CHAPTER 6.

SOCIAL JUSTICE DIRECTIVES AND CONSTITUTIONALISM.

India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realized only in and through the individuals.

“In an ideal Constitution, the overall social objective is one that allows for state intervention when it produces some net social benefit, without leaving any individuals worse off than they were before the state acted”.

This social objective is achieved by the limits prescribed on the government implies the principle of constitutionalism meaning limited govt.

A written Constitution, independent judiciary with powers of judicial review, the doctrine of rule of law, free elections to legislature, accountable and transparent democratic government, Fundamental Rights of the people, federalism, de-centralization of powers are some of the principles and norms which promote Constitutionalism in a country. Preamble to the Indian Constitution lays down principles for the promotion of constitutionalism.¹

Constitutionalism recognizes the need government but insists upon limitation being placed upon governmental powers. Limited govt. is the central point of constitutionalism. It is the anti-thesis of arbitrary powers. The underlying difference between the ‘Constitutionalism’ and Constitution’ is that a Constitution ought not merely to confer powers on the various organs of the Government but also seek to restrain those powers.²


“A good and virtuous constitutionalism having moral foundation protects not only fundamental freedoms but also creates a bridge between conflicting interests and becomes a harbinger to the social needs and produced good legislators and good citizens. The constitutional Courts as sentinel on the qui vive, therefore, function objectively and dispassionately to correct imbalances and keep check on every wing of the State without trespassing upon the field assigned or powers conferred upon the other wings and at the same time maintain a delicate balance on even keel”.

It is necessary to consider at this juncture the meaning of the "socialism" envisaged in the Preamble of the Constitution. Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution. The Fundamental Rights and the Directive Principles are the means, as two wheels of the chariot, to achieve the above object of democratic socialism. The word "socialist" used in the Preamble must be read from the goals Articles 14, 15, 16, 17, 21, 23, 38, 39, 46 and all other cognate Articles seek to establish, to reduce inequalities in income and status and to provide equality of opportunity and facilities. Social justice enjoins the Court to uphold government's endeavour to remove economic inequalities, to provide decent standard of living to the poor and to protect the interest of the weaker sections of the society so as to assimilate all the sections of the society in the secular integrated socialist Bharat with dignity of person and equality of status to all.

Justice is an attribute of human conduct. Law, as a social engineering, is to remedy existing imbalances, as a vehicle to establish an egalitarian social order in a Socialist Secular Bharat Republic. The Upanishad says that, "let all be happy and healthy, let all be blessed with happiness and let none be unhappy". Bhagwatgeeta preaches through Yudhishtra that, "I do not long for kingdom, heaven or rebirth, but I wish to alleviate the suffer-ings of the unfortunate'. Prof. Friedlander in his "Introduction of Social Welfare" at page 6 states that social welfare is the organized system of social service and institutions are designed to aid individuals

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and groups to attain specified standard of life and health and personal and social relationship which permit them to develop their full capacities and to promote their well-being in harmony with the needs of their families and the community. Welfare State is a rubicon between unbridled individualism and communism. All human rights are derived from the dignity of the person and his inherent worth. Fundamental Rights and Directive Principles of the Constitution have fused in them as fundamental human rights as indivisible and inter-dependent. The Constitution has charged the State to provide facilities and opportunities among the people and groups of people to remove social and economic inequality and to improve equality of status. Article 39(b) enjoins the State to direct its policy towards securing distribution of the ownership and control of the material resources of the community as best to subserve the common good. The founding fathers with hind sight, engrafted with prognosis, not only inalienable human rights as part of the Constitution but also charged the State as its policy to remove obstacles, disabilities and inequalities for human development and positive actions to provide opportunities and facilities to develop human dignity and equality of status and of opportunity for social and economic democracy. Economic and social equality is a facet of liberty without which meaningful life would be hollow and mirage. Social and economic democracy is the foundation on which political democracy would be a way of life in the Indian polity. Law as a social engineering is to create just social order removing inequalities in social and economic life, socio-economic disabilities with which poor people are languishing by providing positive opportunities and facilities to individuals and groups of people.4

Rawls in his "Theory of Justice"5 stated that: "From the beginning I have stressed that justice as fairness applies to the basic structure of society. It is a conception for ranking social forms viewed as closed systems. Some decision concerning these background arrangements is fundamental and cannot be avoided. In fact, the cumulative effect of social and economic legislation is to specify the basic structure. Moreover, the social system shapes the wants and aspirations that

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5 Rawls, "Theory of Justice" p.259.
its citizens come to have. It determines in part the sort of persons they want to be as well as the sort of persons they are. Thus an economic system is not only an institutional device for satisfying existing wants and needs but a way of creating and fashioning wants in the future. How men work together now to satisfy their present desires affects the desires they will have later on, the kind of persons they will be. These matters are, of course, perfectly obvious and have always been recognised.

6.1 SOCIALISM IN INDIAN CONSTITUTION.

The framers of the Constitution were very much conscious and aware of the widespread inequalities and disparities in the social fabric of the country as also of the gulf between rich and poor and this is the reason why the goal of justice - social, political and economic was given the place of pre-eminence in the Preamble. The concept of equality enshrined in Part III and Part IV of the Constitution has two different dimensions. It embodies the principle of non-discrimination Articles 14, 15(1), (2) and 16(2). At the same time it obligates the State to take affirmative action for ensuring that unequals (downtrodden, oppressed and have-nots) in the society are brought at a level where they can compete with others (haves of the society) (Articles 15(3), (4), (5), 16(4), (4A), (4B), 39, 39A and 41).\(^6\)

Dr. B.R. Ambedkar, in his closing speech in the Constituent Assembly on November 25, 1949, had lucidly elucidated thus:

"What does social democracy mean? It means way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty, would kill individual initiative - we have in

India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plan, we have a society in which there are some who have immense wealth as against many who live in abject poverty”. We cannot afford to have equality in political life and inequality in economic life. How long shall we continue to live this life of contradiction? How long shall we continue to deny equality in our social and economic life? We must remove this contradiction at the earliest possible moment or else those who suffered from inequality will blow up the structure of political democracy which this Assembly has laboriously built up.”

The core constitutional objective of "social and economic democracy" in other words, just social order, cannot be established without removing the inequalities in income and making endeavour to eliminate inequalities in status through the rule of law. The mandate for social and economic retransformation requires that the material resources or their ownership and control should be so distributed as to subserve the common good. A new social order, therefore, would emerge, out of the old unequal or hierarchical social order. The legislative or executive measures, therefore, should be necessary for the reconstruction of the unequal social order by corrective and distributive justice through the rule of law.

The Supreme Court in *Minerva Mills Ltd. v. Union of India*, the Constitution Bench had held that the edifice of our Constitution is built upon the concept crystallised in the Preamble. We "the People" resolved to constitute ourselves a socialist State which carries with it the obligation to secure to the people, justice - social, economic and political. We, therefore, put Part IV into our Constitution containing Directive Principles of State Policy which specifies the socialistic role to be achieved.

Speaking for the majority, Chandrachud, C.J. observed as under: "This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist

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State which carried with it the obligation to secure to our people justice-social, economic and political. We, therefore, put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved." At a later stage it was observed that the fundamental rights are not an end in themselves but are the means to an end, the end is specified in part IV.

Bhagwati, J. in his minority judgment after extracting a portion of the speech of the then Prime Minister Jawahar Lal Nehru, while participating in a discussion on the Constitution (First Amendment) Bill, observed that the Directive Principles are intended to bring about a socio-economic revolution and to create a new socio-economic order where there will be social and economic justice for all and everyone, not only a fortunate few but the teeming millions of India, would be able to participate in the fruits of freedom and development and exercise the fundamental rights. It, therefore, appears to be well established that while interpreting or examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other. 9

In D.S. Nakara v. Union of India10, another Constitution Bench had dealt with the object to amend the Preamble by the Constitution (42nd Amendment) Act and pointed out that the concept of Socialist Republic was to achieve socio-economic revolution to end poverty, ignorance and disease and inequality of opportunity. It was pointed out that socialism is a much misunderstood word. Values determine contemporary socialism - pure and simple. The principal aim of socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people especially to provide security from cradle to grave. The less equipped person shall be assured a decent minimum standard of life and exploitation in any form shall be prohibited. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder. The Preamble directs the centers of power, Legislature, Executive

9 supra

10 (1983) 2 SCR 165.
and Judiciary - to strive to set up from a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society under rule of law though it is a long march, but during the journey to the fulfilment of goal every State action including interpretation whenever taken, must be directed and must be so interpreted as to take -the society towards establishing egalitarian socialist State, the goal. It was, therefore, held that "it, therefore, appears to be well established that while interpreting or examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other."

The Court further expressed that the Preamble, the flood light illuminating the path to be pursued by the State to set up a Sovereign Socialist Secular Democratic Republic. Expression 'socialist' was intentionally introduced in the Preamble by the Constitution (Forty-Second Amendment) Act, 1976. In the objects and reasons for amendment amongst other things, ushering in of socio-economic revolution was promised.

The clarion call may be extracted: "The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity, has been engaging the active attention of Government and the public for some time. It is, therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism to make the directive principles more comprehensive."

What does a Socialist Republic imply? Socialism is a much misunderstood word. Values determine contemporary socialism pure and simple. But it is not necessary at this stage to go into all its ramifications. The principal aim of a socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxism and Gandhism leaning heavily towards

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11 ibid.
Gandhian socialism. During the formative years, socialism aims at providing all opportunities for pursuing the educational activity. For want of wherewithal or financial equipment the opportunity to be fully educated shall not be denied. Ordinarily, therefore, a socialist State provides for free education from primary to Ph. D. but the pursuit must be by those who have the necessary intelligence quotient and not as in our society where a brainy young man coming from a poor family will not be able to prosecute the education for want of wherewithal while the ill-equipped son or daughter of a well-to-do father will enter the portals of higher education and contribute to national wastage. After the education is completed, socialism aims at equality in pursuit of excellence in the chosen avocation without let or hindrance of caste, colour, sex or religion and with full opportunity to reach the top not thwarted by any considerations of status, social or otherwise. But even here the less equipped person shall be assured a decent minimum standard of life and exploitation in any form shall be eschewed. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder. Then comes the old age in the life of everyone, be he a monarch or a Mahatma, a worker or a pariah. The old age overtakes each one, death being the fulfilment of life providing freedom from bondage. But there socialism aims at providing an economic security to those who have rendered unto society what they were capable of doing when they were fully equipped with their mental and physical prowess. In the fall of life the State shall ensure to the citizens a reasonably decent standard of life, medical aid, freedom from want, freedom from fear and the enjoyable leisure, relieving the boredom and the humility of dependence in old age. This is what Article 41 aims when it enjoins the State to secure public assistance in old age, sickness and disablement. It was such a socialist State which the Preamble directs the centres of power Legislative Executive and Judiciary—to strive to set up. From a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society is a long march but during this journey to the fulfillment of goal every State action whenever taken must be directed, and must be so interpreted, as to take the society one step towards the goal.\(^\text{12}\)

\(^\text{12}\) supra
Pt. Jawaharlal Nehru, while participating in the discussion on the Constitution (First Amendment) Bill, had stated that the Directive Principles are intended to bring about a socio-economic revolution and to create a new socio-economic order where there will be social and economic justice for all and for everyone, not only to fortunate few but also the teeming millions of Indians who would be able to participate in the fruits of freedom and development and exercise the fundamental rights.\(^\text{13}\)

