CHAPTER V:
LIBERALISMS
IN CONFLICT
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We saw in the preceding chapters that the Fundamental Rights and the directive principles of the Indian constitution largely represent classical liberalism and new liberalism respectively. But again there is the case of overlapping and a blanket characterization either of them by saying that these two provisions of the constitution contain two variant of liberalism, mutually exclusively, seems to be untenable. Hence the best that could be said in view of this fact is that the classical liberalism is predominantly present within the fundamental rights and that the new liberal strands are predominantly present within the directive principles. Thus even though at the initial stage the Fundamental Rights and the Directive Principles appear to represent two varieties of liberalism, in the final analysis a different picture emerges. How this difference can be explained or in other words why there has been such a case of overlapping.

The explanation that seems plausible here is that while dividing the fundamental rights and the directive principles, the framers of the Indian constitution did not do so keeping in mind the difference between classical liberalism and new liberalism. They did not design the fundamental rights and the directive principles in so rigid a way as to represent two varieties of liberalisms in a mutually exclusive way. The other explanation is that they were guided as much by socialist precepts as by liberal ideals. Besides this, the design of Fundamental Rights and the Directive Principles was based upon many factors such as the possibility of legal enforceability, resources and financial capacity of the state, etc. Thus, some practicable considerations, rather than an understanding of the difference between classical liberalism and
new liberalism, guided the approach of the constitution makers with regard to
this issue. This, then, is the explanation why there is no parity between the
division of fundamental rights and the directive principles on the one hand, and
the classical liberalism and new liberalism on the other. And it is this absence
of this parity that accounts for the overlapping, and makes it incidental rather
than a deliberate design. The word incidental here is used to refer not to their
existence as such but to the manner in which they exit.

But certain other questions still remain to be answered. That is what
about the conflicts between them? Do these conflicts can be explained as
conflicts between two kinds of liberalisms or do these conflicts are merely the
conflicts between certain legal provisions of the constitution? It is to answer
some of these questions that the current chapter is devoted. I will try to explain
these questions in a theoretical way and try to find out, do the areas that are the
grounds of conflict between the Fundamental Rights and the Directive
Principles constitute the grounds of battle between two kinds of liberalisms.
While doing this I will, however, show that not all the conflicts are the conflicts
between the two kinds of liberalisms, even though they can far be stretched
logically to show that this is the case. In stead I will try to find out in which
areas there is a conflict between classical liberalism and the new liberalism and
try to search which conflicts of these provisions are related to them. Thus I may
start from a general over view of these conflicts.

But before an attempt is made to proceed it will be worthwhile here to
mention a few things. It is a well-known fact that the Fundamental Rights and
the Directive Principles formed a comprehensive charter of rights until the
Constituent Assembly separated them, and made the former enforceable rights
and the latter non-enforceable rights. Though this division and the consequent putting of the directives into the category of non-enforceable rights generated certain controversy, nevertheless the constitution makers did so deliberately taking into account certain practical considerations. The conflicts between them sometimes reveal the fact that they often embody certain policy implications that come into conflict. But some see these conflicts as not conflicts over ends; but conflicts over the means. There are still others who do not even think that there is a conflict between them and see both as complementary to each other.

For instance K.C. Markandan, one of the authors on the Directive Principles says: “Strictly speaking there is no conflicts between the Directive Principles of state policy as non-enforcementable rights and Fundamental Rights as enforceable ones”.¹ He further says that “the Directive Principles are to ensure social and economic democracy in addition to political democracy which was secured by the provisions of Fundamental Rights in a written constitution”.²

Similarly K. Suba Rao, the former Chief Justice of India, sees no inherent conflict between the fundamental rights and the directive principles. Thus he says “uninformed criticism finds a conflict between the two where there is none”.³ Rather, he sees these two provisions as an exemplification of a model of pragmatic solution to reconcile the demands of individual liberty and the requirements of social control.

But there have been real conflicts between these two provisions if we look into the past fifty years of the history of Indian constitution. In the light of its history it can be said that there indeed have been conflicts between the

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² Ibid., p.272.
fundamental rights and the directive principles and some of these conflicts have even led to the subsequent amendments of the constitution. For instance, the First, the Forth or the Seventeenth amendments to mention a few.

