Chapter - II

Women's Status Under the Indian Constitution

The Constitution of India is the best in the world which has taken care of the underprivileged and the minorities. All our laws get their sanction from this Constitution and any law which violates a provision of the Constitution is declared unconstitutional.

The Constitution of India not only grants equality to women but also empowers the state to adopt measures of positive discrimination in favour of women for neutralising the cumulative socio-economic, educational and political disadvantages faced by them.

The Preamble of the Indian Constitution categorically states:

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

The proper function of a Preamble is to explain certain facts which are necessary to be explained before the enactments
contained in the Act can be understood. As Basu has said, "A
statute must be read as a whole and a Preamble is as much a
part of the statute as its enacting part." However, he has
rightly clarified that the Preamble is not the source either
of any power or of any limitation, nor is any appeal to the
Preamble permissible to override the express provision of the
Constitution. 1

Of relevance to us is the promise to secure justice
and equality to all the citizens of our country. The essence
of justice is the attainment of the common good as distinguished
from the good of individuals or even of the majority of them.

Our Constitution realises that a true democracy
requires not only equality but also justice. As a result of
this two-fold ideal, it not only provides for securing equality
of status and opportunity by prohibiting discrimination by the
state on grounds of religion, race, sex etc., but at the same
time makes special provision for the promotion of the interest
of the backward and weaker sections of the people, in whose
case equality of status and opportunity may not be adequate
to secure their well being as a part of the general welfare of
society.

Social justice requires abolition of all sorts of
inequities which result from inequalities of wealth and

1. Durga Das Basu, Commentary on the Constitution of India,
Calcutta, 1965, pp.66-67. We have based this Chapter
mainly on Basu's commentaries which are acknowledged
source material on the Indian Constitution.
opportunity, race, caste, religion and title. Thus, the provision for humane conditions of work, maternity relief, leisure and cultural opportunities to every individual, prevention of exploitation of child in labour and industry, provision for free primary education for all, the promotion of the educational and economic interests of the backward classes, banning of forced labour are all programmes of social justice held out by our Constitution.

According to Basu, "Social justice, in short, is the harmonisation of all the rival claims of the interest of different groups and sections in the social structure by means of which alone it is possible to build up a 'Welfare State'."

The ideal of economic justice means that there will be no distinction between man and men from the standpoint of economic value. In short, it means equality of reward for equal work. Every man should get his just dues for his labour, irrespective of caste, creed, sex or social position.

Political justice means the absence of any arbitrary distinction between man and man in the political sphere. This is secured under our Constitution by the adoption of universal adult suffrage and the abolition of communal reservation and by throwing open employment under the state to all citizens without distinctions of race, caste, sex, descent, place of birth or religion. The Declaration of the Rights of Men and Citizen adopted by the authors at the French Revolution referred to equality in these terms: "All citizens being equal in its eyes, are equally eligible to all

public dignities, places and employments, according to their capacities, and without distinction than of their virtues and talents."

It is exactly this equality of status and opportunity that our Constitution professes to offer to the Indian citizens by the Preamble and the object is secured in the body of the Constitution by making illegal all discriminations by the State between citizen and citizen, simply on the ground of religion, race, caste, sex or place of birth; by throwing open 'public places' to all citizens; by abolishing untouchability; by abolishing titles of honour; by offering equality of opportunity in matters relating to employment under the state; by guaranteeing equality before the law and equal protection of the laws, as justiciable rights.

Besides the Preamble the Articles of the constitution which impinge on our subject of enquiry are Articles 14, 15, 16 under Part III dealing with Fundamental Rights, Articles 39, 42, 44 and 51-A(c)\(^3\) under Part IV dealing with Directive Principles of State Policy and Article 246 under Part XI dealing with relations between the Union and the States. Let us now take up each of these Articles one by one.

