in pursuance of article 35(ii) has enacted the Suppression of Immoral Traffic in Women and Girls Act, 1956. Now the title of this Act has been changed to "The Immoral Traffic (Prevention) Act, 1956. There are many provisions in the Indian Penal Code which are addressed to the problems of crimes against women, including forcing minors to prostitution, and are attended with strict punishment.

Beggar and "other similar forms of forced labour" are also prohibited under article 23 of the Constitution. Beggar means labour or service extracted by government or person in power without giving remuneration for it. In short, it means involuntary work without payment. It must be noted that article 23 of the Constitution not only prohibits beggar but also "other similar forms of forced labour". If a person provides labour or service to another for remuneration which is less than minimum wage, it would also amount to forced labour. The only exception is provided in clause (2) of article 23 of the Constitution which enables the State to impose "compulsory service for public purpose" without discrimination.

As already noted, the practice of forced labour is condemned in almost every international instrument dealing with human rights. Article 23 of the Indian
Constitution provides right against exploitation and it is characterized as a charter of the down-trodden people of India. This article strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and contrary to basic values of human rights. Article 23 of the Constitution protects the individual not only against that State but also against private citizens. The protection under this article is available to both citizens as well as non-citizens. But the painful gap between preachment and performance is best stated by Tolstoy in the following words: “The abolition of slavery has gone on for a long time. Rome abolished Slavery, America abolished it and we did but only the words were abolished, not the things. [74]

Many bonded or forced labours have been identified and liberated in India but the problem of eradication of debt bondage which constituted the most frequent kind of forced labour still exists in many parts of the country. Such kind of forced labour can be solved by the government by generating rural employment and developing a specific programme in this regard. The Parliament has also enacted the Bonded Labour System (Abolition) Act, 1976 so as to tackle the problem of bonded labour in India. The effective implementation of this Act is the crying need of the hour if the human rights of the have-nots are to be protected. Article 24 of the Constitution prohibits the employment of children in factories. It provides: “No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment”.

The genesis of this article is that the human rights of children (boys as well as girls) have to be protected and because of their tender age they should not be exploited and employed in any factory or hazardous employment where there is a danger to their life. Thus, a special provision is found in the Constitution of India where the attention is drawn towards the protection of human rights of
children. Children are the assets of the nation and this provision is in the interest of public health and safety of life of children.

(d) Right to Freedom of Religion

India is a "secular" state. Articles 25 to 28 of the Indian Constitution specifically provide freedom of religion etc. The Indian Constitution guarantees to all persons the freedom of conscience and the right to profess practice and propagate any religion of their own choice. The freedom of religion as enshrined in the Constitution means freedom for all religions but it does not enable any religious group to work against the same rights of another religious group or persons. Article 25 of the Constitution provides: "Freedom of conscience and free profession, practice and propagation of religion".

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion,

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I: The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II: In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or
Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

The corresponding provision is article 18 of the Universal Declaration of Human Rights. Article 18 of the International Covenant on Civil and Political Rights also provides freedom of religion.

Article 25 of the Constitution ensures equality of all religions. Under this article a person is guaranteed two-fold freedom, *i.e.*, (i) freedom of conscience and (ii) freedom to profess, practice and propagate religion. [75]

The "freedom of conscience" means absolute inner freedom of the citizens to have their own relation with Almighty. To "profess" means to openly declare one's faith or belief. To "practice" means to perform the religious duties, rites and rituals according to one's own religion. The word "propagation" means to spread or publicize 'religious views.

However, these freedoms are not absolute. They are subject to the following restrictions.

(i) Public Order

(ii) Morality

(iii) Health

(iv) State law regulating or restricting any economic, financial or political or other secular activity which may be associated with religious practice.

(v) State law providing for social welfare and social reform.

These restrictions have been prescribed in article 25 itself which ensures the freedom of religion to persons. These restrictions are necessary to maintain the
secular character of the State and are in the interests of the general public. Every person is given the freedom to profess, propagate or practice any religion but in doing so he cannot interfere with the religion of another person. Nobody can compel any other person to convert to his religion. Also the Constitution empowers the State to make any law providing for social reform or social welfare.