If these are conflicts between the two provisions of the constitution how can then they be explained? In other words are these conflicts to be seen as conflicts between certain provisions of the constitution or do they involve some broader issue. Moreover, it could be argued here that if the Fundamental Rights and the Directive Principles represent two different kinds of liberalism, could their conflicts be interpreted as conflicts between two kinds of liberalism. Because while the classical liberalism gives priority to individual liberty and by implication, calls for a state with minimum functions and a limited government, the new liberalism, committed to social welfare and altering the socio-economic conditions of the people, allows for an extensive state. So they are bound to have different and often conflicting policy implications. And the task here is to find out whether the conflicts between Fundamental Rights and the Directive Principles exemplify these conflicts.

But before doing that it would be worthwhile to offer a little account of how other view these conflicts. The conflict between them is grounded in their character as enforceable and non-enforceable rights. Because, the enforceable character of the Fundamental Rights make the judiciary obliged in their favour, as has been the case in “Champakam Dorairajan vs. the State of Madras.”⁴ As the court observed: “The directive principles of state policy laid down in Part IV of the constitution can not in any way override or abridge the Fundamental Rights guaranteed by Part III. On the other hand they have to confirm to and

run as subsidiary to the Fundamental Rights laid down in Part III.\textsuperscript{5} The other fact that explains their conflicts is the difference in their policy implications. As D.D. Basu, talking in the context of difference between the two says “while the Fundamental Rights constitute limitations upon the state action, the Directive Principles are in the nature of instruments of instruction to the government of the day to do certain things and to achieve certain ends by their actions”.\textsuperscript{6} Austin also holds a similar view when he characterizes the Fundamental Rights and the Directive Principles as negative and positive obligations of the State. As he says “the fundamental rights are the negative obligation of the state not to encroach upon the individual liberty. With regard to the Directive Principles he says that these are the positive obligation of the state. He, clarifies it in the following terms: “By establishing these positive obligations of the state the members of the Constituent Assembly made it responsibility of future Indian governments to find a middle way between individual liberty and the public good, between preserving the property and the privilege of the few and bestowing benefits on many in order to liberate the powers of all men equally for contribution to the common good”.\textsuperscript{7} Further, it has been made incumbent upon the state to give effect to these directives while making laws because it has explicitly been stated that these principles are fundamental in the governance of the country. Hence, while fulfilling these obligations, the provisions of the state might come into conflict with the Fundamental Rights, as envisaged by the constitution makers. And this indeed has been the case.

\textsuperscript{5} \textit{Ibid.}, p.525.
\textsuperscript{7} Granville Austin, \textit{Indian Constitution: Cornerstone of a Nation}, Oxford University Press, New Delhi, pp.50-52.
But these conflicts are seen generally as conflict between the Fundamental Rights and the Directive Principles over the issue of priority, and in some cases conflict between the Legislature and the Judiciary over the issue of supremacy. Let us again consider the report of the Supreme Court in the case of Champakam Dorairajan vs. the State of Madras, referred earlier. The court observed the following "the chapter of Fundamental rights is sacrosanct and not liable to be abridged by any legislative or Executive Act or order, except to the extent provided in the appropriate articles in Part III. The Directive Principle of state policy have to confirm to and run as subsidiary to the chapter of Fundamental Rights. In our opinion, that is the correct way in which the provisions found in Part III and IV have to be understood". Similarly, Basu points out that "it may be observed that the declarations made in Part IV of the constitution under the head Directive Principles of State Policy are in many cases of a wider import than the declarations made in Part III as Fundamental Rights. Hence, the question of priority in case of conflict between the two classes of provisions may easily arise". These conflicts, and subsequent amendments of the constitution with the judiciary nullifying these amendments by sometimes involving the doctrine of 'basic structure', could also be seen as conflicts between the judiciary and the legislature over the issue of supremacy. Hence the whole constitutional history could be seen as conflict over the issue of priority in case of conflict between the provisions of Part III and IV, and that of supremacy in case of conflict between the legislature and the judiciary.

But a close analysis of these conflicts might reveal that there lies a deeper issue beneath what appears at surface. In order to find out what it is I

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8 SCR 1951, op.cit., p.531,
9 Basu, op.cit., p.141

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will start with a careful consideration of some of the cases that constitute the landmarks in the history of constitutional interpretation in India. While doing this I will not include the cases chronologically, because landmark judgments hardly follow chronologically. I will also exclude from my analysis those cases which do not have any direct relevance to the study. For example, consider for the sake of argument one community wants to preserve an institution that it finds very important in religious terms, and the government wants to preserve it as a historical place. Though this conflict can be far stretched logically to be interpreted in terms of a conflict between two kind of liberalisms, it needs an another debate which will link the question of preserving the historical monuments to a liberal conception of self dignity or take for example, the cases of displacement like the Narmada Valley. The construction of a big dam can be defended by pointing out that it is being done in pursuance of article 48, which says organization of agriculture along with animal husbandry. But it might come into conflict with the fundamental right guaranteed by article 19(e) – to reside in any part of the territory of India. But it will require an enormous task to interpret this conflict as a conflict between two kinds of liberalisms. Considering the limited scope which this work offers, these kinds of debates can well be excluded from the purview of this work. Instead the focus will be on those cases which will reflect in a direct way the conflict between two kinds of liberalisms. Thus a start can be made with the case of “Champakam Dorairajan vs. the State of Madras”.