Article 14 states:

"The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

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3. This clause was added to the constitution by the 42 amendment in 1976.
The article has two phrases - "equality before the law" and "equal protection of the laws". While the former is a somewhat negative concept implying the absence of any special privilege in favour of any individual and the equal subjection of all classes to the ordinary law, the latter is a more positive concept implying equality of treatment in equal circumstances though the object is fundamentally the same, viz., equal justice. In the words of Jennings, "Equality before the law means that among equal the law should be equal and should be equally administered, that like should be treated alike." Basu has raised the question of the effect of incorporating the doctrine of equality before the law in a written guarantee of fundamental rights and in particular along with the analogous guarantee of equal protection. He finds the answer in the minority opinion of Subba Rao in Lachman Das's case that the effect of incorporation of the doctrine of 'equality before the law' in our written Constitution makes it a guarantee against the legislature as well, and also that, by reason of this guarantee being superadded to the guarantee of equal protection, a reasonable harmonisation of the two principles must be effected by the courts when a law is impugned as violative of equal protection. Equality before the law does not mean an absolute

equality of men, which is a physical impossibility, but the
denial of any special privilege by reason of birth, creed or the
like in favour of any individual and also the equal subjection
of all individuals and classes to the ordinary law of the land
administered by the ordinary law courts. It thus excluded the
idea of any exemption of officials or others from the duty of
obedience to the law which governs other citizens or from the
jurisdiction of the ordinary tribunals. 8

It has been made clear while dealing with Article 14
that there can be no equality between unequals. That is why the
constitution has deemed it fit to extend protection of the
special laws to some section of society who have been discrimina-
ted against, like women. These are covered by Articles 15 & 16.

Article 15 states:

i) The state shall not discriminate against any
citizen on grounds only of religion, race,
caste, sex, place and birth or any of them.

ii) No citizen shall, on grounds only of religion,
race, caste, sex, place of birth or any of
them, be subject to any disability, liability,
restriction or condition with regard to -

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

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

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iii) Nothing in this article shall prevent the state from making any special provision for women and children.

iv) 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. 

While Article 14 is available to all persons, Article 15 is available to citizens only, but its scope is very wide. Clause (1) of Article 15 prohibits discrimination against any citizen on any of the specified grounds only, in any matter at the disposal of the state. If discrimination is alleged on a ground other than those specified in Article 15(1), the case must be decided under the general Article 14. Clause (2), on the other hand, is levelled not only against the State but also against private individuals, who may be in control of the public places mentioned in that clause. Clauses (3)-(4) are in the nature of exceptions to the provisions of clauses (1) and (2).

The fundamental right conferred by Article 15(1) is conferred on a citizen as an individual and is a guarantee

9. Clause (4) was added to Article 15 by the Constitution (First Amendment) Act, 1951. The object of this amendment was to bring Articles 15 and 29 in line with Articles 16(4), 46 and 340, and to make constitutional for the state to reserve seats for backward classes of citizens, Scheduled Castes and Tribes in public educational institutions, as well as to make other special provisions as might be necessary for their advancement.
against his being subjected to discrimination in the matter of his rights, privileges and immunities pertaining to him as a citizen generally. The right conferred by Article 15 is personal, and when one single citizen is discriminated against on the ground of caste, religion, etc., it is no answer to his application that other persons of the same caste or religion have been given the opportunity or privilege which has been denied to him.

As Basu points out the discrimination which is forbidden by this Article is only such discrimination as is based solely on the ground that a person belongs to a particular race or caste or professes a particular religion or was born at a particular place or is of a particular sex, and on no other ground. A discrimination based on one or more of these grounds and also on other grounds is not hit by the Article.\footnote{10. Basu, \textit{op. cit.}, p.508.}

What Article 15(1) means is that no person of a particular religion, caste, etc. shall be treated unfavourably (by the State) when compared with persons of other religions and castes merely on the ground that he belongs to a particular religion or caste etc. The significance of the word 'only' is that other qualifications being equal, the race, religion etc. of a citizen shall not be a ground of preference or disability. If there is any other ground or consideration for the differential treatment besides those prohibited by the Article, the discrimination will not be unconstitutional. Thus discrimination in favour of a particular sex or caste will be permissible.
if the classification is the result of other considerations besides the fact that the person belongs to that sex or caste, e.g. physical or intellectual fitness for some work, better provision for education of women. Similarly, the clause does not forbid discrimination on the ground of residence.

Of particular relevance to us is discrimination on the ground of sex. According to article 14 the State cannot discriminate against a person or persons in the absence of a reasonable ground for classification, on the ground of sex. This principle is reiterated by clause (1) of Article 15 by providing that "the State shall not be discriminate against any citizen on grounds only of .....sex."

An exception to the above general principle is offered by clause (3) of Article 15 which authorised the State to make, "any special provision for women".