Dr. Ambedkar, while introducing the Preamble of the Constitution for discussion by the Constituent Assembly, had stated that the purpose of the Preamble is to constitute "a new society in India based on justice, liberty and equality". The Constituent Assembly debates do indicate that the Directive Principles intended to provide life blood to social, economic and political justice to all people. Some of the members like Mahavir Tyagi, Professor K.T. Shah, Dr. Saxena Etc. pleaded for incorporation of socialism as part of the Preamble but Dr. Ambedkar the father of the Constitution, while rejecting the amendment, made it clear that the socio-economic justice provided in the Directive Principles and the Fundamental Rights given in Chapter III would meet the above objective without expressly declaring India as a socialist State in the Constitution. Alladi Krishnaswamy Ayyer supported Dr. Ambedkar and had stated that "the constitution, while it does not commit the country to any particular form of economic structure of social adjustment, gives ample scope for the future legislature and the future Parliament to evolve any economic order and undertake any legislation they choose in public interest". Pandit Jawaharlal Nehru in his speech also emphasised the need to enter into a new social order in which "there would be valid growth in the standard of living of all the people of India with equitable distribution of wealth and equality of opportunity and status of all".\(^\text{14}\)

Justice is not synonymous with equality, equality is one aspect of it. Justice is not something which can be captured in a formula once and for all. It is a


\(^{14}\) *Constituent Assembly Debates*, November 1948 at pages 230 to 357.
process, a complex and shifting balance between many factors including equality. Justice is never given, it is always a task to be achieved. Justice is just allocation of advantages and disadvantages, preventing the abuse of power, preventing the abuse of liberty by providing facilities and opportunities to the poor and disadvantaged and deprived social segments for a just decision of disputes adapting to change.

Mahatma Gandhiji, the father of the nation, had stated that "true economics never militates against the highest ethical standard, just as all true ethics to be worth its name must at the same time be also good economics. An economies that inculcates Mammon worship, and enables the strong to amass wealth at the expense of the weak, is a false and dismal science. It spells death. True economics, on the other hand, stands for social justice, it promotes the good of all equally, including the weakest, and is indispensable for decent life."15

Dr. V.K.R.V. Rao, one of the eminent economists of India, in his "Indian Socialism Retrospect and prospect" has stated that a socialist society has not only to bring about equitable distribution but also to maximize production. It has to solve problems of unemployment, low income and mass poverty and bring about a significant improvement in the national standards of living. At page 47, he has stated that socialism, therefore, requires deliberate and purposive action on the part of the State in regard to both production and distribution and the fields covered are not only savings, investment, human skills and use of science and technology, but also changes in property relations, taxation, public expenditure, education and the social services. A socialist society is not just a give-away society nor is it only concerned with distribution of income. It must bring about full employment as also an increase in productivity.16

A socialistic society involves a planned economy which takes note of time and space considerations in the distribution and pricing of output. It would be necessary for both the efficient working of socialist enterprises and the prevention

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15 'Harijans' dated October 9,1937
of unplanned and anarchical expansion of private enterprises. The Indian conception of socialism with democracy with human dignity is by creation of opportunities for the development of each individual and not the destruction of the individual. It is not for the merging of the individual in the society. The Indian socialist society wants the development of each individual but requires this development to be such that it leads to the upliftment of the society as a whole. Fundamental duties in Chapter VI-A of the Constitution to bear meaningful content, facilities and opportunity on equal footing is the fundamental condition of a socialist society. The more the talent from backward classes and areas get recognition and support, the more socialist will be the society. Public sector and private sector should harmoniously work. The Indian approach to socialism would be derived from Indian spiritual traditions. Buddhism, Jainism, Vedantic and Bhakti Hinduism, Sikhism, Islam and Christianity have all contributed to this heritage rooted to respect for human dignity and human equality. While imposing restrictions on the right to private property even to the extent of abolishing it where necessary in the social and public interest, it permits private enterprise in economic activity and makes for a mixed economy rather than a completely socialised economy. It abhors violence and class war and heirarchical class structure and pins its faith on non-violence, sacrifice, and dedication to the service of the poor and as a natural consequence, its implementation is envisaged through Parliamentary democracy planned economy and the rule of law rather than through a violent revolution or a dictatorship in any form. Indian socialism, therefore, is different from Marxist or scientific socialism.17

To achieve the goal set down in the Preamble, the Directive Principles and fundamental rights, the Constitution envisaged planned economy. The Planning Commission has been given the constitutional status for the above purpose. The Third Five Year Plan document extracts the basic features of the socialist pattern of society thus : "Essentially, this means that the basic criterion for determining lines of advance must not be private profit, but social gain, and that the pattern of development and the structure of socio-economic relations should be so planned

17 Supra.
that they result not only in appreciable increase in national income and employment but also in greater equality in incomes and wealth. The benefits of economic development must accrue more and more to the relatively less privileged classes of society, and there should be progressive reduction of the concentration of incomes, wealth and economic power. The socialist pattern of society is not to be regarded as some fixed or rigid pattern. It is not rooted in any doctrine or dogma. It is neither necessary nor desirable that the economy should become a monolithic type of organisation offering little play for experimentation either as to forms or as to modes of functioning. Nor should expansion of the public sector mean centralization of decision making and of exercise of authority. The accent of the socialist pattern of society is on the attainment of positive goals, the raising of living standards, the enlargement of opportunities for all, the promotion of enterprise among the disadvantaged classes and the creation of a sense of partnership among all sections of the community. These positive goals provide the criteria for basic decisions. The directive principles of State policy in the Constitution have indicated the approach in broad terms; the socialist pattern of society is a more concretised expression of this approach. Economic policy and institutional changes have to be planned in a manner that would secure economic advance along democratic and egalitarian lines."\(^{18}\)

Mr. G.D.H. Cole, one of the leading socialist of United Kindom, in his speech\(^ {19}\) has stated that socialism is a movement aiming at greater social and economic equality and using extended State action as one of its methods, perhaps the most distinctive but certainly not the only one needed to be taken into account. The affairs of the community shall be so administered as to further the common interests of ordinary men and women by giving to everyone, as far as possible, an equal opportunity to live a satisfactory and contended existence, coupled with a belief that such opportunity is incompatible with the essentially unequal private ownership of the means of production. It requires not merely collective control of the uses to which these are to be put, but also their collective ownership and

\(^{18}\) ibid.

disinterested administration for the common benefit. This basic idea of socialism involves not only the socialisation of the essential instruments of production, in the widest sense, but also the abolition of private incomes which allow some men to live without rendering or having rendered any kind of useful service to their fellowmen and also the sweeping away of forms of educational preference and monopoly which divide men into social classes. It involves, in effect whatever is needful for the establishment of what socialists call a 'classless society' and in pursuance of this aim its votaries necessarily look for support primarily, though not exclusively, to the working classes, who form the main body of the less privileged under the existing social order. Socialists seek to reduce economic and social inequalities not only in order to remove unearned sources of superior position and influence, but also in order to narrow the gaps between men to such as are compatible with all men being near enough together in ways of living to be in substance equals in their mutual intercourse.

In *Excel Wear Etc. v. Union of India*\(^\text{20}\) the Constitution Bench had held that the concept of socialism or socialist state has undergone changes from time to time from country to country and from thinker to thinker. But some basic concept still holds the field. The doctrinaire approach to the problem of socialism be eschewed and the pragmatic one should be adapted. So long as the private ownership of an industry is recognised and governs an overwhelmingly large proportions of an economic structure, it is not possible to say that principles of socialism and social justice can be pushed to such an extreme so as to ignore completely or to a very large extent the interest of another section of the public, namely, the private ownership of the undertaking. In other words, the object of intermediation should be co-existence and flourishing of mixed economy. With the rise of the philosophy of Socialism, the doctrine of State ownership has been often discussed by political and economic thinkers. Broadly speaking, this discussion discloses a difference in approach. To the socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the rationalist, nationalization or State ownership is a matter of expediency dominated

\(^{20}\) (1979) 1 SCR 1009.
by considerations of economic efficiency and increased output only production. This latter view supported nationalisation only when it appeared clear that State ownership would be more efficient, more economical and more productive. The former approach was not very much influenced by these considerations, and treated it a matter of principle that all important and nation-building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic. The first proceeds on the general ground that all national wealth and means of producing it should come under national control, whilst the second supports nationalisation only on grounds of efficiency and increased output.

In *State of Kamataka v. Shri Ranganatha Reddy*, 21 a Bench of nine Judges of this Court considered nationalisation of the contract carriages. In that behalf, it was held that one of the principal aims of socialism is the distribution of the material resources of the community in such a way as to subserve the common good. This principle is embodied under Article 39(b) of the Constitution as one of the essential directive principles of State polity. Therein, this Court laid stress on the word 'distribute' as used in Article 39(b) being a keyword of the provision emphasising that The key word is distribution and the genius of the Article, if we may say so., cannot but be given full play as it fulfils the basic purpose of restructuring the economic order. Each word in this Article has a strategic role and the whole Article is a social mission. It embraces the entire material resources of the community. Its task is to distribute such resources, its goal is to undertake distribution as best to subserve the common good. It reorganises by such distribution the owner-ship and control.” Article 39(b) fulfils the basic purpose of restructuring the economic order and undertakes to distribute the entire material resources of the community, as best to subserve the common good. To exclude ownership of private resources from its coils, is to cipherise its very purpose of redistribution the socialist way. Article 39(b) is ample enough to rope in buses, as motor vehicles, are part of the material resources of the operators. Socially conscious economists will find little difficulty in treating nationalisation of transport as a distributive progress for the good of the community. The Court

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21 (1978) 1 SCR 641.
observed that the State symbolises, represents and acts for the good of society. Its concerns are the ways of meeting the wants of the community, directly or otherwise, and the public sector in our constitutional system, is a strategic tool in' the national plan for transformation from stark Poverty to social justice, transcending administrative and judicial allergies. Serious constitutional problems cannot be studied in a socio economic vacuum, since socio-cultural changes are the source of new values. Our emphasis is on abandoning formal legalistic or sterile logomachy in assessing the vires of statutes regulating vital economic areas, and adopting instead, a dynamic, goal-based approach to problems of constitutionality. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. The Constitution ensouls such a value system in Parts III and IV and elsewhere, and the dialectics of social justice should not be missed if their synthesis is to influence State action and Court pronouncement. Illusory compensation, nexus doctrine and 'distributed to subserve the common good, should not reduce lofty constitutional considerations into hollow concepts.