The case involves admission into the educational institutions. The Madras government issued an order fixing the number of seats for particular communities. The government did this in pursuance of the article 46 which
says that the state should take special care to promote the educational interest of the weaker section of the people and in particular of the Scheduled and the Scheduled tribes (SCs/STs). Srimathi Champakam Dorairajan filed a petition in the court saying that the said act violated her fundamental rights guaranteed under article 15 and article 29(2).

Though this case could be seen from many angels, in the ultimate analysis it seems to represent a case roughly involving the conflict between a provision requiring the status quo and a provision requiring a redistribution of benefits of the community in the interest of social justice. And it is the concept of social justice associated with the welfaristic dimension of the new liberalism. Hence here is a case of conflict between two kinds of liberalisms, one committed to maintenance of the status quo of existing rights and liberties while the other aims at restructuring the existing socio-economic arrangements through redistribution. But before we go deeper into the case, it would be worthwhile to examine a few cases more.

Most of the cases that involve Fundamental Rights and the Directive Principles and necessitated subsequent constitutional amendments are the cases of conflict over property rights. But the cases are fought by attacking certain amendments which introduce the acts which aim of giving effect to the Directive Principles. For instance, in case of Keshavanada Bharti case, which is also known as fundamental right case, Mr. Palkhivala, the counsel for the petitioners attacked article 31-C, which was added by the Twenty-fifth amendment act. At first sight this might appear as a conflict between certain technical provisions, but a close analysis might reveal the obvious link between

10 Keshavananda Bharati vs. The State of Kerala.
this article and the Directive Principles. But it should be made clear here that
not all cases relate to Directive Principles and it has been left to the court to
decide whether an act is pursuance of the Directive Principles or not. For
instance speaking in the context of whether an act that violated freedom of
speech is entitled to the protection under the article 31C, the court observed
that “such a provision may not and perhaps would not be entitled to the
protection of the amended article 31C, even though it finds a place in the
Prohibition Act, because its dominant object is not to give effect to the
directive principles but to stifle freedom of speech in respect of a particular
matter and it may run the risk of being struck down as violative of article 19”.
Thus the cases that involve the conflict between the Fundamental Rights and
the Directive Principles must involve an act whose purpose would be to give
effect to the Directive Principles.

If the above is taken to be the criterion then not all cases that involve the
Fundamental rights would pass the test. But some cases do and the
Keshavananda Bharati case referred above is one among them. Apart from
article 31C which was the major target, and which provided a protective cover
to the acts which were in pursuance of the Directives, the property was the
dominant issue was clear from the arguments in the course of court
proceedings. It was argued that “property was an essential feature of the
constitution because property was necessary for the meaningful exercise of
other fundamental rights”.11 This argument seems to be in line with the

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11 (The argument about the property Rights on which Palkhivala relied has been taken from Austin’s
_Working a Democratic Constitution_, Oxford University Press, New Delhi, 2000, p.261. In which
Austin deals with the case in a more elaborate manner).
classical liberals' defence of property rights by making it basic to self-realization and a meaningful existence.

The issue of property was the dominant issue in the Golaknath case as well. But before I say something about the Golaknath case I want to bring another aspect of the Keshavananda case, the aspect which made it in the words of Pratap Bhanu Mehta, "landmark case with profound implications for constitutionalism in India" The Supreme Court in this case invoked the doctrine of basic structure even though what constitutes basic structure has not been defined by the court. But nevertheless it has been invoked many a times since the Keshavananda case. For instance it was invoked in the context of Minerava Mill case in the following terms: "To destroy the guarantees given by Part III in order, purportedly to achieve the goals of Part IV is plainly to subvert the constitution by destroying its basic structure. The Indian constitution is founded on the bedrock of the balance between Part III and Part IV. To give absolute priority to one over the other is to disturb the harmony of the constitution. This harmony and balance between fundamental rights and the Directive Principles is an essential feature of the basic structure of the constitution". This further intensifies the conflict between judiciary committed to the preservation of existing rights and the legislature obsessed with restructuring the socio-economic arrangements

Turning to the Golaknath case it could be said that it also involved the conflict between property rights and the acquisition by the state, with a view to

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12 AIR 1967 SC 1643.
14 AIR 1980 SC 1789.
redistribute resource of the community. The majority in this case, however, held that the fundamental rights are sacrosanct.