Under article 26 of the Constitution every religious denomination has been given the freedom to manage the religious affairs. It provides:

*Freedom to manage religious affairs-Subject to public order, morality and health, every religious denomination or any section thereof shall have the right*

(a) to establish and maintain institutions for religious and charitable Purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

Article 27 further advances the secular character of the nation. It provides freedom as to payment of taxes for promotion of any particular religion. It says: *Freedom as to payment of taxes for promotion of any particular religions-SC: person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.*

Article 28 prohibits the imposition of religious beliefs in any educational institutions on the persons attending any such educational institutions. It provides: *Freedom as to attendance at religious instruction or religious worship in certain educational institutions;*
(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

It is submitted that all these provisions are of great importance to India which comprises of people belonging to different religions, faith and beliefs. The secular and democratic nature of Indian society demands mutual tolerance of different religious beliefs and faiths with full freedom to practice the respective religious belief or faith of any community.

(c) Cultural and Educational Rights

Cultural and educational rights are indispensable for the dignity of a person and for the free development of his personality. Articles 29 and 30 of the Indian Constitution deal with cultural and educational rights. These articles provide:

*Protection of interests of minorities;*
(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission in to any educational institution maintained by the State of receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Right of minorities to establish and administer educational institutions:

(1) All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

The corresponding provisions are article 22 of the Universal Declaration of Human Rights and article 27 of the International Covenant on Civil and Political Rights.

The protection under article 29 of the Constitution is available to only citizens whereas article 30 applies to both citizens and noncitizens. In article 29(1) the
protection is provided to any section of citizens to conserve their distinct language, script or culture. Article 29(2) prohibits the discrimination between citizens in state funded educational institutions on the grounds only of religion, race, caste, language or any of them.

On the other hand article 30 of the Constitution is confined to minorities, whether based on religion or language. At the same time, article 30 (1) is not confined to the conservation of language, script or culture. It protects the minorities, whether based on religion or language, firstly by granting them the right to establish and administer educational institutions of their choice and secondly by restraining the State from discriminating against any such institution. Thus, the Indian Constitution provides suitable protection to all the languages and the linguistic communities and guarantees equal treatment.

(f) Right to Constitutional Remedies

The talk of all human rights and declaring them as fundamental rights in the Constitution is meaningless unless they can be enforced by an effective machinery. If there is no effective remedy against the violation of human rights, there are no effective human rights in the real sense. In India, the courts are regarded as standing between the individual and the State, protecting the human rights of the individual from any interference which is not justified by law. The Indian Parliament has the power to legislate on matters relating to human rights which are embodied in the Indian Constitution as fundamental rights, directive principles or other constitutional rights. The Indian legal system enables individuals to challenge legally the violation of their civil and political rights. The fundamental rights guaranteed under Part III of the Indian Constitution vest the individual with legal capacity to challenge the measures adopted by the State which affect or threaten to affect his or her civil or
political right. For the enforcement of fundamental rights, the individual can approach the highest court of the land, *i.e.*, the Supreme Court, even at the very first instance under article 32 of the Constitution which provides:

**Remedies for enforcement of rights conferred by this Part**

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari*, whichever may... be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

The corresponding provision is article 8 of the Universal Declaration of Human Rights. Similar provision has also been incorporated in article 2(3) (a) of the International Covenant on Civil and Political Rights.

Thus, the right to move to the highest court of the land, *i.e.*, the Supreme Court, has itself been raised to the status of fundamental right. Article 226 of the Constitution confers powers on all the High Courts to issue the writs, orders or directions for the enforcement of fundamental rights. In addition, individuals can also seek administrative remedies. In certain
circumstances, particularly affecting life, resort could be made to the executive head of the Union or the State. [76]

Clause (1) of article 32 guarantees the fundamental right to move the Supreme Court by "appropriate proceedings" for the enforcement of fundamental rights conferred by Part III of the Indian Constitution. The power of the Supreme Court under this clause is the widest. Article 32(1) talk of "appropriate proceedings" and this means that the requirement of the appropriateness of the proceeding must be judged in the light of the purpose for which the proceeding is taken, namely, the enforcement of fundamental rights. Therefore, the Supreme Court has held that even a member of the public can move the Court even by writing a letter. [77] This interpretation has led to the development of a new constitutional jurisprudence in the area of public interest litigation and human rights. It is not obligatory on the Court to follow adversary system'.