The social philosophy of the Constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and else-where, ensouls such a value system and the debate in this case puts precisely this soul in peril. Friedman has said in his 'Legal Theory and Social Evolution'. 'The lawyer cannot afford to isolate himself from the social process. His independence can never be more than relative, and it is only a clear awareness of the political, social and constitutional foundations of, his function in general as well as of particular legal problems that enables him to find the proper balance between Stability and progress." Our thesis is that the dialectics of social justice should not be missed if the synthesis of Part III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socioeconomic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process of the new equity-loaded legality. A judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension in his complex duties. The credal essence of the Constitution consists in its Preamble, Articles 38, 39(b) and
(c), 31 and the bunch of Articles 31A, 31B and 31C. Our emphasis is on abandoning formal legalistics or sterile logomachy in assessing the vires of statutes regulating vital economic are-as, and adopting instead a dynamic, goal-based approach to problems of constitutionality. It is right that the rule of law enshrined in our, Constitution must and does reckon with the roaring current of change which shifts our social values and shrivels our feudal roots, invades our lives and fashions our destiny. The key issues argued at learned length in these appeals cannot suffer 'judicial separation' from the paramount principles in the Preamble and in Article 39(b) and (c). So we have to view the impugned provisions from the vantage point of socio-legal perception. The semantic sin of dubious legislating drafting before entering the thorny thicket of debate on the questions arising in this batch of appeals a cautionary word may be uttered, without disrespect, about the unwitting punishment of the community by our legislative draftsmen whose borrowed skills of Westminster vintage and hurried bills without sufficient study of their economic project, occasionally result in incomprehensibility and incongruity of the law for the lay and the legal. In a country where the people are, by and large, illiterate, where a social revolution is being pushed through by enormous volume and variety of legislation and where new economic adventures requiring unordhoodoz jural techniques are necessitous, if legal drafting is to be equal to the challenge of change, a radicalisation of its methodology and philosophy and an ability for the legislative manpower to express themselves in streamlined, simple, project oriented fashion is essential. In the hope that a role conscious court communicates to a responsive Cabinet, we make this observation.

In Sanjeev Coke Manufacturing Company v. Bharat Coking Coal Ltd. another Constitution Bench reiterated the above view; while considering Article 39(b) of the Constitution, at page 1020, this Court had held that the broad egalitarian principle of economic justice was implicit in every directive principle and, therefore, a law designed to promote a directive principle, even if it came into conflict with the formalistic and doctrinaire view of equality before the law, would

\footnote{ibid.}

\footnote{(1983) 1 SCR 1000.}
most certainly advance the broader egalitarian principle and desirable constitutional goal of social and economic justice for all. If the law was aimed at the broader egalitarianism of the Directive Principles, Article 31C protected the law from needless, unending and rancorous debate on the question whether the law contravened Article 14’s concept of the equality before the law. The law seeking the immunity afforded by Article 31C must be a law directing the policy of the State towards securing a Directive Principle and the connection with the Directive Principle must not be some remote or tenuous connection. The object of the nationalisation of the coal mine is to distribute nations resources. It was held at page 1023 that though the word 'socialist' was introduced in the Preamble by late amendment of the Constitution, that socialism has always been the goal is evident from the Directive principles of the State policy. The amendment was only to emphasise the urgency. Ownership, control and distribution of national productive wealth for the benefit and use of the community and the rejection of a system of misuse of its resources for selfish ends is what socialism is about and the words and thought of Article 39(b) but echo the familiar language and philosophy of socialism as expounded generally by all socialist writers. Socialism is, first of all, a protest against the material and cultural poverty inflicted by capitalism on the mass of the people. Nationalisation of coal mine for distribution was upheld as a step towards socialism.

In *State of Tamil Nadu v. L. Abu Kavur Bai*\(^{24}\), the same extended meaning of distribution of material resources in Article 39(b) was given by another constitution Bench to uphold Tamil Nadu State Carriages and Contract Carriages (Acquisition) Act. Similar view was reiterated by a three Judge Bench in *Madhusudan Singh v. Union of India*\(^{25}\).

Social Justice directive also flows from fundamental rights, as aptly opined by the Supreme Court that it would be incorrect to assume that social content exist only in directive principles and not in the fundamental rights. As held in *M.*

\(^{24}\) (1984) 1 SCR 725.

\(^{25}\) (1984) 2 SCC 381.
Nagaraj’s case that egalitarian equality exist in Article 14 read with Articles 16(4), (4-A), (4-B). Article 15 and 16 are facets of Article 14. Therefore it would be wrong to suggest that equity and justice find place in the directive principles. Article 16(1) concerns formal equality which is the basic of the rule of law. At the same time, Article 16(4) refers to egalitarian equality. Similarly the general right to equality under Article 14 has to be balanced with Article 15(4) when excessiveness is detected in grant of protective discrimination. Article 15(1) limits the right of the State by providing that there shall be no discrimination on the ground only of religion, race, caste, sex, etc. and yet it permits classification for certain classes, hence social content exerts in fundamental rights as well.

The inalienability and importance of fundamental rights received unprecedented support from the Apex Court of India.27

Granville Austin28 has been extensively quoted and relied on in Minerva Mills29. Chandrachud, C.J. observed that to destroy the guarantees given by Part III in order to purportedly achieve the goals of Part IV is plainly to subvert the Constitution by destroying the basic structure. Fundamental right enjoys a unique place in the lives of civilized societies and have been described in judgments as “transcendental”, “inalienable”, and “primordial”. They constitute the arc of the Constitution. The Learned Chief Justice held that Part III and Part IV together constitute the core of commitment to social revolution and they together are the conscience of the Constitution. It is to be traced for a deep understanding of the scheme of the Indian Constitution. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Part III and Part IV together constitute the core of our Constitution and combine to form its conscience. “Anything that destroys the balance between the two parts will ipso facto will destroy an essential element of the basic structure of our Constitution.

28 “The Indian Constitution, Cornerstone of a Nation”, Granville Austin.
The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law. The principal of constitutionalism is now a legal principle which requires control over the exercise of governmental powers to ensure that it does not destroy the democratic principle upon which it is based. These democratic principles includes the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The principle of constitutionalism underpins the principle of legality which requires the courts to interpret legislations on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for laws protecting fundament rights to be impliedly repealed by future statutes. The protection of fundamental constitutional rights through the common law is the main feature of common law constitutionalism. Under the controlled Constitution, the principle of checks and balances have a important role to play.30

In M. Nagraj v. Union of India31, the Supreme Court explained the concept of social justice as flowing out of the Fundamental Rights in the following words: “Social justice is one of the sub-divisions of the concept of justice. It is concerned with the distribution of benefits and burdens throughout a society as it results from social institutions - property systems, public organisations etc. The problem is - what should be the basis of distribution? Writers like Raphael, Mill and Hume define ‘social justice’ in terms of rights. Other writers like Hayek and Spencer define ‘social justice’ in terms of deserts. Socialist writers define ‘social justice’ in terms of need. Therefore, there are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality - “formal equality” and “proportional equality”. “Formal equality”

means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of “proportional equality” expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy. Under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and no person suffers because of drawbacks which is not his but social. Therefore, axioms like secularism, democracy, reasonableness, social justice etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21.”

Thus, the Fundamental Rights, through Articles 14, 15, 16 and 17 reflect the right to equality in its various aspects and aim to foster social equality by empowering the citizens to be free from any form of coercion or restriction by the state or private people. The Directive Principles aim at creating an egalitarian society whose citizens are free from the abject physical conditions that had hitherto prevented them from fulfilling their best selves. They are the creative part of the Constitution, and fundamental to the governance of the country. It is interesting to note that at the time of drafting of the Constitution, some of the Directive Principles were part of the declaration of fundamental rights adopted by the Congress party at Karachi.32

Mr. Munshi had even included in his draft list of rights, the “rights of workers” and “social rights”, which included provisions protecting women and children and guaranteeing the right to work, a decent wage, and a decent standard of living. The primordial importance of Part IV can be understood by the following words of Dr. Ambedkar, when he insisted on the use of the word “strive” in Article 38: “We have used it because it is our intention that even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these directive principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfillment of these directives.

32 supra.
Otherwise it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go.” Thus, the enforceability of measures relating to social equality was never envisaged as being dependent only on the availability of state resources. Going further, though the Fundamental Rights and Directive Principles may resemble Western constitutional provisions, they can be distinguished in their innate desire to end the inequities of traditional social relations and enhance the social welfare of the population. 33

Other provisions furthering social equality include Article 334, and those relating to the upliftment of Anglo Indians. Again, Article 23 prohibits the trafficking of human beings and other forms of forced labour and Article 24 protects children under the age of fourteen from enduring the hazards of employment in difficult conditions. Freedom of Religion, freedom of conscience and free profession, practice and propagation of religion; freedom to manage one’s religious affairs; and freedom to attend religious instruction or religious worship in certain educational institutions has been ensured through Articles 25, 26, 27 and 28 of the Constitution. Articles 29 and 30 deal exclusively with the Cultural and Educational Rights of Minorities while ensuring equal opportunity for all citizens to take admission in any educational institution. The Courts have taken recourse to these provisions often, in their crusade to bring justice to the poor. Through innovative and creative strategies, they have expanded the scope of the Fundamental Rights, in order to render justice to women, children, bonded laborers and other oppressed sections of society. The Courts have also played a significant role in bridging the divide between the colonial legal system and the value based jurisprudence of our Constitution. Notably, over the decades, the Supreme Court has affirmed that both the fundamental rights and Directive Principles must be interpreted harmoniously.

In *Madhu Kishwar v. State of Bihar*34, it was laid down that law is the manifestation of principles of justice. Rule of law should establish a uniform

33 ibid.

pattern for harmonious existence in a society where every individual should exercise his rights to his best advantage to achieve excellence, subject to the protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps into iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are Trinity for social and economic equality. Therefore, law is the foundation on which the potential of the society stands. If the law is to adapt itself to the needs of the changing society, it must be flexible and adaptable. The constitutional objective of socioeconomic democracy cannot be realised unless all sections of the society participate in the State power equally irrespective of, their cast, community, race, religion and sex.

By 42nd Constitution (Amendment) Act, secularism and socialism were brought in the Preamble of the Constitution to realise that in a democracy unless all sections of the society are provided facilities and opportunities to participate in political democracy irrespective of caste, religion and sex, political democracy would not last long. Dr. Ambedkar in his closing speech on the draft Constitution stated on November 25, 1949 that "what we must do is not to be attained with mere political democracy; we must make, our political democracy a social democracy as well, Political democracy cannot last unless there lies on the base of it a social democracy". Social democracy means "a way of life which recognizes liberty, equality and fraternity as principles of life". They are not separate items in a trinity but they form union of trinity. To diversify one from the other is to defeat the very purpose of democracy. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things.\(^{35}\)

The Constitution seeks to establish secular socialist democratic republic in which every citizen has equality of status and of opportunity, to promote among the people dignity of the individual, unity and integrity of the nation transcending

them from caste, sectional, religious barriers fostering fraternity among them in an integrated Bharat. The emphasis, therefore, is on a citizen to improve excellence and equal status and dignity of person. With the advancement of human rights and constitutional philosophy of social and economic democracy in a democratic polity to all the citizens on equal footing, secularism has been held to be one of the basic features of the Constitution and egalitarian social order is its foundation.\textsuperscript{36}

Security to citizens by the State is also a very sensitive issue. The State has to draw a careful balance between providing security, without violating fundamental human dignity. “The primary task of the State is to provide security to all citizens without violating human dignity. Powers conferred upon the statutory authorities have to be, perforce, admitted. Nonetheless, the very essence of constitutionalism is also that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution.”\textsuperscript{37}

In \textit{Bhim Singh v. Union of India}\textsuperscript{38}, while referring to the obligations of the State and its functions, the Court held: “It is also settled by this Court that in interpreting the Constitution, due regard has to be given to the Directive Principles which has been recorded as the soul of the Constitution in the context of India being the welfare State. It is the function of the State to secure to its citizens social, economic and political justice, to preserve liberty of thought, expression, belief, faith and worship” and to ensure equality of status and of opportunity and the dignity of the individuals and the unity of the nation. This is what the Preamble of our Constitution says and that is what which is elaborated in the two vital chapters of the Constitution on Fundamental Rights and Directive Principles of the State Policy.”