The other landmark case was Minerava Mills\textsuperscript{15} case. This case and the context in which it was decided will appear interesting if we rely on the words of Austin. According to Austin despite the court’s assertion of the doctrine of basic structure these years witnessed encroachment of the individual rights by the state. He said: “The Supreme Court’s reformation of the basic structure doctrine in Minerava Mills case restored the balance between the judiciary and the legislature and definitely gave the constitution the protection of judicial review. Yet, during these years, the government’s resort to preventive detention and its enactment of other oppressive legislations diminished constitutional liberties and the courts’ ability to protect them”.\textsuperscript{16}

This case appears at first sight a case of tussle between the legislature and the judiciary, revolving around the protection of judicial review, but a closer analysis reveals it to be a case of property. The government, on the basis of a claim that privately owned mills are ill-managed assumed the management of them in 1971 and passed an Act (Sick Textiles Undertakings Act) and nationalized them. The counsel for the petitioners, Mr. Palkhivala, argued that this contravened the right to carry on business, which in one way or the other is related to property rights. Attorney general L.N. Sinha and Additional Solicitor General K.K Venugopal presented arguments on behalf of the government. In course of the arguments Art.31A, B and C were referred to which they argued were in pursuance of the Directive Principles. The court,

\textsuperscript{15} Minerava Mills vs. Union of India.  
\textsuperscript{16} G. Austin, \textit{op.cit.}, p.498.
however, struck down section 4 of the 42nd amendment which provided that all laws which were to give effect to any of the directives would be immune from judicial scrutiny even if they contravened the fundamental rights.

Apart from the issue of whether the judiciary has the power to review, the Minerva Mills case also invoked the debate of supremacy between fundamental rights, and directive principles. The majority, however, held that “the goals set out in Part IV have to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Part III and IV together constitute the core of our constitution and combine to form its conscience”.17 Justice Bhagawati, however, took a different view: “It will thus be seen that the Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate. For it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have even the bare necessities of life and who are living below the poverty line”.18 This line of argument clearly resembles the new liberals' defence of welfaristic legislation that these are necessary to create the conditions essential for a meaningful enjoyment of other liberties. Here is also the issue of property right coming into conflict with the larger aim of prevention of concentration of wealth and redistribution.

If one looks at the history of the conflict between fundamental rights and the directive principles it could be found that most of the conflicts revolves round the issue of property. The cases that well start with the First

17 AIR, 1980, SC 1790.
18 Ibid., p.1791.
amendment could be seen as cases that mostly involve the issue of property, welfaristic legislation and redistribution. The cases of Bihar Zamindari Abolition Act and subsequent challenge to it in the supreme court reflects the conflict between fundamental rights and directive principles revolving round the issue of property and redistribution. Hence the other cases like Kameshawar Singh vs. State of Bihar,\textsuperscript{19} Sajjan Singh vs. State of Rajasthan,\textsuperscript{20} Sankari Prasad vs. Union of India\textsuperscript{21} and many more similar cases should be seen in this light. These cases involve the issue of redistribution of resources with a view to prevent its concentration in few hands.

But before we conclude that the conflict between the Rights and the Directives exemplifies the conflict between two kinds of liberalisms, we must answer to the question that, is there a conflict between the two kinds of liberalisms that are present within the fundamental rights and the directive principles. The conflict between the two kinds of liberalisms appears to be grounded in the shift in the emphasis resulting in a corresponding difference in commitment. For instance, with regard to the concept of liberty it should be noticed that the emphasis was from the negative concept to a positive one which defined freedom in terms of power or ability to do certain things which are worth doing. As Arblaster takes note of the change while discussing Green’s idea of freedom in the following words: “There are three ways in which this conception (the enlarged conception of freedom) makes a radical departure from, or at least enlargement of the traditional liberal idea of freedom. Green turns freedom from a negative conception – the absence of

\textsuperscript{19} AIR 1952 SC 252.
\textsuperscript{20} SCR(1), 1965, 933.
\textsuperscript{21} SCR 1952, 89.
restraints to a positive one, the actual power or ability to do things. Freedom is bond up conceptually with power".22