Basu has raised the question whether Article 15(3) authorises special provisions for women even where there is no reasonable basis for the classification, having regard to the object of the legislation. Now, so far as Clause (3) of Article 15 is concerned, the provision is not qualified by any condition. Further, since this is a special provision, it has to prevail if there is any conflict between it and the general provision in Article 14.11

It would, accordingly, follow that any special provision for women can not be challenged on the ground that

11. Ibid., p.510.
there is no reasonable basis for the classification having regard to the object of the legislation. Thus, it has been held that the following provisions which confer special privileges upon or protection to women are not valid:

a) Section 497 of the Indian Penal code which provides that the woman shall not be liable as abettor of the offence of adultery.

b) Section 354 of the Indian Penal code which protects the modesty only of women.

c) Section 488 of the Criminal Procedure Code which obliges the husband to maintain his wife, but not vice versa; 497(1) of the same code which provides for special treatment of women accused of a non-bailable offence, in the matter of bail.

d) Section 18 of the Divorce Act which differentiates between husband and wife as to the grounds for divorce.

e) Reservation of seats for women in a local body.

In other words, any legislation coming under Article 15(3) is shielded from attack on the ground of contravention of Article 14. If that were not so, there would have been no meaning to insert clause (3) to control clause (1) of Article 15.

But the special provisions referred to in clause (3) need not be restricted to measures which are beneficial in the strict sense. Thus, it would support a provision like that in section 497 of the Indian Penal Code which says that an
offence of adultery, though the man is punishable for adultery, the woman is not punishable as an abettor.

We can cite some illustrations to further clarify this issue of discrimination on the ground of sex. When an applicant has been refused admission to a college under a scheme of better arrangement of both men's and women's education in the locality, which covered development of the local Women's College and also relieving pressure on the mixed College where the applicant was refused admission, it could not be said that the applicant was discriminated against only on the ground of sex. It was necessary to restrict further admission of women students into the latter college in view of facts cited. 12

Again elaborating on this point, Basu says that discrimination between man and woman by the law relating to adultery either because it does not punish the woman as an abettor or because it requires something besides adultery (e.g., desertion or cruelty) when a woman seeks to divorce her husband, offends neither against Article 14 nor Article 15. 13

Clause (3) of Article 15 allows the State to make any special provision for women and children. This clause is an exception to the rule against discrimination provided

by Clauses (1) as well as (2). The reason why special provision is needed for women is that woman's physical structure and the performance of maternal function places her at a disadvantage in the struggle for subsistence and her physical well-being becomes an object of public interest and care in order to preserve the strength and vigour of the race. Special treatment of women may also be justifiable on account of peculiar social position of women in India.¹⁴

Thus the provision of maternity relief for women workers (Article 42) will not be a contravention of the prohibition against discrimination under clause (1) of the present Article; nor will be the provision of free education for children (Article 45) or measures for prevention of their exploitation (Article 39(f)). Similarly, the provision of separate accommodation, entrances etc. for women and children at places of public resort will not be a violation of Clause (2) of the present Article. The present clause would also justify the regulation or limiting of working hours for women employees even though such regulation was not necessary for men.

The Supreme Court has held in Nain Sukh v. State of U.P.¹⁵ that the general prohibition against discrimination in clause (1) of Article 15 also extends to political rights.

so that the reservation of seats or provision of separate representation on the basis of religion, sex etc. would offend against clause (1) of Article 15. But the Bombay High Court has upheld the separate representation of women in local bodies, by reason of clause (3). 16

Basu comments that the special treatment that is permissible under clause (3) of Article 15 must be relatable to some feature or disability which is peculiar to women so as to differentiate them from men as a class. It is not possible to exhaust these special features of women, but some of them were mentioned by the American Supreme Court in Muller v. Oregon: 17 the difference between two sexes in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labour; dependence of women upon men, in general; the need for maintenance of the home and proper discharge of the maternal function, including the rearing and education of children for the future well-being of the race. Discrimination in favour of women on such grounds exists, more or less, in all civilised countries of the world. But, as mentioned above, the Supreme Court of

16. Dattatraya v. State of Bombay, A.1953, Bom.311. The High Court held that clause (3) of Article 15 formed a complete exception to clause (1) of that Article in relation to women so that reservation of seats for women would not offend against clause (1).

India has held that the special provision referred to in clause (3) need not be restricted to measures which are beneficial in the strict sense. This view of the Supreme Court thus overrides the view taken by the Calcutta High Court that the words 'provision for' mean 'provision in favour of'.

It thus becomes clear that any law making special provision for women (or children) under Article 15(3) cannot be challenged on the ground of contravention of Article 14.