Article 32(2) empowers the Supreme Court to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, certiorari and quo warranto, whichever may be appropriate, for the enforcement of any of the fundamental rights. On the scope of article 32 Bhagwati, J (as he then was), rightly said: This provision conferring on the Supreme Court power to enforce the fundamental rights in the widest possible terms shows the anxiety of the Constitution makers not to allow any procedural technicalities to stand in the way of enforcement of fundamental rights. The Constitution makers clearly intended that the Supreme Court should have the amplest power the issue whatever direction, order or writ which may be appropriate in a given case for the enforcement of a fundamental right.[78]

Thus, the Indian Supreme Court is not bound to follow the procedural technicalities of the English law. Bhagwati, J., further said that we could no
longer blindly follow the adversarial procedure and the Courts must "abandon the laissez faire approach in the judicial process", particularly in human rights jurisprudence in a country like ours where there is so much of poverty, ignorance, illiteracy, deprivation and exploitation. Any insistence on a rigid formula of proceeding for enforcement of fundamental rights would be self-defeating. The true scope of article 32 has thus been summed as under:

Article 32 does not only confer power on the Court to issue a direction, order or writ for the enforcement of the fundamental rights but it also lays a constitutional Obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including to forge new remedies and fashion new strategies designed to enforce fundamental rights. It is in realization of this constitutional Obligation that this Court has innovated new methods and strategies, particularly for enforcing fundamental rights of the poor and disadvantaged who are denied their human rights and to whom freedom and liberty have no meaning. [79]

Thus, whenever any person approaches the Supreme Court for the protection against violation of human rights, the Court is not helpless and the wide powers given to the Supreme Court by article 32, which itself is a fundamental right, imposes a constitutional Obligation on the Court to forge such new tools which may be necessary for doing complete justice and for enforcing the fundamental right guaranteed by the Constitution. The power available to the Supreme Court under article 142 of the Constitution is also an enabling provision in this behalf, any contrary view would not only merely render the Court powerless but also make the constitutional guarantee a mirage.

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Under clause (3) of article 32 the Parliament is empowered to make a law and confer the powers of the Supreme Court on any other Court. But this power is without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2) of Article 32. Under clause (4) it is provided that this article shall not be suspended except as otherwise provided by the Constitution. It may also be mentioned here that the law declared by the Supreme Court is binding on all the Courts within the territory of India.

In India the Supreme Court and the High Courts have been vested with the power of judicial review which is vital and essential safeguard against the illegal exercise or abuse of power by the executive and administrative authorities. This is so because an independent judiciary is able to judge matter brought before it entirely free from political or other bias. Judicial review is thus the interposition of judicial restraint on the legislature as well as the executive organs of the government.

3.4 Suspension of Fundamental Rights

It has already been mentioned earlier that the fundamental rights cannot be enjoyed as absolute rights. Most of the fundamental rights also contain the grounds on the basis of which restrictions can be imposed in the exercise of those fundamental rights. In addition to this, the Indian Constitution also contains provision under article 352 for the imposition of emergency on the ground that the security of India or any part of its territory is threatened by war or external aggression or armed rebellion. In such a situation the security of the country becomes more important than the rights of the individuals. Corresponding provisions, i.e., article 4 of the International Covenant on Civil and Political Rights is relevant in this regard. Therefore, the Constitution
provides for the curtailment or suspension of the fundamental rights in the following circumstances;

Art. 358 of the Constitution provides that when an emergency is declared on the ground that the security of the country or any part of its territory is threatened by "war" or "external aggression", the fundamental freedoms guaranteed under article 19 of the Constitution are automatically suspended and would continue to be so far the period of emergency. The suspension of the freedoms guaranteed under article 19 thus removes the restrictions on the legislative and executive powers of the State imposed by the Constitution. Any law or executive order made by the State during this period cannot be challenged on the ground that it is inconsistent with the rights or freedoms guaranteed under article 19 of the Constitution. However, such laws or executive order cease to have effect as soon as the proclamation of emergency ceases and then article 19 is automatically revived. Article 358 also makes it clear that anything done or omitted to be done during the proclamation of emergency cannot be challenged even after the emergency is over. This is so because when the right itself had been suspended, no remedy can be sought for the violation of that right after its revival.