This conceptual link between freedom and power reminds of the positive conception of the freedom which was employed by Austin while describing the Directive Principles. Austin's description of the directives as instrumental in making people free in positive sense and the new conception of freedom employed by the new liberalism appear to share a close resemblance. This shift it seems was necessitated by the New Liberals to accommodate the principle of state intervention within the liberal ideology. This accommodation of what liberalism fought against, into the very liberal stream, generated conflicting commitments. And even though the new liberals accommodated a new concept of freedom that supported positive state action the hostility to the state nevertheless remained there. As Arblaster notes in the context: "Behind differences over specified policies lay the same old cause of social good against class interests for which, under the altered names, liberals are fighting now as they were fifty years ago".23 But it may be asked here over what they were fighting? It is definitely state intervention, but it may be asked again intervention for what. Because the classical liberals did not attacked intervention perse, since we have already seen in chapter second that the classical liberals assigned the state certain functions. And if we believe John Gray we can find that the view that the negative rights of the classical liberalism implies a minimum state is mistaken. He says that "most liberals,

22 Anthony Arbluster, *Rise and decline of Western Liberalism*, p.286. (The distinction between negative and positive conception of freedom is generally ascribed to Issaiah Berlin who has provided an elaborated account of the distinction between these two kinds of liberalism in his two concept of liberty for detail see Issaiah Berin, *Two Concepts of Liberty*, Oxford University Press.

23 Ibid., p.287.
and all the great classical liberals, acknowledge that the liberal state may have a range of service functions going beyond right protection and the upholding of justice, and for this reason are not advocates of the minimum state but rather of limited government. Then the conflict might be over something else which will be clear if we take into account the aims of New Liberalism. The New Liberalism aimed at the redistribution of community resources in the interest of social justice and social welfare. And this contravened the property rights which the classical liberals held as sacrosanct. "According to all classical liberal thinkers" Gray continues, "a commitment to individual liberty implies endorsement of the institutions of private property and the free market. Against this classical liberal view Marxists and other socialists have argued that private property is itself a constraint upon liberty and revisionary liberals of the modern school have argued that property right must sometimes be overridden by the demands of other rights including right to positive freedom of various sorts. The view that the issue of private property vis-à-vis redistribution set the classical liberals and the new liberals in opposition to one another has also been shared by Alan Ryan. The implication of the following passage should be taken into consideration.

"The second is the thought that modern liberalism makes everyone an unrealizable promise of a degree of personal fulfillment that the welfare state can not deliver and that its efforts to deliver will inevitably frustrate. For one

24 Gray, op.cit., p.70-1.
25 John Gray, Liberalism, World View Publications, New Delhi, 1998, p.61 (Gray however is concerned here with the liberal defence of private property than with providing an account of the conflict over property right among the various liberals. I borrowed this statement in so far as it forms his starting point and simultaneously serving the purpose of this work), The revisionary variant of liberalism mentioned here is well identified with the New Liberalism).
thing people resent being forced to part with their hard earned income to provide the resources that supply jobs, education and the various social services that modern liberalism employs to create its conception of individual freedom for other of people. This creates hostility between more and less favoured groups of citizens that is usually at odds with what modern liberals desire.

Moreover, the welfare state must employ an extensive bureaucracy whose members are granted discretionary powers and charged by law to use those powers for the welfare of their clients. This means that the classical liberal’s concerns for the rule of law, and the curtailing of arbitrary discretion is ignored as bureaucrats have been given resources to disburse to their clients and mean while the allegiance of the citizenry has been undermined as the state has to produce the good things it has been asked to provide. The liberation that the welfare state promises – liberation from anxiety, poverty and the cramped circumstance of working class existence – is easily obtained by the educated middle class and is impossible to achieve for most others.”

Before an analysis of the passage a little classification should be added. Much of what is said about modern liberalism is true also of the new liberalism. Ryan himself shows the link between the modern liberalism and new liberalism by using the concept of man as a progressive being, a concept Ryan claims has been shared by both. “Philosophically”, says Ryan about the progressive nature of human beings “it is exemplified equally by the liberalism

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26 Alan Ryan, Liberalism in R. Goodin and P. Petit’s A Companion to Contemporary Political Philosophy, Blackwell Oxford, 1995, pp.295-6.(Ryan suggests here why the modern liberalism is inimical to the spirit of classical liberalism. His first suggestion consists an explanation that sees the modern liberalism as ideologically over committed. I have however borrowed the second one since it provides a clue to the conflict between classical liberalism and the modern liberalism.)
of the English idealists and new liberals such as L.T. Hobhouse. Now it can be said that apart from the issue of an extensive state over expanding its scope of activity, there is the issue of property which was as important as other personal liberties to the classical liberals.