According to Article 16:

1) There shall be equality of opportunity for all citizens in matter 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 or 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

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18. Yusuf v. State of Bombay. Bombay High Court has pointed out that this provision has been enacted in view of the relative helplessness of women in India in such matters owing to their social position.
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
person professing a particular religion
or belonging to a particular denomination.

Articles 14 and 16:

Article 14, 15 and 16 form part of the same constitutional code of guarantees and supplement each other. In other

19. The underlined words were substituted by the Constitution (Seventh Amendment) Act 1956.
words, Article 16 is only an instance of the application of the general rule of equality laid down in Article 14 and it should be construed as such. Hence, there is no denial of the equality of opportunity unless the person who complains of discrimination is not equally situated with the person or persons who are alleged to have been favoured. In short, Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection. The equality of opportunity guaranteed by it means "equality between members of the same class of employees and not equality between members of separate, independent classes." 20

The principle underlying Article 14 has, accordingly, been applied to the interpretation of Article 16(1), namely, that the equality of opportunity guaranteed by it means "equality as between members of the same class of employees, and not equality between members of separate, independent classes."

The selective test adopted by the Government shall be violative of Article 16 if there is no relevant connection between the test and efficient performance of the duties and obligations of the particular office. 21

20. All India Station Masters' Association v. General Manager, A.1960 S.C.384.

Basu comparing Article 15 and 16 comments that while Article 16 deals with a limited subject, viz., employment or appointment of state, Article 15 is more general in its application and deals with all cases of discrimination which do not fall expressly under Article 16.\textsuperscript{22}

Regarding equality of opportunity under Article 16(1) we would like to point out that it does not mean that Government is not, like other employers, entitled to pick and choose from amongst a number of candidates offering themselves for employment under the Government. It is also open to the appointing authority to lay down such pre-requisite conditions of service as would be conducive to proper discipline amongst Government servants.

Clause (2) of Article 16 emphatically brings out in a negative form what is guaranteed affirmatively by clause (1). It prohibits discrimination on certain grounds and thus assures the effective enforcement of the right of equality and opportunity guaranteed by clause (1). The words 'in respect of any employment' used in clause (2) must, therefore, include all "matters relating to employment" as specified in clause (1).

If the discrimination is on any ground other than those specified in the clause, it will not offend against Article 16(2). But even in that case, the discrimination may be violative of Article 14, if there is absence of any nexus

\textsuperscript{22} Basu, \textit{op.cit.}, p.526.
between the basis of the classification and the object to be
achieved by the State.

It is to be noted that there is no provision in
Article 16 corresponding to clause (1) of Article 15. The
result is that for purposes of employment under the State,
though reservation in favour of backward classes is permissi-
ble under clause (4) of article 16, no such reservation is
possible in favour of women, nor is any other discrimination
in favour of women possible, e.g., relaxation of rules of
recruitment or standard of qualification or the like.

Any discussion of Fundamental Rights under the
Constitution of India would remain incomplete without a
reference to Article 32 which deals with the Right to
Constitutional Remedies. As per Article 32:

1) The right to move the Supreme Court by
appropriate proceedings for the enforce-
ment 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.

A declaration of fundamental rights is meaningless unless there are effective judicial remedies for their enforcement. This is also stated in Article 8 of the Universal Declaration of Human Rights 1948.

The present Article of our Constitution provides for the enforcement of the Fundamental Rights by means of these writs or writs of the same nature. As will be shown presently, the power conferred by the present Article is the most potent weapon in the hands of our Supreme Court and that it is the duty of the Supreme Court to use it in a case properly coming under the Article.

Since the remedy under Article 32 is itself a guaranteed right, it follows that it can neither be directly curtailed by any legislation, short of amendment of Article 32 itself (in accordance with Article 363) nor can it be indirectly rendered illusory or nugatory.\(^\text{23}\)

Any law which renders nugatory or illusory the exercise of the Supreme Court's powers under Article 32 is void, except where the constitution itself shields a law from challenge on the ground of contravention of fundamental rights.

Clause (4) of Article 32 provides that the right guaranteed by article 32(1), i.e., the right to move the Supreme Court for the enforcement of the Fundamental Rights, shall not be suspended except as provided by this Constitution, i.e., except as provided in Article 359.

The mode of suspension provided by Article 359 is an order of the President subject to legislative approval, when a Proclamation of Emergency is in operation.