Article 359 of the Constitution further empowers the President that when a proclamation of emergency is in operation, he may by order declare that the right to move any Court for the enforcement of such of the fundamental rights guaranteed by Part III of the Constitution as may be mentioned in the order and all proceedings pending in any Court for the enforcement of the rights so mentioned, shall remain suspended during the period of proclamation of emergency or for any shorter period as may be provided in the order. However, Constitution (Forty-fourth) Amendment Act, 1978 has introduced a very important safeguard, i.e., right to move any court for the enforcement of
fundamental rights under articles 20 and 21 cannot be suspended. This safeguard was introduced after the nation saw how the provision could be misused in the national emergency which was proclaimed in 1975. Thus, the Constitution of India gives top priority to the right to life and personal liberty which is the basic human right of the people. Unlike article 358, any legislative or executive order in contravention with the fundamental rights whose enforcement is suspended under article 359, can be challenged after the order of the President under article 359 ceases to have effect. This is so because rights as such are not suspended under article 359. Only the "right to move any Court" for their enforcement is suspended. Thus, under the Constitutional scheme an attempt has been made to harmonize the individual rights with national interest.

3.5 Directive Principles of State Policy

Directive Principles of State Policy are enshrined in Part IV of the Constitution (articles 36 to 51). The preamble, the fundamental rights and the directive principles all are part of the same constitutional scheme and aim at the establishment of a free and an egalitarian social order based on rule of law. The directive principles aim at the betterment of the individual as an integrated component of the society. The fundamental rights would be meaningless and remain only as paper tigers if the people who are to enjoy these rights are not free socially and economically. The makers of the Constitution were aware that in the context of socioeconomic conditions which existed at the time when the Constitution was framed, it was not enough to guarantee the people mere civil and political rights. Hence they incorporated certain socio-economic rights in Part IV of the Constitution. In the socialist countries like ours it has always been regarded that economic rights are as important as, if not more than, political rights. The Indian Constitution acts up to this synthesis and
philosophy and describes, in Parts III and IV, both classes of human rights as "fundamental."[81]

At this place, it is also worth pointing out that article 13 makes all the laws inconsistent to Part III as void and prohibits the State from making any law in contravention with Part III. On the other hand, a positive obligation is put on the "State" to apply the directive principles of Part IV in "the making of laws".

Article 36 of the Constitution provides that in Part III the expression "State" shall have the same meaning as under article 12 in Part III. Article 37 deals with the application of the directive principles in Part IV. It provides:

Provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Thus, at the first place, the directive principles in Part IV have been made "unenforceable" by any court. In this regard they also differ from the fundamental rights of Part III which are enforceable in the court of law. But the non-enforceability does not decrease their importance in the constitutional scheme. Article 37 itself makes them "fundamental in the governance of the country". What is "fundamental in the governance of the country", cannot be said to be of less fundamental importance than the individual fundamental rights.[82] Further, last part of article 37 provides that "it shall be the duty of the State to apply these principles in making laws". Thus, all the three organs of the "State", i.e., legislature, executive and judiciary are duty bound to respect these directive principles and apply them in the making of laws. They serve as the guidelines for the future and they are equally "fundamental" with fundamental rights.[83]
The reason for the division of directive principles and the fundamental rights into two Parts making one enforceable and other as non-enforceable has been best explained by the Planning Commission in the following words:

The non-enforceability clause only provides that the infant State shall not be immediately called upon to account for not fulfilling the new obligations laid down upon it. A State just awakened to freedom with its many pre-occupations might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling them. [84] In fact, both Parts III and IV are complementary and supplementary to each other and integral component of the same organic constitutional system. Fundamental rights can be made more meaningful by implementing the directive principles, for, the directive principles are intended to bring about socio-economic revolution and to create a new socio-economic order wherein there will be social and economic justice for all and everyone [85] If the State commits a breach of its duty by acting contrary to the directive principles, the courts can prevent it from doing so. [86]

Article 38 provides: “State to secure a social order for the promotion of welfare of the people.”