This issue of property and redistribution, and their conflicts could be seen in its renewed form in the recent opposition by the libertarians to the agenda of redistribution by a liberal welfare state in the interest of social justice. The works of two notable libertarians, namely F.A. Hayek and Robert Nozick is well illustrative of these points. Hayek is considered as the man responsible behind the revival of classical liberalism. As Gray saying in the context of Hayek’s suggestion in support of classical liberalism quotes “any tolerable future for western civilization would demand that socialist ideals be forsworn and the abandoned road of classical liberalism – the road to limited government under the rule of law – be travelled again”. Gray again says: “In 1960 F.A. Hayek, who more than any single figure is responsible for the revival of classical liberalism, published his masterpiece, ‘The Constitution of Liberty’”. Similarly, Nozick is also referred to when the libertarian debates are invoked. In Ryan’s account “there is at least one strand of libertarian thought represented by Robert Nozick’s ‘Anarchy State and Utopia’ that advocates the decriminalization of ‘victimless crimes’ such as prostitution, drug taking and unorthodox sexual activities”.

29 Ibid., p.38.
30 Ryan, op.cit., p.296.
The Libertarianism shares with the classical liberalism the same commitment to the individual liberty and private property and therefore they are closely identified with the classical liberalism. But nevertheless a division lies between them which Ryan seems to have identified when he says the followings: “The line of cleavage lies between the libertarian view that government is not a necessary evil but a largely unnecessary evil and the liberal view that government power is to be treated with caution, but like any other instrument may be used to achieve good ends, perhaps the most important point of difference is that libertarians see our rights as a form of private property, what Nozick has called entitlements”.31 The case then is that the difference lies in the interpretation of rights and it does not result in the difference in the commitment to preserve the private property, and libertarians employ this enlarged concept of rights while arguing against the welfare state and redistribution. After seeing there is a conflict between libertarianism and welfare liberalism, a few words need to be said about the basis on which they attack the welfare and redistributive programme of the state effected in the interest of social justice.

Hayek starts from the requirement of the justice according to which, since a liberal state has to be neutral among the basic conceptions of human good and human nature, it should allow as much space as possible to enable each to pursue his or her own conception of good without interfering others in their similar pursuits. Under such a scheme Hayek regards that the market is the best system of distribution of goods and wealth and income of the society. According to Hayek this market society has its legitimacy in the fact that the

31 Ryan, op.cit p.296
outcome of the market are unintended and product of an independent process. Injustice attaches to a state of affairs where the outcomes are intended and presuppose a distributor acting in such a manner as to produce the outcome. Since this can not be said about he market, the market society can not be said to perpetuate injustice and as a result, the question of social justice does not arise. This independence of the market economy maintained through a set of rules which govern the society and in Hayek’s word these rules are purpose-independent. They are purpose independent in the sense that they do not favour any conception of human good over others. This then forms the background of his thought and from here he starts his attack upon the idea of social justice and redistribution. He says:

“It has of course to be admitted that the manner in which the benefits and burdens are apportioned by the market mechanism would in many instances have to be regarded as very unjust if it were the results of a deliberate allocation to particular people. But this is not the case. Those shares are outcomes of a process the effect of which on particular people was neither intended nor foreseen... To demand justice from such a process is clearly absurd, and to single out some people in such a society as entitled to a particular share evidently unjust”.

Hayek further identifies the problems of social justice which relates to the process of moral consensus about the appropriate principles of social justice. The principles of justice – Rights, Deserts and Needs – will lead to very different distributions and besides this there are no agreed criteria about which principle should guide the process of distribution. Even if one principle is

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adopted it would be part of a different moral outlook. The following passage well summerises Hayek's position on distribution.

"Any attempt to secure distributive justice in society will therefore, in Hayek's view, inevitably bring about two bad consequences on a free society. First of all, to seek to secure a particular pattern of justice will mean that one set of values related to human purposes will be given a privilege over others in a society and this is incompatible with a liberal and free society in which the diversity is recognized. Secondly, because there will be a lack of clarify and precision about these values, reflecting social and moral diversity, to attempt to distribute goods and income according to one or other of these criteria will be a very indefinite enterprise and will have a very great deal of power in the hands of the officials who will of necessity to have to exercise this power in a discretionary way just because the ideas are so indefinite." 33

There are other problems that are associated with the implementation of the ideal of social justice which Hayek deals as well. He says that in the absence of any objective or determinate criteria for determining the principles of social justice the interest groups would mask their claims under the cover of social justice and it will be a matter of private interests – resulting in a competition between the various interest groups to have their respective claims accepted".34 He also sees the attempt to introduce social justice as hampering the economic efficiency of the market.