The effect of an order under Article 359(1) is that during operation of the Proclamation of Emergency under Article 356 no application under Article 32 will lie to enforce any of the fundamental rights specified in the order under Art. 359 (1). 24

Let us now move on to the Directive Principles of State Policy which are related to the status of women in India. The first such article is Article 39 which states:

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 subserve the common good;
c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
d) that there is equal pay for equal work for both men and women;
e) that the health and strength of workers, men and women, and 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 moral and material abandonment.  

25. Clause (f) was substituted by the Constitution (42nd Amendment) Act, 1976.
The Article that follows 39A was inserted by the Constitution (42nd Amendment) Act 1976. It says:

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.

This Directive was added to ensure equal justice which has been promised to all citizens by the Preamble and to further the guarantee of equality before the law. Article 14 which provides this guarantee was meaningless to a poor man (including a poor woman) so long as he/she was unable to pay for his/her legal adviser.

According to Basu, read with Art.21, this Directive leads to the following consequences as far as the administration of justice is concerned:

1) When the accused is unable to engage a lawyer owing to poverty or similar circumstances, the trial would be vitiated unless the state offers

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free legal aid for his defence by engaging a lawyer to whose engagement the accused does not object.\(^{27}\)

ii) To allow an indigent claimant for compensation for a road accident to apply in forma pauperis.\(^{28}\)

iii) To compel the jail authorities to supply a free copy of the judgement to a prisoner so that he may exercise his right to appeal.\(^{29}\)

The other relevant articles of this chapter dealing with the Directive Principles of State Policy are Articles 42, 44 and 51-A(e) which was added to the Constitution by the 42nd Amendment in 1976.

**Article 42**: The State shall make provision for securing just and humane conditions of work and for maternity relief.

This is in accordance with Article 23 and 25 of Universal Declaration of Human Rights. Article 7 and Article 10.2 of International Convenant on Economic, Social and


Cultural Rights 1966, have provided these rights a sound footing. Article 10.2 of this Covenant merits being quoted, since it appears to be the best statement on the rights of motherhood. The Article says - "The State parties to the present Covenant recognize that special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits."

Basu points out that the principle of just and humane conditions of work has been extended even to work of prisoners in jails so that convicts and under-trial prisoners are not subjected to subtle forms of punishment.\(^\text{30}\)

Article 44 deals with the uniform civil code for the citizens. It says:

"The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

The object of this Article is to introduce a uniform personal law for the purpose of national consolidation. It proceeds on the assumption that there is no necessary connection between religion and personal law in a civilized society. While the constitution guarantees freedom of conscience and of religion (Art. 25), it seeks "to divest religion from personal law and

social relations and from laws governing inheritance, succession and marriage" just as it has been done even in Muslim countries like Turkey or Egypt. The object is not to encroach upon religious liberties. Clause (2)(a) of article 25 already reserves such right of the state.

Owing to political considerations (fear of losing Muslim votes or of violence) the Directive to frame a uniform civil code for the whole of India has not borne any fruit in the 47 years of our Republic's existence. In 1954, while defending in Parliament the presentation of the Hindu Code Bill instead of a uniform civil code, Pandit Nehru said, "I do not think that at the present moment the time is ripe in India for me to try to push it through." Basu has rightly commented, "one may reasonably apprehend that time may never come at all." He further says that even though the legal foundation behind Article 44 is quite patent and has been explained by Muslim judges and lawyers of eminence, the uninitiated still think that to include the Muslims in a common civil code would be an interference with their religion. The fact is that the real reason behind Muslim opposition to a common civil code in India is not legal but political.

Basu concludes: "One wonders how long more will it take these religious minorities to realise that (a) India is their motherland; (b) India cannot survive against foreign aggression unless she is strong enough; (c) India, composed of

heterogenous races, religions and languages, can never be strong
until every citizen sincerely believes that he belongs to a
brotherhood and a unified 'Nation', which is envisaged by the
very Preamble of our Constitution. 32

Our discussion would remain incomplete without some
comments on the legal utility of the Directive Principles of
State Policy as given in part IV of our constitution. 'State'
here means that not only the Union and State authorities but
also local authorities shall have a moral obligation to follow
the Directives. It also includes codes and statutory tribunals
so that they can not over-look the objectives of these principles
and the fact that they are morally binding upon the executive
and the legislature in determining their policy and action. The
Directives can be implemented by the executive so long as these
do not contravene any law, or the matter is such that legisla-
tion would not be required to affect the citizens rights.