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

(2) The State shall, in particular, strive to minimize the inequalities in income and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

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A positive obligation has been put on the State to promote the social welfare of the people by securing socio-economic justice to all. In a way article 38 of the Constitution reflects the spirit of articles 28 and 29 of the Universal Declaration of Human Rights. Article 38(2) of the Constitution is focused towards promoting equality not only amongst individuals but also amongst groups of people residing in different areas. In other words, the State is required not to discriminate the people. Clause (2) of article 38 was added in the Constitution by the Constitution (Forty-fourth) Amendment Act, 1978 and it is also in consonance with article 7 of the Universal Declaration of Human Rights and articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights.

Article 39 can also be described as having the Object of securing a "welfare state". It provides: Certain principles of policy to be followed by the State____

The State shall in particular direct its policy towards Securing______

(a) that the citizens, men and 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 sub serve the common good;

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

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

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

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Thus, the State is required to direct policies towards securing. Objectives mentioned in article 39. Clause (a) puts obligation on the State to secure to the citizens an adequate means of livelihood. The Supreme Court has interpreted this clause as a part of article 21 of the Constitution. The State may not by affirmative action, be compellable to provide adequate means of livelihood. But any person, who is deprived of his right to livelihood except according to just, fair and reasonable procedure established by law, can challenge the deprivation as offending the right to life conferred by article 21 of the Constitution.[87]

Clauses (b) and (c) of article 39 are pivotal not only in the context of article 39 but in the context of whole of the Constitution. They can be described as "the charter of economic democracy" and "the charter of the poor men". These two clauses promote the objective of establishing a social welfare State where there is no concentration of wealth in the hands of a few people. Clauses (b) and (c) of article 39 read with article 37 and 38 provide all the necessary tools for the attainment of equalitarian order and prevention of concentration wealth in a few hands and provide social-economic justice to the people of India. The corresponding provision regarding "agrarian reforms and "equitable distribution" is also found in article 1.1 clauses 2(a) and (b) of the International Covenant on Economic, Social and Cultural Rights, 1966.
The doctrine of "equal pay for equal work" for both men and women enshrined in article 39(d) "is not a mere demagogic slogan. It is a constitutional goal capable of attainment through constitutional remedies, by the enforcement of constitutional rights. [88] The Supreme Court has interpreted this provision as implicit in articles 14 and 16 of the Constitution and thus made it enforceable in the court of law. The Parliament has also enacted the "Equal Remuneration Act, 1976" for achieve of the objectives of article 39(d) of the Constitution. The applicability of this Act does not depend upon the financial ability of the management to pay equal remuneration as provided by it. [89]

The corresponding provision is article 23(2) of the Universal Declaration of Human Rights and article 7(a) (i) of the International Covenant on Economic, Social and Cultural Rights, 1966. Clause (e) of article 39 of the Constitution is aimed at protecting the health and strength of workers, men and women and tender age of children so that they may not be compelled by economic necessity to enter avocations which are not suited to their age. Similarly clause (f) expects the State to direct its policies in such a manner so as to provide opportunities and facilities to children to develop in a healthy manner and in conditions of freedom and dignity, which are their basic human rights.

Article 39-A, dealing with equal justice and free legal aid was added by the Constitution (Forty-second) Amendment Act, 1976. It provides:

39A. Equal justice and free legal aid. The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The right to seek justice is one of the very important human rights and article 39-A enables
the people to seek justice. Under article 39-A the State is required to secure the operation of legal system which promotes justice on a basis of equal opportunity and to ensure that equal opportunity for securing justice are not denied to any citizen by reason of economic or other disabilities. One may say that article 39-A, aims of achieving the Object of *Magna Carta* of 1215 which provided: “To no one will we sell, to no one will we refuse or delay the right of justice ....” [90]

Thus, article 39-A gives constitutional status of free legal aid to the poor and envisages the prospects of inequality in access to justice being abolished. [91] The Supreme Court has further elevated the right to free legal services as an essential ingredient of "reasonable, fair and just" procedure and implicit in article 21 of the Constitution as an enforceable right. [92] The Parliament has also enacted "Legal Services Authorities Act, 1987" to achieve the objectives of article 39-A of the Constitution.