To fashion a fair and firm State, a State and society in which the individual is all, an individual with an inviolate sphere of autonomy that neither the State nor anyone acting in the name of religion nor any other collectivity can breach, a State


\textsuperscript{37}Re: Ramlila Maidan Incident, (2012) 5 SCC 1,

\textsuperscript{38}(2010) 5 SCC 538.
and society in which we learn to look upon one another as human beings, in which
the habit of partitioning our fellow-men between ‘them’ and ‘us’ is gone; a State
and society in which a man of God is known not by the externals - by his
appearance, by the rituals he observes, by the religious office he holds, - but by the
service he renders to his fellow-men, a State and society in which each of us
recognises all our traditions as the common heritage of us all, a State and society in
which we shed the dross in religion and perceive the unity and truth to which the
mystics of all traditions have born testimony, a state and society in which we learn,
in which we examine, in which we begin to think for ourselves - fashioning such a
State and society is a programme worthy of those who aspire to humanism and
secularism. 39

Pluralism is the keynote of Indian culture and religious tolerance is the
bedrock of Indian secularism. It is based on the belief that all religions are equally
good and efficacious the pathways to perfection or God-realisation. It stands for a
complex interpretive process in which there is a transcendence of religion and yet
there is a unification of multiple religions. It is a bridge between religions in a
multi-religious society to cross over the barriers of their diversity. Secularism is the
basic feature of the Constitution as a guiding principle of State policy and action.
Secularism in the positive sense is the cornerstone of an egalitarian and forward -
looking society which our Constitution endeavours to establish. It is the only
possible basis of a uniform and durable national identity in a multi - religious and
socially disintegrated society. It is a fruitful means for conflict-resolution and
harmonious and peaceful living. It provides a sense of security to the followers of
all religions and ensures full civil liberties, constitutional rights and equal
opportunities. 40

Table showing number of statues corresponding to particular economic,
social and cultural rights in provisions in the Indian Constitution:


<table>
<thead>
<tr>
<th>Provision of the Indian Constitution</th>
<th>Corresponding Law Enacted by the Indian Parliament</th>
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<tbody>
<tr>
<td>Article 39(d) – Equal pay for equal work</td>
<td></td>
</tr>
<tr>
<td>Article 15(3) – Affirmative action</td>
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</tr>
<tr>
<td>Article 24 – Prohibition of employment of children below 14 years in hazardous and occupation</td>
<td>The Child Labour (Prohibition Factories Act, 1948</td>
</tr>
<tr>
<td>Article 39 A – Equal justice and free legal Authorities Act, 1987 aid</td>
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<tr>
<td>Article 42 – Just and humane conditions of Work</td>
<td>Minimum Wages Act, 1948</td>
</tr>
</tbody>
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6.2. CONSTITUTIONALISM, CHECK AND BALANCE.

‗Constitutionalism‘ means limited government or limitation on government. It is antithesis of arbitrary powers.

Constitutionalism recognizes the need for government with powers but at the same time insists that limitation be placed on those powers. The antithesis of constitutionalism is despotism. It envisages checks and balances by restraining the powers of governmental organs by not making them uncontrolled and arbitrary.

Social objective is achieved by the limits prescribed on the government, implies the principle of constitutionalism meaning limited government. A written Constitution, independent judiciary with powers of judicial review, the doctrine of rule of law, free elections to legislature, accountable and transparent democratic government, Fundamental Rights of the people, federalism, de-centralization of powers are some of the principles and norms which promote Constitutionalism in a
country. Preamble to the Indian Constitution lays down principles for the promotion of constitutionalism. Constitutionalism recognizes the need government but insists upon limitation being placed upon governmental powers. Limited govt. is the central point of constitutionalism. It is the anti-thesis of arbitrary powers. The underlying difference between the ‘Constitutionalism’ and ‘Constitution’ is that a Constitution ought not merely to confer powers on the various organs of the Government but also seek to restrain those powers.  

Constitutionalism comes from political philosophy and takes the position that a government, in order to be legitimate must have legal limits on its powers. Thus, the government's authority ends up depending upon actually staying within those limits. A government which goes beyond its limits loses its authority and legitimacy.

If the constitution confers unrestrained power on either the legislature or the executive, it might lead to an authoritarian, oppressive government. Therefore, to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with ‘Constitutionalism’; it should have some inbuilt restrictions on the powers conferred by it on governmental organs.

There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates, or, if the power of judging be not separated from the legislative and executive powers. Jefferson said : All powers of government - legislative, executive and judicial result in the legislative body. The concentration of these powers in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not by a single person. One hundred and seventy-three despots would surely be as oppressive as one. And, Montesquieu's own words would show that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the

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fundamental principles of a free Constitution are subverted. In Federalist No. 47, James Madison suggests that Montesquieu's doctrine did not mean that separate departments might have "not partial agency in or no control over the acts of each other." His meaning was, according to Madison, no more than that one department should not possess the whole power of another. The Judiciary, said the Federalist, is beyond comparison the weakest of the three departments of power. It has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. Of the three powers Montesque said, the Judiciary is in some measure next to nothing. If he realised the relative weakness of the Judiciary at the time he wrote, it is evidence of his vision that he appreciated the supreme importance of its independence. There is no liberty, he said, if the judicial power to be separated from the legislative and executive.42

While introducing the Draft Constitution in the Constituent Assembly, Dr. Ambedkar who was one of the chief architects of the Constitution said that our Constitution avoided the tight mould of federalism in which American Constitution was caught and could be "both unitary as well as federal according to the requirements of time and circumstances". We have what may perhaps be described by the phrase, 'cooperative federalism' a concept different from the one in vogue when the federations of United States or of Australia were set up. The American Constitution provides for a rigid separation of governmental powers into three basic divisions, the executive, legislative and judicial. It is an essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. The Australian constitution follows the same pattern of distribution of powers. Unlike these Constitution, the Indian Constitution does not expressly vest the three kinds of power in three different organs of the State. But the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions. The principle of separation of powers "is not a doctrinaire concept to be made use of with pedantic rigour. There must be sensible approximation, there must be elasticity of

adjustment in response to the practical necessities of Government which cannot foresee today. The truth of the matter is that the existence, and the limitations on the powers of the three departments of government are due to the normal process of specialisation in governmental business which becomes more and more complex as civilization advances. The Legislature must make laws, the Executive enforce them and the Judiciary interpret them because they have in their respective fields acquired an expertise which makes them competent to discharge their duly appointed functions. 43

The Moghal Emperor, Jehangir, was applauded as a reformist because soon after his accession to the throne in 1605, he got a golden chain with sixty bells hung in his palace so that the common man could pull it and draw the attention of the ruler to his grievances and sufferings. The most despotic monarch in the modern world prefers to be armed, even if formally, with the opinion of his judges on the grievances of his subjects. The political usefulness of the doctrine of separation of powers is now widely recognised though a satisfactory definition of the three functions is difficult to evolve. But the function of the Parliament is to make laws, not to decide cases. The British Parliament in its unquestioned supremacy could enact a legislation for the settlement of a dispute or it could, with impunity, legislate for the boiling of the Bishop of Rochester's cook. The Indian Parliament will not direct that an accused in a pending case shall stand acquitted or that a suit shall stand decreed. Princely India, in some parts, often did it. The reason of this restraint is not that the Indian Constitution recognizes any rigid separation of powers. Plainly, it does not. The reason is that the concentration of powers in any one organ may, by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged. Neither in Montesquieu's analysis nor in Locke's are the governmental powers conceived as the familiar trinity of legislative, executive and judicial powers. Montesquieu's "separation" took the form not of impassable barriers and unalterable frontiers, but of mutual restraints, or of what afterwards came to be known as "checks and balances". The three organs must act in concert, not that their respective functions should not ever touch one another. If this limitation is

43 ibid.
respected and preserved," it is impossible for that situation to arise which Locke and Montesque regarded as the eclips. No Constitution can survive without a conscious adherence to its fine checks and balances. Just as Courts ought not to enter into problems entwined in the "political thicket", Parliament must also respect the preserve of the courts. The principle of separation of powers is a principle of restraint which "has in it the precept, inmate in the prudence of self-preservation (even if history has not repeatedly brought it home), that discretion is the better part of valour". Courts have, by and large, come to check their valorous propensities. In the name of the Constitution, the Parliament may not also turn its attention from the important task of legislation to deciding court cases for which it lacks the expertise and the apparatus. If it gathers facts, it gathers facts of policy. If it records findings, it does so without a pleading and without framing any issues. And worst of all, if it decide.\textsuperscript{44}

If we notice the evolution of Separation of Power doctrine, traditionally the checks and balances dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable Social and Economic entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of checks and balances to include governmental inaction. Otherwise we envisage the country getting transformed into a state of repose. Social engineering as well as Institutional engineering therefore forms part of this obligation. Separation of power in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose, to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand Separation of Power as operating in vacuum. Separation of power doctrine has been reinvented in modern times.\textsuperscript{45}

\textsuperscript{44} ibid.

There is broad separation of powers under the Constitution, and the judiciary should not ordinarily encroach into the executive or legislative domain. The theory of separation of powers, first propounded by the French philosopher Montesquieu in his book ‘The Spirit of Laws’ still broadly holds the field in India today. Thus, in \textit{Asif Hameed v. State of Jammu and Kashmir}^{46}, a three Judge bench of this Court observed. “Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people’s will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self imposed discipline of judicial restraint”.

The rationale of the doctrine of Separation of Powers, to my mind, is to uphold individual liberty and rule of law. Vesting of all power in one authority obviously promotes tyranny. Therefore, the principle of Separation of Powers has to be viewed through the prism of constitutionalism and for upholding the goals of

\footnote{46 AIR 1989 SC 1899}
justice in its full magnitude. The doctrine is normally associated with the French Philosopher Montesquieu, but the origin of this principle can be traced back to Aristotle who opined that government should be composed of three organs, namely, the deliberative (i.e legislative), the magisterial (i.e., executive) and the judicial. However the scope of this doctrine was not worked out fully until Locke and Montesquieu elaborated this concept in 18th Century. Following the principles of John Locke, James Madison wrote in the Federalist Papers, (esp. No.47) that:-

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

The value of this doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of persons. This concept of separation of power or of divided authority is clearly woven in the fabric of American Constitutional Law.47

In our Constitution there is no such defined and express incorporation of the doctrine of Separation of Power, save and except that the Executive power of the Union is vested in the President under Article 53(1) and similarly the Executive power of the State is vested on the Governor under Article 154(1). But so far as legislative and judicial powers are concerned they are not vested on any authority. Under Article 50, one of the directive principles of State policy, State is to take steps to separate the judiciary from the executive in the public services of the State. But this has nothing to do with the vesting of power. Under our Constitution the executive is endowed with certain legislative powers, for instance the Ordinance making powers under Article 123 and Article 213. It also has certain judicial powers under Article 103 and Article 192. The legislature is also empowered to exercise certain judicial powers under Article 105 and Article 195. The judiciary also exercises certain legislative and executive powers under Articles 145, 146, 227 and 229.