Though the makers of our Constitution drew the
inspiration for including in the Constitution non-justifiable
provisions in the shape of Directive Principles of state policy
from the Constitution of Eire, in the text of the provision as
well as their working we can notice certain differences.

While in the Irish Constitution, the Directives are
not cognisable by any court, in our constitution the word
'shall not be enforceable' by any court have been used. Again
while under the Irish Constitution, the Directives are in the
shape of general guidance to the Legislature under the Indian

Constitution, the Directives are to be "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." 33

The Constitution (42nd Amendment) Act 1976 added part IVA dealing with Fundamental Duties. This part has only one Article, 51A which says:

"It shall be the duty of every citizen of India—
a) to abide by the Constitution and respect the 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 and 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

33. Article 37 of the Constitution of India. According to Dr. Ambedkar, "In enacting this part of the constitution, the Assembly is giving certain directions to the future legislature and the future executive to show in what manner they are exercise the legislature and the executive power they will have. Surely it is not the intention to introduce in this part these principles as mere pious declarations. It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip service to these principles but that they should be made the bases of all legislative and executive action that they may be taken hereafter in the matter of the government of the country." Basu, (Sixth edn.), p. 84.
of India transcending religions, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women; 34

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

g) to protect and improve the natural environment including forests, lakes, rivers and 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 endeavour and achievement.

This part was added in accordance with the recommendation of the Sawarn Singh Committee. According to Basu, the Committee appears to have taken up the suggestion in this behalf made by him. 35 The Committee had gone beyond the suggestion made by Basu in empowering Parliament to impose punishment for breach of such duties. That suggestion was,

34. Emphasis added.

however, not accepted while drafting the bill.

The citizen, it is accepted, should be his own monitor while exercising and enforcing his fundamental rights, that if he does not care for the duties, he should not deserve the right. For instance a person who burns the constitution, in violence of the duty in Art.51-IA(a), cannot assert that the meeting or assembly at which it was burnt by way of demonstration against the government should be protected by the freedom of expression or assembly guaranteed by Art.19.

While speaking in the Lok Sabha on 25 Oct., 1976 Mrs. Indira Gandhi stressed the moral value of the fundamental duties and said it would be "not to smother rights but to establish a democratic balance", by making the people conscious of their duties equally as they are conscious of their rights. The Law Minister, two days earlier on 26 Oct. 1976, had assured that care would be taken to include these duties in the educational curriculum.

The Directives fall into three categories:

i) certain ideals, particularly economic, which the framers of the constitution wished that the State should not strive for;

ii) certain directions to the future legislature and the future executive to show in what manner they should exercise their legislative and executive powers.

iii) certain rights of the citizens which shall not be enforceable by the courts like the 'Fundamental
Rights' but which the State shall nevertheless aim at securing, by regulation of its legislature and administrative policy.

One thing is certain - so far as the end of the State is concerned, it is clearly that of a Welfare State as distinguished from a mere 'Police State' which aims at social welfare and the common good and to secure to all citizens 'justice, social and economic' as declared by the very preamble to the Constitution.

The sanction behind the Directives, as Basu says, is political and not judicial. Dr. Ambedkar had observed in the Constituent Assembly, "if any Government ignores them, they will certainly have to answer for them before the electorate at the election time." It would also be a patent weapon in the hands of the opposition which can be used to discredit Government. So far as the courts are concerned, the Directives are not enforceable by any judicial process. No court would be entitled to declare any legislation as invalid on the ground that it does not conform to the spirit of any of the Directive Principles. Nor will the court be competent to compel the

38. Basu, 6th Ed., p. 84.
Government to carry out any directive within the time limited by the Constitution, e.g. the provision for free and compulsory primary education within the period of 10 years as required by Article 45, or to give assistance for unemployment as required by Article 41. The directives in short do not create any legally enforceable rights or obligations.

Nevertheless, the courts cannot altogether ignore the existence of the Directives in the body of the Constitution and our Supreme Court has aided the implementation of the Directives in a substantive manner, even in cases where the relevant legislation has been challenged as an inroad upon Fundamental Rights. In the working of our Constitution, thus, the directives have gathered more weight than a mere 'moral homily'. Under our 'Constitution, though the courts cannot declare any law to be void on the ground of contravention of any of the directives, the courts have already taken cognizance of the tendency of the directives for the purpose of upholding social legislation.