32 Ibid., p.84.
34 Raymond Plant, While describing Hayek's critique of social justice Plant, however, ascribes the Concepts of private interests to Hume).
Hayek puts the concepts of social justice at the heart of socialism and brings out a difference between the roles that the government performs within the classical liberalism on the one hand and within a society founded on socialism on the other, in following terms.

"The former was governed by principles of just individual conduct while the new society is to satisfy the demands for 'social' justice - or in other word, that the former demanded just actions by the individuals while the latter more and more places the duty of justice on authorities with power to command people what to do". 35

At prima facie this observation would give the impression that Hayek was blind to the association of the idea of social justice with the new liberalism and with the recent liberal theories committed to social welfare. But the explanation that might be offered here is that it is rather disillusionment with the idea of social justice reflected in an attempt to dissociate it from the liberal theory all together, rather than non-cognizance on the part of Hayek, which led him to put social justice as the defining idea of socialism.

Hence, for Hayek the idea of social justice is incompatible with a free state which encompasses (a) the operation of a set of rules which are purpose independent and neutral among competing conceptions of good so as to allow individuals maximum freedom in pursuit of their goals, and (b) a free-market.

This incompatibility is well reflected as the points of difference between the classical liberals and the new liberals over the issue of property and other

welfaristic legislations. This also forms the main part of Robert Nozick’s attack on welfarism and redistribution in the interest of social justice.

Nozick provides an account of the minimum state grounded in the idea of rights. He offers a theory of rights which defines these rights as so inviolable that no conception of good can override them. To put in his own words: “Individual have rights, and there are things no person or group may do to them (without violating their rights). So strong and far reaching are these rights that they raise the question of what, if anything the state and its officials may do. How much room do individual rights leave for the state”.36 The language he uses here suggests that these rights are so inviolable that “no one, private individual or government, has a right to force an individual to make any kind of sacrifice for the social good and the state must be neutral between its citizens”.37

After proclaiming the inviolability of the rights Nozick offers a powerful theory of property right. While doing this he appears to have argued after the fashion of Locke. Therefore in case of Nozick as in case of Locke the mixing of labour with an unowned resource makes a property rights. Hence, on Nozick’s view individual has a right in his own person, his powers and capacities. And by mixing his powers and capacities through his labour in an unowned thing an individual can come to have a property right in that thing. There are other problems with this view, which are not going to be touched upon here. What is relevant here is that Nozick provides a powerful theory of property right and he employs this concept in his attack upon the scheme of state-redistribution.

36 Nozick as quoted in Plant, Ibid., p.124
37 Ibid., p.125
But before looking at Nozick’s attack on the idea of social justice and redistribution, it would be worthwhile to see whether he offers an alternative conception. He offers a concept of justice which is retrospective in its nature and scope in the sense that it looks to the past arrangements or how a particular pattern of distribution came into existence. He contrasts this with the state redistribution which he calls as end results principles of justice. He says “In contrast to end results principles of justice, historical principles of justice hold that past circumstances or actions of people can create differential entitlements or differential deserts to things”.

This theory of justice allows for a distribution only if it is the result of a transfer of resources by voluntary consent. “A distribution”, according to Nozick “is just if it arises from another just distribution by legitimate means. The legitimate means of moving from one distribution to another are specified by the principle of justice in transfer. The legitimate ‘first moves’ are specified by the principles of justice in acquisition”. Here it then appears that the principles of acquisition retrospectively looks into the legitimacy of an arrangement while the transfer principle validates any distribution if it confirms to the principles of just transfer.

If this is the case then Nozick’s conception of justice does not leave any room for social justice based on the principle of state redistribution because it does not follows the principles of justice associated with the voluntary transfer of resource. This indeed has been the case when he rejects the principles of

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38 Ibid., p.126

social justice. In Nozick's view, therefore, a state directed system of redistribution and social justice constitute illegitimate interference with the lives of people and violate the inviolability of rights, because these principles do not satisfy the criteria of legitimacy due to their compulsory nature.

But this poses another problem; is not the state required to initiate some welfaristic programmes for the betterment of those who are downtrodden and victims of what could be called mal-distribution. Raymond Plant presents the answer on behalf of Nozick in following terms: “Of course individual may choose as an act of generosity, altruism, humanity or philanthropy to transfer their justly held property to those who are worse off than themselves, or they can choose to join groups or communes which go in for pooling and redistributing resources, but this is a matter for individual choice and not for the state”.