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47 *University Of Kerala v. Kerala* on 11 November, 2009
In addition, the executive also exercises substantial quasi-judicial powers under several statutory provisions whereby Tribunals have been set up. These Tribunals, with almost the trappings of a Court, decide the lis between the parties. Of course, the same is subject to well known grounds of interference by writ court under judicial review. The Parliament, the highest legislative body in this Country also exercises quasi-judicial power in the case of impeachment of judges vide Article 124(5) and Article 217 and also in respect of contempt of legislatures by resorting to Article 194(3).

It may perhaps be said that the framers of our Constitution never wanted to introduce the doctrine of Separation of Powers rigidly to the extent of dividing the three organs into water-tight compartments. In this context the direction of Justice Bhagwati (as His Lordship then was) in the Constitution Bench decision in *Minerva Mills v. Union of India*[^48], is very apt and is quoted:-. "Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that "the concentration of powers in any one organ may" to quote the words of Chandrachud, J., (as he then was) in *Indira Gandhi case*[^49], "by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged"

The Supreme Court declared Separation of Powers to be a part of the Basic Structure of the Constitution.

The Supreme Court in the case of *Bhim Singh v. Union of India*[^50], Indian Constitution does not recognize strict separation of powers. The constitutional principle of separation of powers will only be violated if an essential function of

[^48]: (1980) 3 SCC 625
[^49]: Indira Gandhi v. Raj Narain, (1975)Supp SCC 1
[^50]: (2010) 5 SCC 538
one branch is taken over by another branch, leading to a removal of checks and balances.

The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.\(^5\)

Court described Common Law constitutionalism in precise manner which may reveal our vehement exigencies. The protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism.

The constitutionalism or constitutional system of Government abhors absolutism - it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself.” Moreover, when our theories have been glorified with such emblazonment why in execution part it is sterile. We are just enriching our theories with intellectual twists which can be exemplified as Constitutionalism is about limits and aspirations. The Constitution embodies aspiration to social justice, brotherhood and human dignity. It is a text which contains fundamental principles. Fidelity to the text qua fundamental principles did not limit judicial decision making. The tradition of the written constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living constitution.\(^6\)

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\(^{51}\) I.R. Coelho (Dead) by LRs. v. State of Tamil Nadu, (1999) 7 SCC 580

As observed by Chandrachud, CJ, in *Minerva Mills Ltd.*\(^{53}\) case “The Constitution is a precious heritage and, therefore, you cannot destroy its identity”.

On one hand, our judiciary elicit such intellectual responses that “Faith in the judiciary is of prime importance. Ours is a free nation. Among such people respect for law and belief in its constitutional interpretation by courts require an extraordinary degree of tolerance and cooperation for the value of democracy and survival of constitutionalism” \(^{54}\)

Separation of powers in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged, nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of powers as operating in vacuum. Separation of powers doctrine has been reinvented in modern times.

If we notice the evolution of separation of powers doctrine, traditionally the checks and balances dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable social and economic entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of checks and balances to include governmental inaction. Otherwise we envisage the country getting transformed into a state of repose. Social engineering as well as institutional engineering therefore forms part of this obligation.\(^{55}\)

Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These


\(^{54}\) *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 212.

\(^{55}\) *State Of West Bengal v. The Committee For Protection of Democratic Rights*, (2010) 3 SCC 571.
would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary. 56

It has been held by the Supreme Court in Bar Council of India v. Union of India on 3 August, 2012 that the Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of the courts). Similarly while constituting Tribunals, the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of the judiciary or the standards of the judiciary, the court may interfere to preserve the independence and standards of the judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.”

In kindred spirit, the Supreme Court in M. Nagaraj v. Union of India 57, Justice Kapadia, writing for the Constitutional Bench, observed: “The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adopted to the various crisis of human affairs. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.”

56 I.R. Coelho (Dead) by LRs. v. State of Tamil Nadu, AIR 2007 SC 861.
57 AIR 2007 SC 71.
Accordingly, in *State of U.P. v. Jeet S. Bisht*\(^{58}\), even though the matter was referred to another Bench, owing to a split decision Justice S.B. Sinha aptly described the modern understanding of the separation of powers thus: “Separation of power in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. Separation of power doctrine has been reinvented in modern times. The modern view, which is today gathering momentum in Constitutional Courts world over, is not only to demarcate the realm of functioning in a negative sense, but also to define the minimum content of the demarcated realm of functioning.”

In *Dayaram v. Sudhir Batham*\(^{59}\), the Supreme Court doubted the competence of this Court to issue such directions, which were allegedly to be legislative in nature. Therefore, the matter was referred to a larger bench, and such larger bench held, that in exercise of the powers conferred upon it by Article 32 read with Article 142 of the Constitution, the directions issued by this Court were valid and laudable, as the same had been made to fill the vacuum that existed in the absence of any legislation, to ensure that only genuine SC/ST and OBC candidates would be able to secure the benefits of certificates issued, and that bogus candidates would be kept out. Simply filling up an existing vacuum till the legislature chooses to make appropriate laws, does not amount to taking over the functions of the legislature.

It is a fundamental principle of our constitutional scheme, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for

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\(^{58}\) (2007) 6 SCC 586.

\(^{59}\) (2012) 1 SCC 333.
this broad separation of powers is that “the concentration of powers in any one organ may” by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which we are pledged.\textsuperscript{60}

6.3. BASIC STRUCTURE DOCTRINE.

The Constitution of India lays down the framework on which Indian polity is run. The Constitution declares India to be a sovereign socialist democratic republic, assuring its citizens of justice, equality, and liberty. The Constitution lays down the basic structure of government under which the people chose themselves to be governed. It establishes the main organs of government - the executive, the legislature and the judiciary. The Constitution not only defines the powers of each organ, but also demarcates their responsibilities. It regulates the relationship between the different organs and between the government and the people.\textsuperscript{61}

The Constitution is superior to all other laws of the country. Every law enacted by the government has to be in conformity with the Constitution. The Constitution lays down the national goals of India - Democracy, Socialism and National Integration. It also spells out the Fundamental Rights, Directive Principles and Duties of citizens. The Draftsmen of the Indian Constitution took inspiration from Constitutions all over the world and incorporated their attributes into the Indian Constitution. For example Part III on Fundamental Rights is partly derived from the American Constitution and Part 1V on Directive Principles of State Policy from the Irish Constitution.\textsuperscript{62}

A Constitution should be a dynamic document. It should be able to adapt itself to the changing needs of the society. Sometimes under the impact of new powerful social and economic forces, the pattern of government will require major changes. Keeping this factor in mind the Draftsmen of the Indian Constitution

\textsuperscript{60} Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625


\textsuperscript{62} Supra.
incorporated Article 368 in the Constitution which dealt with the procedure of amendment. Due to Article 368 the Indian Constitution can neither be called rigid nor flexible but in fact it is partly rigid and partly flexible. Articles of the Indian Constitution can be amended by a simple majority in the Parliament (Second Schedule, Article 100(3), 105, 11, 124, 135, 81, 137), or by special majority that is majority of the total membership of each house and by majority of not less than two thirds of the members of each house present and voting, or by Ratification by the State Legislatures after special majority (Article 73, 162, Chapter IV of Part V, Chapter V of Part VI, Seventh Schedule, representation of the State in Parliament and provisions dealing with amendment of the Constitution).\textsuperscript{63}

Constituent power is the area in the history of Indian Constitutional Law which has lead to most serious disagreements between Parliament and Judiciary, the conflict involving Parliamentary Supremacy on one hand and on the other Judicial review of the Scope and extent of the power and the manner in which such power is to be exercised. Constituent power is termed as a power which is exercised by a representative body authorized by a Constitution to amend the Constitution. This amending power is one of the most desirable powers in a Constitution, if a Constitution as a fundamental document is to continue. John Burgess is of the opinion that the first and most important part is the organization of the State for the accomplishments of future changes in the Constitution, which is the amendment clause.\textsuperscript{64}

Classification of amendment procedures can if classified in two heads as rigid and flexible. Rigid procedures means difficult to amend the constitution like that of U.S., Australia, Canada and Switzerland and flexible procedure means in which procedure to amend is easy, and can be done even by passing a normal legislation like that of United Kingdom. But in Indian constitution though the procedure is classified as Rigid but it has practically proved to a flexible one. In India Article 368 provides the power of amendment. The procedure to be followed in India in not strictly rigid or flexible, and further there is a difference in

\textsuperscript{63} ibid.

procedure when it affects the federal character of the Union. An amendment can be proposed in either of the Houses. In India all constitutional amendments can be generally effectuated by a Special Majority, i.e., it must be passed by both the houses, with more than 50% of total number of members along with two thirds of members present and voting.\(^{65}\)

In either of the two procedures after the bill is passed it is reserved for Presidential assent, which in turn is bound to give it. In India the procedure has proved to be far more flexible, till now as much as 96 amendments have been made. Dr. Ambedkar in the Constituent Assembly while defending the procedure contented that the procedure for amendment in the Indian Constitution is a simple procedures, as compared to US, Australia or Canada, and deliberately models of convention and referenda are avoided. He further said that it may be possible that in future this power may be used for partisan motives and hence some rigidity is required in the procedure.\(^{66}\)

During the 50 years of the Constitution, more than 80 amendments have taken place. The founding fathers of the Indian constitution who granted more rights to the people without balancing them with their duties, perhaps did not foresee the emergence of present political environment, wherein the political players of various segments in the country are more interested in fulfilling their individual aspirations than the aspirations of the people. There is an element of truth in this criticism. The fact is that the ease in the amending process of the Indian Constitution is due to the one party dominance both at the Centre and the State. Yet, on close examination it will be seen that there were compelling circumstances which led to the constitutional amendments. While some amendments were a natural product of the eventual evolution of the new political system established under the Constitution in 1950, there were others necessitated by practical difficulties. The first amendment took place in June, 1950.\(^{67}\)

\(^{65}\) Supra.

\(^{66}\) ibid.

Provisions for amendment of the constitution is made with a view to overcome the difficulties which may encounter in future in the working of the constitution. The time is not static; it goes on changing. The social, economic and political conditions of the people go on changing so the constitutional law of the country must also change in order toward it to the changing needs, changing life of the people. If no provisions were made for amendment of the constitution, the people would have recourse to extra constitutional method like revolution to change the constitution. The framers of the Indian constitution were anxious to have a document which could grow with a growing nation, adapt itself to the changing circumstances of a growing people. The Constitution has to be changed at every interval of time. Nobody can say that this is the finality. A constitution which is static is a constitution which ultimately becomes a big hurdle in the path of the progress of the nation.  

Restriction on parliament power of Amending Provisions in the Constitution and Judicial Review: The framers of the Indian constitution were also aware of that fact that if the constitution was so flexible it would be like playing cards of the ruling party so they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesirable changes. India got independence after a long struggle in which numerous patriots sacrificed their life. They knew the real value of the freedom so they framed a constitution in which every person is equal and there is no discrimination on the basis of caste, creed, sex and religion. They wanted to build a welfare nation where the social, economical, political rights of the general person recognize. The one of the wonderful aspect of our constitution is Fundamental rights and for the protection of these rights they provided us an independent judiciary. According to constitution, parliament and state legislature in India have the power to make the laws within their respective jurisdiction. This power is not absolute in nature. The constitution vests in judiciary, the power to adjudicate upon the constitutional validity of all the laws. If a laws made by parliament or state legislature violates any provision of the

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constitution, the Supreme Court has power to declare such a law invalid or ultra virus. So the process of judicial scrutiny of legislative acts is called Judicial Review. Article 368 of the Constitution gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. With the intention of preserving the original ideals envisioned by the constitution-makers. To Abraham Lincoln, democracy meant a Government of the people, by the people and for the people. So in democratic nation whenever any law passed by parliament violates any provision of constitution or takes away any fundamental rights of the person, the Supreme Court has right and power to strike down that law or act. According to me this jurisdiction of Supreme Court is essential for protection of basic features of the constitution.\(^6^9\)

In *I.R. Coelho (Dead) By LR. v. State of Tamil Nadu and Ors*\(^7^0\) view taken by the Supreme Court - The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law.