Thus, the Directives have been used as aids for the interpretation of the Constitution, as aids to interpretation of statutes, as fundamental in the governance of the country and as guiding principles in making laws. Let us take up some instances.

A favourable classification of an object, the promotion of which is encouraged by Directive Principles should be regarded

as a reasonable classification under Art.14.42

Regarding interpretation of statutes, the Supreme Court in an unanimous decision said, "While courts are not free to direct the making of legislation, courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of social policy. This command of the Constitution must be ever present in the minds of judges when interpreting statutes which concern themselves directly or indirectly with matters set out in the Directive Principles of the State Policy."43

Thus, the court made a beneficial construction of S.127(3)(h) of the Cr.P.C., 1973, in order to save the right to maintenance of a divorced wife who had received satisfaction of her mehar money under a compromise. In this view, the court invoked art.44.44

However, as Basu has pointed out, the court can not act as a super-legislature to impute to a legislative language a meaning which it cannot bear, except where the language used by the legislature is ambiguous or capable of two meanings.45

Unless this limitation of beneficial statutory construction is kept at the back of the mind, interpretation by the highest court of the land may be shrouded in uncertainty, for the simple reason that the language of the Directives in Part IV of the Constitution is so pervasive and the total sweep of the different Directives contained in that Part is so wide that the citizen who relies on the plain meaning of the statutory provisions would remain at sea until the Supreme Court gives its interpretation in consonance with the Directives.

A question arises whether a Directive can be implemented by the Government with legislation. There is some controversy on this point which, however, is not real but apparent. Broadly speaking, the executive power of the Government is co-extensive with the legislative power of the State. The Government can, therefore, without legislative authority, do by taking administrative action what could be done by legislation, provided if there is any law relating to the matter, the executive action must not contravene that law. Also we must remember that there are certain provisions of the Constitution which say that a thing may be done only by legislation.

Lastly, let us discuss the relationship between the Fundamental Rights and Directive Principles. Historically, the Fundamental Rights and Directive Principles had a common origin if the common origin of the two parts - III and IV - of the Constitution be borne in mind, it would be clear that
their objective also is the same, namely, to ensure the welfare society envisaged by the Preamble. While the fundamental Rights seek to achieve that goal by guaranteeing certain minimal rights to the individual as against State action, the Directives enjoin the State to ensure the welfare of the people collectively. The history of the treatment of this problem by the Supreme Court would show that while the Supreme Court, in its earliest decisions took a purely legalistic view, the later development has been towards avoidance of any conflict, by applying the principles of reconciliation and harmonious construction.

Applying this doctrine of harmonious construction, the Court has come to hold that in determining the ambit of the Fundamental Rights themselves, the Court might look at the relevant Directives. In Chandra Bhavan's case; Hegde, J. observed, "We see no conflict on the whole between the provisions content in part III and part IV. They are complementary and supplement to each other."

The question is how far this process of harmonious reading to make the Fundamental Rights give way to the Directives should go. The Court had observed in Chandra Bhavan's case thus, "Freedom of trade does not mean freedom to exploit. The provisions of the Constitution are not erected as the barriers to

47. In re, the Kerala education bill (1959) S.E.R.995.
progress. They provide a plan for orderly progress towards
the social order contemplated by the Preamble to the
Constitution."\textsuperscript{49}

According to Iyer, J., "Keshvanand Bharti has
clinched the issue of primacy as between Part III and Part
Iv of the Constitution."\textsuperscript{50} In this case the Supreme Court
introduced a more \textsuperscript{51} radical doctrine. Khanna J. enunciated
the preposition -

1) that both the Directive Principles and Funda­
mental Rights were equally 'Fundamental' even
though the Directives were not directly
enforceable by the courts;

ii) that the Directive Principles embody a commit­
ment which was imposed by the Constitution
makers on the state to bring about economic
and social regeneration of the teeming millions.