Article 41 to 43 of the Constitution provide as under:

*Right to work, to education and to public assistance in certain cases*—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 undeserved want.

*Provision for just and humane conditions of work and maternity relief*—The State shall make provision for securing just and humane conditions of work and for maternity relief.

*Living wage, etc., for workers*—The State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers agricultural, industrial or otherwise, work, a living wage, conditions of work
ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavor to promote cottage industries on an individual or co-operative basis in rural areas.

These articles correspond to articles 23 and 25 of the Universal Declaration of Human Rights and articles 6, 7 and 10(2) of the International Covenant on Economic, Social and Cultural Rights.

The basic aim of these provisions is not only that the State should secure, within its economic capacity, right to work, education, humane conditions of work and maternity leave, etc., but also social security in cases of old age, sickness and disablement and ensuring decent standards of life, which is the basic human right of all.

Article 43-A, dealing with participation of workers in management of industries, was added by the Constitution (Forty second) Amendment Act, 1976. This provision is also based on industrial democratic principle and is in consonance with a “conception of man and human rights.” [93] It was expected that the State shall provide free and compulsory education to all the children below the age of fourteen years within the period of ten years after the commencement of the Constitution. Article 45 of the Constitution provides:

*Provision for free and compulsory education for children-* The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

This provision corresponds to article 26 of the Universal Declaration of Human Rights and Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights. Education is enlightenment. It is the one that lends dignity to a man. Education seeks to build up the personality of the pupil by
assisting his physical, intellectual, moral and emotional development. [94] Today, education is perhaps the most important function of State and local government. In the present days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. [95]

It is noteworthy that among the several articles in Part IV, only article 45 speaks of a time-limit; no other article does. But even after 45 years of the commencement of the Constitution the underlined objective of article 45 remains a distant dream. The Constitution contemplated a crash programme being undertaken by the State to achieve the goal set out in article 45. It is relevant to note that article 45 does not speak of the "limits of its economic capacity and development" as does article 41. *inter alia,* speaks of right to education. Even article 46 of the Constitution also says that the State *shall* promote the educational and economic interests of Scheduled Castes and other weaker sections of the people. But so far only 14 States and 4 Union Territories have enacted legislations to make education compulsory but socio-economic compulsions that keep the children away from schools have restrained them from prescribing the rules and regulations whereby those provisions can be endorsed. However, the judicial activism has made it a fundamental right implicit in article 21 of the Constitution.

Raising the level of nutrition and standard of living and the improvement of public health is considered as primary duty of the State in article 47 of the Constitution which provides:

"Duty of the State to raise the level of nutrition and the standard of living and to improve public health-The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor
to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health”.

This provision correspond to article 25(1) of the Universal Declaration of Human Rights and articles 11(1) & (2) and 12(1) of the International Covenant on Economic, Social and Cultural rights.

In 1976, a new article 48-A was added by the Constitution (Forty-second) Amendment Act which says: “The State shall endeavor to protect and improve the environment and to safeguard the forest and wild life of the country”.

In this regard article 12(2) (b) of the International Covenant on Economic, Social and Cultural Rights is relevant.

Improvement of public health will include the improvement of environment without which public health cannot be assured.

The State cannot treat these obligations as mere pious wishes or pious obligations. They are "fundamental in the governance of the country" and they being the part of the supreme law of the land, have to be implemented. The Courts in India have further interpreted that the right to live in healthy environment is a part of right to life under article 21 of the Constitution because right to life means, a life of dignity, to be lived in a proper environment, free from the danger of disease or infection.

Finally article 51 provides as under:

_Promotion of international peace and security_

The State shall endeavor to

(a) promote international peace and security;

(b) maintain just and honorable relations between nations;
(c) foster respect for international law and treaty obligations in the dealings of organized people with one another, and

(d) encourage settlement of international disputes by arbitration.

Thus, the State is, inter alia, under an Obligation to maintain just and honorable relations with other nations and foster respect for international law and treaty obligations in dealing with the people.

Thus, the Indian Constitution covers the question of propaganda for war by enabling the State to impose restrictions on the expression and opinions of its citizens in such a way that do not violate friendly relations with foreign States. Further the Indian Penal Code treats the acts aimed against foreign states as crimes with suitable punishment.