The first time the question whether fundamental rights can be amended under Article 368 came for consideration of the Supreme Court in *Shankari Prasad v. Union of India*\(^7^1\). In that case the Validity of the First Constitutional Amendment which added Article 31-A and 31-B of the Constitution was challenged. It was contended that though it may be open to Parliament to amend the provisions in respect of the fundamental rights, the amendments, would have to be tested in the light of the provisions contained in Art.13(2) of the Constitution. The Supreme Court, with a bench of five judges, unanimously rejected the contention that in so far as the First Amendment took away or abridged the fundamental rights

\(^6^9\) ibid.

\(^7^0\) AIR1999 SC 3197.

\(^7^1\) AIR 1951 SC 458.
conferring by Part III it should not be upheld in the light of the provisions of article 13(2). Shastri J: delivering the judgment of the court said that although "law" must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in the exercise of legislative power, and constitutional law, which is made in the exercise of constituent power. Dicey defines constitutional law as including "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State." The terms of Article 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever.

Shastri J. was here implementing Dicey's doctrine of parliamentary sovereignty. He recognized that an amendment in terms of Article 368 was the "exercise of sovereign constituent power" and that there was no indication that the constitution-makers intended to make fundamental rights immune from constitutional amendment. Therefore "law" in Article 13 must be taken to mean rules or regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power. Article 13 (2) did not affect amendments made under Article 368.72

Notwithstanding the First Amendment, agrarian legislative measures adopted by the States were effectively challenged in the High Courts and two further amendments were passed to save the validity of those measures. The Constitution (Fourth Amendment) Act, 1955, amended Article 31-A, while the Constitution (Seventeenth Amendment) Act, 1964, amended Article 31-A, again and added 44 Acts to the Ninth schedule.

The validity of the Seventeenth Amendment was challenged in the case of Sajjan Singh v. State of Rajasthan73. The main contention before the five-judge bench of the Supreme Court was that the Seventeenth Amendment limited the jurisdiction of the High Courts and, therefore, required ratification by one-half of the States under the provisions of Article 368. The court unanimously disposed of

72 supra
73 (1965) 1 SCR 933.
this contention, but members of the court chose to deal with a second submission, that the decision in the *Shankari Prasad case*\(^{74}\) should be reconsidered. The Chief Justice (Gajendragadkar C.J.) in delivering the view of the majority (Gajendragadkar C.J., Wanchoo and Raghbar Dayal JJ.) expressed their full concurrence with the decision in the earlier case. The words "amendment of this constitution" in Article 368 plainly and unambiguously meant amendment of all the provisions of the Constitution; it would, therefore, be unreasonable to hold that the word "law" in article 13(2) took in Constitution Amendment Acts passed under Article 368.

They went on to point out that, even if the powers to amend the fundamental rights were not included in Article 368, Parliament could by a suitable amendment assume those powers. The Chief Justice also dealt in his judgment with the wording of article 31B. That article, he considered, left it open to the Legislatures concerned to repeal or amend Acts that had been included in the Ninth Schedule. But the inevitable consequence would be that an amended provision would not receive the protection of Article 31B and that its validity could be examined on its merits.\(^{75}\)

Hidayatullah and Mudholkar JJ., in separate judgments, gave notice that they would have difficulty in accepting the reasoning in *Shankari Prasad’s*\(^{76}\) case in regard to the relationship of Articles 13 (2) and 368. Hidayatullah J. said that he would require stronger reasons than those given in that case to make him accept the view that the fundamental rights were not really fundamental, but were intended to be within the power of amendment in common with other parts of the Constitution. The Constitution gives so many assurances in Part III that it would be difficult to think that they were the play things of a special majority.” Mudholkar J. took the view that the word "law" in Article 13 (2) included an amendment to the Constitution under Article 368. Article 368 does not say that when Parliament makes an amendment to the Constitution it assumes a different capacity, that of a

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\(^{74}\) Supra.

\(^{75}\) Supra.

\(^{76}\) Supra.
constituent body. The learned Judge recalled that India had a written constitution, which created various organs at the Union and State levels and recognized certain rights as fundamental.

The judgments in *Sajjan Singh’s*\(^{77}\) case were to provide the outlines of what was to become, and still is, a national debate on the method by which the Indian Constitution can be amended. As an Indian commentator has pointed out the doubts expressed by Hidayatullah and Mudholkar JJ. in *Sajjan Singh’s*\(^{78}\) case about the correctness of the decision in *Shankari Prasad’s*\(^{79}\) case were to be confirmed by the majority in the next case to be considered.

The doubts of the minority judges in *Sajjan Singh's*\(^{80}\) case as to the correctness of the decision in *Shankari Prasad’s*\(^{81}\) case were raised before a bench of eleven judges of the Supreme Court in *Golakhnath v. State of Punjab*\(^{82}\) this case, in which the validity of the First and Seventeenth Amendments to the Constitution in so far as they affected fundamental rights was again challenged. The Fourth Amendment was also challenged. This time a majority of six judges to five decided that Parliament had no power to amend any of the provisions of Part III, so as to take away or abridge the fundamental rights enshrined therein. The majority were, however, faced with the problem that, if the First, Fourth and Seventeenth Amendments were at a late stage to be invalidated, the impact on social and economic affairs would be chaotic. On the other hand, the court considered that it had a duty to correct errors in the law. It, therefore, adopted a doctrine of prospective overruling under which the three constitutional amendments concerned would continue to be valid, and the decision to the effect that Parliament had no power to amend the provisions of Part III would operate for the future only.

\(^{77}\) Supra.
\(^{78}\) Supra.
\(^{79}\) ibid.
\(^{80}\) ibid.
\(^{81}\) ibid.
\(^{82}\) (1967) 2 SCR 762.
Given this "policy and doctrinaire decision to favour Fundamental Rights", the majority judgment of Subha Rao C.J. proceeded to accept the following propositions:

(i) Article 368 with its marginal note "Procedure for amendment of the Constitution" dealt only with the procedure for amendment. Amendment was a legislative process and the power of Parliament to make amendments was contained in article 248 and Entry 97 in List I of the Seventh Schedule (the Union List) which confer residuary legislative powers on the Union Parliament. (ii) An amendment to the Constitution, whether under the procedural requirements of Article 368 or under any other Article, is made as part of the normal legislative process. It is, therefore, a "law" for the purpose of article 13(2).

The judgment of three of the dissentients. (Wanchoo, Bhargava and Mitter JJ.) in the Golak Nath’s case was delivered by Wanchoo J. The learned observed that Article 368 carried the power to amend all parts of the constitution including the fundamental rights in part III of the constitution. They reaffirmed the correctness of the decisions in cases of Shankri Prasad and Sajjan Singh’s case.

To get over the decision of the Supreme Court in Golaknath’s case the Constitution 24th Amendment Act was passed in 1971. The Twenty-fourth Amendment made changes to articles 13 and 368: (i) A new clause was added to Article 13: "(4) Nothing in this Article shall apply to any amendment of this Constitution made under Article 368." (ii) Amendments were made to Article 368: a) The article was given a new marginal heading: "Power of Parliament to amend the Constitution and procedure therefore." b) A new clause was added as clause (I): "(I) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article. c)
Another clause was added as clause (3): "(3) Nothing in Article 13 shall apply to any amendment under this article."

Another amendment to the old Article 368 (now Article 368(2)) made it obligatory rather than discretionary for the President to give his assent to any Bill duly passed under the article.

The Supreme Court recognized basic structure concept for the first time in the historic Kesavananda Bharati v. State of Kerala case in 1973. Ever since the Supreme Court has been the interpreter of the Constitution and the arbiter of all amendments made by parliament. In this case validity of the 25th Amendment act was challenged along with the Twenty-fourth and Twenty-ninth Amendments. The court by majority overruled the Golak Nath’s case which denied parliament the power to amend fundamental rights of the citizens. The majority held that Article 368 even before the 24th Amendment contained the power as well as the procedure of amendment. The Supreme Court declared that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution and parliament could not use its amending powers under Article 368 to 'damage', 'weaken', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the constitution. This decision is not just a landmark in the evolution of constitutional law, but a turning point in constitutional history.

It is a landmark of the Supreme Court of India, and is the basis in Indian law for the exercise by the Indian judiciary of the power to judicially review, and strike down, amendments to the Constitution of India passed by the Indian Parliament which conflict with or seek to alter the Constitution’s basic structure. The judgment also defined the extent to which the Indian Parliament could restrict the right to property, in pursuit of land reform and the redistribution of large landholdings to cultivators, overruling previous decisions that suggested that the right to property could not be restricted.89

87 (1973) 4 SCC 225.
88 ibid.
89 supra
To have a clear view of the conception of the basic structure theory it is necessary to have a study of the majority view of the judgment in *Kesavananda Bharati v. State of Kerala*[^90].

Sikri C. J. held that the fundamental importance of the freedom of the individual has to be preserved for all times to come and that it could not be amended out of existence. According to the learned Chief Justice, fundamental rights conferred by Part III of the Constitution cannot be abrogated, though a reasonable abridgement of those rights could be effected in public interest. There is a limitation on the power of amendment by necessary implication which was apparent from a reading of the preamble and therefore, according to the learned Chief Justice, the expression "amendment of this Constitution", in Article 368 means any addition or 'change in any of the provisions of the Constitution within the broad contours of the preamble, made in order to carry out the basic objectives of the Constitution. Accordingly, every provision of the Constitution was open to amendment provided the basic foundation or structure of the Constitution was not damaged or destroyed.

Shelat and Grover, JJ. held that the preamble to the Constitution contains the clue to the fundamentals of the Constitution. According to the learned Judges, Parts III and IV of the Constitution which respectively embody the fundamental rights and the directive principles have to be balanced and harmonized. This balance and harmony between two integral parts of the Constitution forms a basic element of the Constitution which cannot be altered. The word 'amendment' occurring in Article 368 must therefore be construed in such a manner as to preserve the power of the Parliament to amend the Constitution, but not so as to result in damaging or destroying the structure and identity of the Constitution. There was thus an implied limitation on the amending power which precluded Parliament from abrogating or changing the identity of the Constitution or any of its basic features.

Hegde and Mukherjea, JJ. held that the Constitution of India which is essentially a social rather than a political document is founded on a social

[^90]: (1973) 4 SCC 225.
philosophy and as such has two main features basic and circumstantial. The basic constituent remained constant; the circumstantial was subject to change. According to the learned Judges, the broad contours of the basic elements and the fundamental features of the Constitution are delineated in the preamble and the Parliament has no power to abrogate or emasculate those basic elements of fundamental features. The building of a welfare State, the learned Judges said, the ultimate goal of every Government but that does not mean that in order to build a welfare State, human freedoms have to suffer a total destruction. Applying these tests, the learned Judges invalidated Article 31C even in its un-amended form.