In the words of Chandrachud, J. "What is fundamental
in the governance of the country cannot surely be less signi­
ficant than what is fundamental in the life of the individual
.... The freedom of a few have then to be in order to ensure
the freedom of all. If the state fails to create conditions
in which the fundamental freedoms are enjoyed by all, the
freedom of few will be at the mercy of the many and then all

\textsuperscript{49} Basu, 6th Ed., p.96.
\textsuperscript{50} State of Kerala v. Thomas, A.1976 S.C.496.
freedom will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it."\(^{52}\)

However, it is interesting to note in this context that at the drafting stage, Sir B.N. Rau has suggested the insertion of a provision that in case of a conflict between the Fundamental Rights and Directives, the latter should prevail, because the Directives were intended for the welfare of the State as a whole. But the suggestion was not accepted by the drafting committee nor adopted in the text of the Constitution.\(^{53}\)

The parliament has been seeking to give the Directives primacy over the Fundamental Rights by amending the Constitution so that it may not have to depend on the vagaries of judicial interpretation. It started with the very first amendment to the Constitution in 1951 through which Parliament introduced Article 31\(^{A}\)\(^{54}\) and by inserting Article 31B and the 9th schedule through which certain specified laws were shielded. Then followed the Constitutional Fourth Amendment Act to amend Article 31A itself by adding new sub clauses to Article 31A(1).\(^{55}\) Successive amendments enlarged the list in the schedule until it

\(^{52}\) Ibid., Emphasis added.


\(^{54}\) To exempt laws for the execution of the zamindari estate and rights therein from the mischief of the Fundamental Rights in Part III altogether.

\(^{55}\) To widen the scope of that Article to comprise other kinds of social welfare legislation which might be prompted by the Directives under Article 39(B) and (C).
came up to include as many as 188 enactments, by the 48th Amendment Act 1976.

Parliament sought to prevent interference by the Judiciary by inserting Art. 31C by the 25th amendment Act of 1971. The second part of Article 31C was invalidated by a majority of the full bench of the Supreme Court in Keshavananda case.

The Parliament replied by enacting the 42nd Amendment Act of 1976. Now, the sweep of Art 31C was extended to its maximum extent to include legislation to implement any of the Directives included in Part IV. By the same amendment Act, the list of the Directives in part IV was enlarged by adding new Directives in Art. 39A, 43A and 48A.

Article 368 itself was amended (new clause 2) to provide that no court shall call in question the validity of any constitution amendment Act on any ground.

The Supreme Court (Constitution Bench) has again invalidated the attempt to take away the power of judicial review from the judiciary to question the constitutionality

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56. The second part of this Art. 31C provided that if the Legislature declare on the face of a law that it has been enacted for giving effect to the Directives under Art. 39(b) and (c), that would be conclusive and the courts would be debarred from holding that it was not.

57. The Supreme Court held that the Constitution amendment Act could be struck down if it effected any of the 'basic features' of the Constitution, such as Judicial Review.

58. Even though it attempted over any of the 'basic features' of the Constitution as asserted by the Supreme Court.
of a Constitution Amendment Act in the Minerva Mills Case.\textsuperscript{59}

We seem to agree with Basu that there is a social purpose behind every Fundamental Right because a society is nothing but a collective body of individuals, which can not thrive unless certain minimal rights are guaranteed to each individual to secure his life and liberty.\textsuperscript{60}

Thus, an analysis of the relevant constitutional provisions makes it clear that women have not only equal rights with men but because they have been considered 'deprived', special provisions have been made to provide protection to them. To sum up –

1) Article 14 provides that the State shall not deny to any person equality or equal protection of the laws.
2) Article 15 prohibits discrimination on the ground of religion, race, caste, sex or place or birth.
3) Article 15(3) empowers the State to make special provision for women and children.
4) Article 16 provides for equality of opportunity in the matter of public employment.
5) Article 39(d) provides for pay for equal work for both men and women.

\textsuperscript{59} Minerva Mills Case v. Union of India, 1980 S.C. d. 958.
\textsuperscript{60} Basu, p.99.
6) Article 42 makes provision for just and humane conditions of work and maternity relief.

7) Article 44 says that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

8) Article 51A(e) in part IV-A, the new chapter in Fundamental Duties provides that it is the duty of every citizen to renounce practices derogatory to the dignity of women.

9) Article 246 empowers Parliament and State Legislators to make laws in the areas which since the pre-constitution days fall in the domain of personal laws.

To uphold the constitutional mandate, the State has enacted various Legislative measures to ensure equal rights, to counter social discrimination and various forms of violence and atrocities and to provide support services especially to working women. Although all laws are not gender specific, the major provisions affect women significantly. Amendments have been periodically carried out to keep pace with emerging demands.

The legal edifice thus built on the foundation provided by the Constitution effectively affirms and promotes the principles of equity and equality of women and takes care of their special needs. To this legal edifice we would now turn in the following chapters.