Thus, the recent debate between libertarians and the liberal welfaric theorists committed to social justice and state-directed redistribution, highlights the inviolability of the property rights around which much of the debate between classical liberals and new liberals revolves.

This conflict has been exemplified in the Indian constitution between Fundamental Rights and the Directive Principles. The cases that caused much political uproar and led to the subsequent amendments of the constitution for instance Keshavananda Bharati case could be seen in the ultimate analysis as the conflict over property right. But it should be mention here that not all conflicts between the Fundamental Rights and the Directive Principles are the

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40 Plant, *op.cit.*, p.133.
cases of conflict over property. The case of Champakam Dorairajan could be put in this category because it involves not the issue of property but of benefits. But it could be explained in terms of social justice in its distributive form and the issue of distribution of community benefits is involved here. This case closely resembles the new liberals’ justification of liberal legislation in terms of freedom itself. Similarly, this can be justified in terms of equality itself, by employing a concept of equality which both new liberals and Rawlsian liberals are using in support of the principle of egalitarian distribution. This new concept of equality which could be applicable to the Champakam Dorairajan could be summed up in the words of justice Bhagwati, which seems appropriate in this context. “Where a law”, he said “is enacted for giving effect to a Directive Principle in furtherance of the constitutional goal of social and economic justice it may conflict with a formalistic and doctrinaire view of equality before law, but it would always confirm to the principle of equality in its total magnitude and dimension, because the quality before law in the constitution does not speak of mere formal equality before law but embodies the concept of real and substantive quality which strike at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of social and economic justice”.41

Before concluding that the conflict between the Fundamental Rights and the Directive Principles could be seen as conflict between the classical liberalism and the new liberalism in which the issue of property comes to the forefront, a few words of caution must be mentioned.

41 Minerava Mills vs. Union of India, AIR 1980 SC 1789.
Not all the conflicts in which Fundamental Rights are involved are the conflicts with the Directives. The case of A.K. Gopalan vs the state of Madras or Sambhunath Sarkar vs the state of West Bengal could well be cited as exceptions. Similarly not all the cases of the conflicts with the Directives are the conflicts of property rights in the same sense as is understood when reference is made to the case of Minerava Mills or Golaknath. The cases of Bombay Labour Union vs. Internal Franchies (Pvt) Ltd., Ramdhan Das vs. State of Punjab, Express Newspaper Private Limited vs. Union of India, Remington Panel of India Ltd vs. The workmen, and many other similar cases well attest to this fact. These cases could be interpreted as the case of law striving to give effect to humanitarian and welfaristic precepts underlying the Directive Principles.

Last but not least it could be said that each and every implementation of the Directive Principles can not be said to have caused as much uproar as has been caused by the property issues, and in some cases there has been no challenge at all to the implementation. The implementation of the scheme of education, the establishment of Panchayati Raj institutions under the obligation of article 40, the introduction of Jawahar Rojgar Yojana in pursuance of the ideas of minimum wage. Later on the introduction of programmes like Integrated Rural Development Programme (IRDP), Community Development Project, National Rural Employment Programme (NREP), and similar other programmes were effected with a view to give effect to ideal of raising the

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43 Sambhunath Sarkar vs. State of West Bengal, AIR 1973 SC 1425.
44 AIR 1966 SC 942.
45 AIR 1961 SC 1559.
46 AIR 1958 SC 578.
47 AIR 1970 SC 1421.
standard of living (Art.47) without any difficulty. The promotion of cottage industries though several programmes, for instance All India Handicrafts board, Small-Scale Industries board to mention a few were effected without any difficulty.

Therefore with regard to the conflict between the Rights and the Directives this could be said some of the cases exhibit the conflict between two liberal traditions, and that though property rights prominently figure in these conflicts at the same time this can also be said that not all cases are conflicts over property. Further the Directives are much more diverse and comprehensive in their scope and nature, and embody a number of acts in order to give effect to welfaristic and distributive ideals underlying them. These policies might have come into conflict with some of the fundamental rights, but they are not the cases of conflict over the issue of property in strict sense of the term.

Further the smoothness with which some of the Directives have been given effect stands as a testimony to their complementary nature. Those who rejected the view that their lack of judicial sanction behind them would make them susceptible to neglect by the government and adopted an optimistic approach appear to be on firm ground.

Hence the existence of Fundamental Rights and the Directive Principles and the attempts by the judiciary to give effect to both in a harmonious manner could be seen as an exemplification of the balance which the constitution makers have successfully established in the constitution.