Jaganmohan Reddy, J. held that the word 'amendment' was used in the sense of permitting a change, in contradistinction to destruction, which the repeal or abrogation brings about. Therefore, the width of the power of amendment could not be enlarged by amending the amending power itself. The learned Judge held that the essential elements of the basic structure of the Constitution are reflected in its preamble and that some of the important features of the Constitution are justice, freedom of expression and equality of status and opportunity. The word 'amendment' could not possibly embrace the right to abrogate the pivotal features and the fundamental freedoms and therefore, that part of the basic structure could not be damaged or destroyed. According to the learned Judge, the provisions of Article 31C, as they stood then, conferring power on Parliament and the State Legislatures to enact laws for giving effect to the principles specified in Clauses (b) and (c) of Article 39, altogether abrogated the right given by Article 14 and were for that reason unconstitutional. In conclusion, the learned Judge held that though the power of amendment was wide, it did not comprehend the power to totally abrogate or emasculate or damage any of the fundamental rights or the essential elements of the basic structure of the Constitution or to destroy the identity of the Constitution. Subject to these limitations, Parliament had the right to amend any and every provision of the Constitution.

Khanna, J. broadly agreed with the aforesaid views of the six learned Judges and held that the word 'amendment' postulated that the Constitution must survive without loss of its identity, which meant that the basic structure or framework of the Constitution must survive any amendment of the Constitution.
According to the learned Judge, although it was permissible to the Parliament, in exercise of its amending power, to effect changes so as to meet the requirements of changing conditions, it was not permissible to touch the foundation or to alter the basic institutional pattern. Therefore, the words "amendment of the Constitution" in spite of the width of their sweep and in spite of their amplitude, could not have the effect of empowering the Parliament to destroy or abrogate the basic structure or framework of the Constitution.

The Basic Structure concept was again reaffirmed in the case of Indira Nehru Gandhi v. Raj Narayan. The Supreme Court applied the theory of basic structure and struck down Clause (4) of Article 329-A, which was inserted by the 39th Amendment in 1975 on the ground that it was beyond the amending power of the parliament as it destroyed the basic feature of the constitution. The amendment was made to the jurisdiction of all courts including the Supreme Court, over disputes relating to elections involving the Prime Minister of India.

Basic Features of the Constitution according to the Election case verdict again, each Judge expressed views about what amounts to the basic structure of the Constitution.

Justice Y.V. Chandrachud listed four basic features which he considered unamendable:

a) Sovereign Democratic Republic status.
b) Equality of Status and Opportunity of an individual.
c) Secularism and freedom of conscience and religion.
d) 'Government of laws and not of men' i.e. the Rule of Law.

After the decision of the Supreme Court in Kesavananda Bharati and Indira Nehru Gandhi case the Constitution (42nd Amendment) Act, 1976

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91 AIR 1975 SC 2299.
92 ibid.
93 ibid.
94 ibid.
was passed which added two new clauses, namely, clause (4) and (5) to Article 368 of the Constitution. It declared that there shall be no limitation whatever on the constituent power of parliament to amend by way of addition, variation or repeal of the provisions of the Constitution under this Article. This Amendment would put an end to any controversy as to which is supreme, Parliament or the Supreme Court. Clause (4) asserted the supremacy of the Parliament. It was urged that Parliament represents the will of the people and if people desire to amend the Constitution through Parliament there can be no limitation whatever on the exercise of this power. This amendment removed the limitation imposed on the amending power of the Parliament by the ruling of the Supreme Court in Kesavananda Bharati’s\(^{95}\) case. It was said that the theory of ‘basic structure’ as invented by the Supreme Court is vague and will create difficulties. The amendment was intended to rectify this situation.

In the case of Minerva Mill v. Union of India\(^{96}\) the validity of 42\(^{nd}\) Amendment Act was challenged on the ground that they are destructive of the ‘basic structure’ of the Constitution. The Supreme Court by majority by 4 to 1 majority struck down clauses (4) and (5) of the Article 368 inserted by 42\(^{nd}\) Amendment, on the ground that these clauses destroyed the essential feature of the basic structure of the constitution. It was ruled by court that a limited amending power itself is a basic feature of the Constitution. The historical Judgement laid down that:

The amendment made to Article 31C by the 42\(^{nd}\) Amendment is invalid because it damaged the essential features of the Constitution. Clauses (4) and (5) are invalid on the ground that they violate two basic features of the Constitution viz. limited nature of the power to amend and judicial review. The courts cannot be deprived of their power of judicial review. The procedure prescribed by Clause (2) is mandatory. If the amendment is passed without complying with the procedure it would be invalid. The Judgment of the Supreme Court thus makes it clear that the Constitution is Supreme not the Parliament. Parliament cannot have unlimited

\(^{95}\) ibid.

\(^{96}\) (1980) 3 SCC 625.
amending power so as to damage or destroy the Constitution to which it owes its existence and also derives its power.\(^\text{97}\)

Article 323-A and 323-B, both dealing with tribunals, were inserted by the 42\(^{\text{nd}}\) Amendment. Clause 2(d) of Art.323-A and Clause 3(d) of 323-B provided for exclusion of the jurisdiction of the High Court under Art.226 and 227 and the Supreme Court under Art.32. The Supreme Court in *L. Chandra Kumar v. Union of India*\(^\text{98}\) held these provisions as unconstitutional because they deny judicial review which is basic feature of the Constitution. It held that the power of judicial review vested in the High court under Article 226 and right to move the Supreme Court under Article 32 is an integral and essential feature of the Constitution.

*Kesavananda Bharati*\(^\text{99}\) case over ruled *Golaknath’s*\(^\text{100}\) case but did not re-establish Parliamentary Supremacy. It stated that fundamental rights may be amended by the Parliament, but not all of them. Those fundamental rights which constitute the basic structure of the Constitution cannot be abridged. *Golaknath’s*\(^\text{101}\) case gave primacy to fundamental rights. *Kesavananda Bharati*\(^\text{102}\) case recognizes that some other provisions in the Constitution may be equally important. If they form the basic structure they are unamendable. Under Article 368 the Parliament cannot rewrite the entire Constitution and bring in a new one.

By invalidating part of Article 31-C *Kesavananda Bharati*\(^\text{103}\) case prevented the State Legislature from exercising power to virtually amend the Constitution. Article 31-C lays down that if a State Legislature makes a law which contains a declaration that it is to giving effect to the policy contained in Article 39 (b) and (c) then no court may scrutinize it. Thus a state legislature could make

\(^{97}\) supra

\(^{98}\) (1997) 3 SCC 261.

\(^{99}\) ibid.

\(^{100}\) ibid.

\(^{101}\) ibid.

\(^{102}\) ibid.

\(^{103}\) ibid.
review proof law. Kesavananda Bharati\textsuperscript{104} case denied them such power. Power of judicial review shall remain with the court, legislative declaration cannot destroy it.

*Kesavananda Bharati\textsuperscript{105} case* is an example of judicial creativity of the first order. It protected the nation from the attacks on the Constitution by a passing 2/3 majority which may be motivated by narrow party or personal interests. The basic feature cannot be mauled.

**Summary of the effect of the various judgments of the Supreme Court:**

Parliament has limited powers to amend the constitution. Parliament cannot damage or destroy the basic features of the Constitution. The Procedure prescribed for the amendment is mandatory. Non compliance with it will result in invalidity of the amendment. Clauses (4) and (5) inserted in Article 368 by the 42\textsuperscript{nd} Amendment Act are invalid because they take away the right of judicial review. Parliament cannot increase its amending power by amending Article 368.

*Golaknath's\textsuperscript{106} case* and later *Kesavananda Bharati's\textsuperscript{107} case* were subjected to a lot of criticism. It was said that there are no express limitations to the amending power. The courts are enlarging their powers by inventing implied limitations. It was contended that the doctrine of basic features leads to uncertainty. Nobody can foretell with certainty what the basic features are. The Parliament does not know where it stands—what power it possesses. Without uncontrolled power the Parliament cannot bring about socio-economic reforms.

The answer to the comments is that the Supreme Court has adopted a purposive approach. Most of the amendments that were invalidated were no part of any socio-economic reforms. Some of them had nothing to do with public welfare. Some provisions of the 39\textsuperscript{th} and 42\textsuperscript{nd} Amendments were made to ensure power to one individual and one party. The standard of political morality is low. Within

\textsuperscript{104} ibid.

\textsuperscript{105} ibid.

\textsuperscript{106} ibid.

\textsuperscript{107} ibid.
political parties democracy hardly breathes and power is concentrated in the hands of a single individual or a coterie. Majority of the people are apathetic and easily led by attractive slogans. All these situations compelled the Supreme Court to rule in favour of limited powers and protect the freedom of the people. Uncertainty is part of life. Most of the legal concepts e.g. negligence, reasonableness, public interest and natural justice are not susceptible to exact definitions. The 39th and 42nd Amendments have clearly shown that unlimited amending power can be and effective instrument to usher dictatorship. The doctrine of implied powers is a safety device to prevent such occurrence.108

The Supreme Court in S.P. Sampath Kumar v. Union of India109 decided on 9th December, 1986 that judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution, but Parliament can certainly without in any way violating the basic structure doctrine amend the Constitution so as to set up an effective alternative institutional mechanism or arrangement for judicial review.

A five Judges Bench in Ashok Kumar Thakur v. Union of India110 wherein Constitution (93rd Amendment) Act, 2005 and the enactment of the Central Educational Institutions (Reservation in Admission) Act, 2006 were impugned. Referring Article 19(1)(g) Court held that if any constitutional amendment is made which moderately abridges the principle under Article 19(1)(g), it cannot be held that it violates the basic structure of the Constitution. For determining whether a particular feature of the Constitution is part of basic structure, it has to be examined in each individual case, keeping in mind, the scheme of the Constitution, its object and purpose, and the integrity of the Constitution as a fundamental instrument for the complete governance. Further it was pointed out that the principle of equality is a delicate, vulnerable and supremely precious concept for our society and has embraced a critical and essential component of constitutional identity. Principles of equality of course cannot be completely taken away so as to leave citizens in a state of lawlessness, but it was pointed out that the facets of the


principle of equality can always be altered, especially to carry out the directive principles of State policy.

Similar view has been taken in *State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal*

111, where the Court was examining the powers of the High Court under Article 226 of the Constitution to order investigation by the Central Bureau of Investigation in respect of a cognizable offence. In conclusion the Bench held as follows: The fundamental rights, enshrined in Part III of the Constitution are inherent and cannot be extinguished by any constitutional or statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure.

Fundamental rights enshrined in Part III can be extinguished by Constitutional amendments and if it abrogates or abridges such rights, would not as such, abrogate or abridge the basic structure. The test is whether it has the effect of nullifying the over arching principles of equality, secularism, liberty and so on. Some doctrines die hard. That certainly is true of the doctrine of basic structure of the Constitution.112

If one finds that the constitutional amendment seeks to abrogate core values/ over-arching principles like secularism, egalitarian equality, etc. and which would warrant re-writing of the Constitution then such constitutional law would certainly violate the basic structure. In other words, such over-arching principles would fall outside the amendatory power under Article 368 in the sense that the said power cannot be exercised even by the Parliament to abrogate such over-arching principles.113

111 2010 (3) SCC 571
112 *Glanrock Estate (P) Ltd. v The State of Tamil Nadu,* (2010) 10 SCC 96
113 supra
The decision in *I.R. Coelho v. State Tamil Nadu*\(^{114}\) had clarified that the constitutional amendments which have been placed in the Ninth Schedule after the *Keshavananda Bharati*\(^{115}\) decision are not immune from judicial review. Even though there is some uncertainty as to whether constitutional amendments can be scrutinized with respect to the fundamental rights enumerated in Part III, there is no obstruction to their scrutiny on the basis of principles such as equality, democracy and fraternity, since all of them find a place in the Preamble to our Constitution.