India has been against any advocacy of racial or religious hatred, and has consistently followed the policy of non-violence. Accordingly, India has become party to the International Covenant on the Suppression and Punishment of the Crimes of Apartheid. The Indian Parliament has already passed legislation on this matter, namely, the Anti-Apartheid (United Nations Convention) Act, 1981. We have seen in that most of the directive principles correspond to venous provisions of the Universal Declaration of Human Rights and other International Covenants on Human Rights. It is the duty of the State that it must respect the international instruments on human rights and achieve their underlined objectives by implementing the various constitutional provisions which are part of the Supreme Law of the land.

3.6 Fundamental Duties

Rights and duties are co-relative. Part III of the Constitution confers certain human rights on its people. In Part IV certain "obligations" have been placed on the State which it must endeavor for achieving the ends given in Part III of
the Constitution. At the same time it is necessary that the citizens also have
certain duties for achieving the ends or goals of Part III of the Constitution.
Article 51-A in Part IV-A was added by the Constitution (Forty-second)
Amendment Act, 1976 specifying ten duties for its citizens which are as under:

51A. *Fundamental duties* — It shall be the duty of every citizen of India——

(a) to abide by the Constitution and respect its ideals and institutions,
the National Flag and the National Anthem;

(b) to cherish and follow the noble ideals which inspired our national
struggle for freedom;

(c) to uphold and protect the sovereignty, unity any integrity of
India;

(d) to defend the country and render national service when called
upon to do so;

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

(f) to value and preserve the rich heritage of our composite culture;

(g) to protect and improve the natural environment including forests,
lakes, rivers, wild life and to have compassion for living
creatures;

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

(i) to safeguard public property and to abjure violence;
(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement.

We find that it is the duty of every citizen of India, inter alia, to promote harmony and the spirit of common brotherhood amongst people; to renounce practices derogatory to the dignity of women; to protect and improve natural environment; to safeguard public property and to adjure violence and to strive towards excellence in all spheres of individual and collective activity which is possible if we protect and promote the human rights of all the people.

Thus, we find that the preamble, fundamental rights, directive principles of state policy and the fundamental duties provided in the Indian Constitution aim at protecting and promoting the human rights.

References


[14] Magna Carta of 1215 is one of the four great Charters of liberty from which the liberties of the British citizens derive their protection. In 1689 the Bill of Rights was written consolidating all important rights and liberties of the English people.


[17] Article 13(4) provides:"Nothing is this article shall apply to any amendment of this Constitution made under article 368."

[19] Second paragraph of the Preamble to the Charter of the United Nations
and paragraph 3 of article I.


[22] Indra Sawhney vs. Union of India, 1992 Supp (3) see 211, 212 and 213.


S.C. 1473.

637. 41. Peoples Union for Democratic Rights v. Union of India, A.I.R.


[27] Pathumma vs. State of Kerala, AIR. 1978 S.C. 771. See also

[28] Narendra Kumar vs. Union of India, A.I.R. 1960 S.C. 430; State of
Madras vs. V.G. Row, A.I.R. 1952 S.C 196 and Kerala S.M.T Fed. v,

[29] Universal Declaration of Human Rights, 1948, article 29(2). See also
B.G. Ramcharan (Ed.), Human Rights-Thirty Years after the Universal


[53] Unni Krishnan v. State of A.P., (1993) 1 SCC 645 at 680-681 where the Supreme Court has limited the right to education up to the age of 14 years as implicit in article 21 of the Constitution.


[58] List I to III and different entries there under are enumerated in the Seventh Schedule of the Constitution of India.

[59] Article 246 of the Constitution of India.


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[71] A.K Roy v. Union of India supra notes 91 at 754. Tulzapurkar, J. agreed with Gupta J., on this point ibid at 756.

[72] (1994) 5 see 54 at 98.


[76] Articles 72 and 161 of the Constitution of India.


[80] Art. 141 of the Constitution of India.


[90] Clause 40 of Magna Carta of 1215.


[94] University of Delhi vs. Ram Nath, (1964) 2 SCR 703 at 710.