The Supreme Court in *K. Krishna Murthy v. Union of India*\(^ {116}\) were are required to examine the constitutional validity of some aspects of the reservation policy prescribed for the composition of elected local self-government institutions were challenged as being violative of principles such as equality and democracy, which are considered to be part of the 'basic structure' doctrine. It held the policy constitutionally valid since they are in the nature of provisions which merely enable State Legislatures to reserve seats and chairperson posts in favour of backward classes. It further opined that concerns about disproportionate reservations should be raised by way of specific challenges against the State Legislations.

But we must have a clear perception that the Basic Structure concept with regard to our Constitution is exhaustive. It is hazardous to define what is the Basic Structure of the Constitution as what is basic does not remain static for all time to come. However, the basic features have been culled out from various pronouncements of this Court.\(^ {117}\)

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\(^{114}\) (2007) 2 SCC 1.

\(^{115}\) (1973) 4 SCC 425.


\(^{117}\) *J&K, National Panthers Party v. The Union of India*, (2011) 1 SCC 228.
D.D. Basu in his most famous book have enumerated the list which have been declared as basic structure. In the book these features have been noted as basic structure of the Constitution

(a) Supremacy of the Constitution.
(b) Rule of law.
(c) The principle of Separation of Powers.
(d) The principles behind fundamental rights.
(e) The objectives specified in the Preamble to the Constitution.
(f) Judicial review Article32 and Articles 226, 227.
(g) Federalism
(h) Secularism.
(i) The sovereign, democratic, republican structure.
(j) Freedom and dignity of the individual.
(k) Unity and integrity of the Nation.
(l) The principle of equality, not every feature of equality, but the quintessence of equal justice
(m) The rule of equality in public employment.
(n) The 'essence' of other Fundamental Rights in Part III.
(o) The concept of social and economic justice-to build a welfare State;

Part IV in toto.
(q) The Parliamentary system of government.
(r) The principle of free and fair elections.
(s) Limitations upon the amending power conferred by Art. 368.
(t) Independence of the judiciary; but within the four corners of the Constitution and not beyond that.
(u) Independent and efficient judicial system.
(v) Powers of the Supreme Court under Articles 32, 136, 141, 142.
(w) Effective access to justice.

In a recent Constitution Bench judgment of this Court in Union of India v. R. Gandhi, President, Madras Bar Association, Justice Raveendran, speaking

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119 (2010) 11 SCC 1
for the unanimous Bench held:- The fundamental right to equality before law and equal protection of laws guaranteed by Article 14 of the Constitution, clearly includes a right to have the person's rights, adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognised principles of adjudication. Therefore wherever access to courts to enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum, such legislative Act is open to challenge if it violates the right to adjudication by an independent forum. Therefore, though the challenge by MBA is on the ground of violation of principles forming part of the basic structure, they are relatable to one or more of the express provisions of the Constitution which gave rise to such principles. Though the validity of the provisions of a legislative Act cannot be challenged on the ground it violates the basic structure of the Constitution, it can be challenged as violative of constitutional provisions which enshrine the principles of the rule of law, separation of powers and independence of the judiciary.

In *L. Chandra Kumar v. Union of India*¹²⁰, Chief Justice Ahmadi, after an analysis of different decisions of this Court, affirmatively held that judicial review is one of the basic features of our Constitution. Such a finding of this Court, obviously means that there cannot be an administrative review of a decision taken by a judicial or a quasi judicial authority which has the trappings of a court. Since judicial review has been considered an intrinsic part of constitutionalism, any statutory provision which provides for administrative review of a decision taken by a judicial or a quasi judicial body is, therefore, inconsistent with the aforesaid postulate and is unconstitutional.

Under our constitutional scheme, an executive authority cannot entertain an appeal from an order passed by the judicial authority even though such judicial authority is acting in a quasi-judicial capacity.¹²¹

¹²⁰ AIR 1997 SC 1125

¹²¹ *Amrik Singh Lyallpuri v. Union Of India*, (2011) 6 SCC 535
Modern constitutionalism, to which Germany is a major contributor too, especially in terms of the basic structure doctrine, specifies that powers vested in any organ of the State have to be exercised within the four corners of the Constitution, and further that organs created by a constitution cannot change the identity of the constitution itself.122

An independent and efficient judicial system is one of the basic structures of our Constitution. If sufficient number of Judges are not appointed, justice would not be available to the people, thereby undermining the basic structure. It is well known that justice delayed is justice denied. Time and again the inadequacy in the number of Judges has adversely been commented upon. Not only have the Law Commission and the Standing Committee of Parliament made observations in this regard, but even the Head of the judiciary, namely, the Chief Justice of India has had more occasion than one to make observations in regard thereto. Under the circumstances, we feel it is our constitutional obligation to ensure that the backlog of the cases is decreased and efforts are made to increase the disposal of cases. Apart from the steps which may be necessary for increasing the efficiency of the judicial officers, we are of the opinion that time has now come for protecting one of the pillars of the Constitution, namely, the judicial system123

This Court which stands as a sentinel on the quiver over the rights of people of this country has to interpret the Constitution in its true spirit with insight into social values and suppleness of the adoption to the changing social needs upholding the basic structure of the Constitution for securing social justice, economic justice and political justice as well as equality of status and equality of opportunity. Part-III dealing with 'Fundamental Rights' and Part-IV dealing with 'Directive Principles of State Policy' which represent the core of the Indian Constitutional philosophy envisage the methodology for removal of historic injustice and inequalities -either inherited or artificially created - and social and

122 Ram Jethmalani v. Union Of India, JT 2011 (7) SC 104.
economic disparity and ultimately for achieving an egalitarian society in terms of the basic structure of our Constitution as spelt out by the preamble.\textsuperscript{124}

6.4. SOCIAL WELFARE STATE.

State is an important legal institution as it is a source of all the powers and rights. It is a working conception of life as a whole. A state is an association of human beings established for the attainment of certain ends by certain means. The relationship between state and law is inherent. A state maintains peace and administration in a society through law. By the time the role of the state has been changed. Now the state is a social welfare state. A social welfare state means such a social system whereby then state assumes primary responsibility for the welfare of its citizens, as in matters of health care, education, employment, and social security.

Concept of government in which the state plays a key role in protecting and promoting the economic and social well-being of its citizens. It is based on the principles of equality of opportunity, equitable distribution of wealth, and public responsibility for those who lack the minimal provisions for the good life. The term may be applied to a variety of forms of economic and social organization. A basic feature of the welfare state is social insurance, intended to provide benefit during periods of greatest need (e.g. old age, illness, unemployment).

The welfare state also usually includes public provision of education, health services, and housing. A Welfare state is a concept of government where then state plays a key role in the protection and promotion of the economic and social well-being of its citizens. It is based on the principles of quality of opportunity, equitable distribution of wealth, and public responsibility for those unable to avail themselves of the minimal provisions for a good life. Then general term may cover a variety of forms of economic and social organization.\textsuperscript{125}

\textsuperscript{124} 1992 Supp (3) SCC 212.

\textsuperscript{125} http://www.answers.com/topic/welfare-state accessed on 21.03.2010.
The welfare state refers to the provision of welfare services by the state. It is an ideal model where the state assumes primary responsibility for the welfare of its citizens. This responsibility is comprehensive, because all aspects of welfare are considered; a “safety net” is not enough. It is universal, because it covers every person as a matter of right. A welfare states may be identified with general systems of social welfare. In many “welfare states”, welfare is not actually provided by the state, but by a combination of independent, voluntary and government services.

According to studies of philosophical theory, one can ascertain that a welfare state is a system in which ultimate responsibility of government is well-being of all citizens. Similarly if one studies according to economic theory, it can be very well ascertained that a welfare state is a social system based on political responsibility for improvement in condition of all citizens.126

Before independence, state was a police state who’s main function was to collect revenue, maintain peace and to control administration. But, gradually, a drastic change has occurred in the form of state. After independence, Indian state is blossomed as a “social welfare state”. Due to which the functions of the state have highly increased. Initially there was a rule of king which was replaced by the government later on. This government have three organs- Legislature, Executive and Judiciary. Being the representative of the state, the government started performing all the functions of all the state. However, the aforesaid three organs are detached from each other. So that anarchy and arbitrariness can not be developed.

At the time of independence, the constitution makers were highly influenced by the feeling of social equality and welfare of the people. They accepted that this sacrosanct work could only be done by state. For the same reason, they incorporated such provisions in the constitution of India which made the role of state important and went towards social welfare and ideal state.

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126 supra
Preamble, in general, is the form of expression and intend that the constitution makers which reflects that idea of a socialist state. The words, “Socialist”, “secular”, “democratic” and “republic” have been inserted in the preamble. Which reflects it’s from as a “social welfare state.” The expression “socialist” was intentionally introduced in the Preamble.\textsuperscript{127}

The Supreme Court has held that the principal aim of a socialist state is to eliminate inequality in income, status and standards of life. The basic framework of socialism is to provide a proper standard of life to the people, especially, security from cradle to grave. Amongst there, it envisaged economic equality and equitable distribution of income. This is a blend of Marxism & Gandhism, leaning heavily on Gandhian socialism. From a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society reveals a long march, but, during this journey, every state action, whenever taken, must be so directed and interpreted so as to take the society one step towards the goal.\textsuperscript{128}

Earlier in a landmark judgment, the Supreme Court held that the addition of the word ‘socialist’ might enable the courts to learn more in favour of nationalisation and state ownership of an industry. But, so long as private ownership of industries is recognised which governs an overwhelming large principles of socialism and social justice can not be pushed to such an extent so as to ignore completely, or to a very large extant, the interest of another section of the public, namely the private owners of the undertaking.\textsuperscript{129}

Similarly, the word ‘secularism’ is also adopted by 42\textsuperscript{nd} Constitutional (Amendment) Act, 1976. The multifarious religious groups co-existed in India, but in spite of this, the constitution stands for secular state ‘secularism’ that there is no official religion but state protects all religions equally. Religion is irrelevant

\textsuperscript{127} 42\textsuperscript{nd} Constitutional (Amendment) Act, 1976.

\textsuperscript{128} \textit{D. S. Nakara v. Union of India}, (1983) 1 SCC 305.

\textsuperscript{129} \textit{Excel Wear v Union of India}, AIR 1979 SC 25.
for the enjoyment of fundamental rights. Over and above, some fundamental rights have guaranteed freedom of worship and religion.

In *S.R. Bommai v. Union of India*\(^{130}\), the Supreme Court has held that ‘secularism’ is the basic feature of the Constitution. In *Aruna Roy v. Union of India*\(^{131}\), the Supreme Court has held that ‘secularism’ has a positive meaning which is developing, understanding and respect towards different religion.

‘Democracy’ is a unique feature of the Constitution of India. It signifies the power of the people of India. The electorate choose representatives who run the government. It can be determined as ‘of the people for the people and by the people’, the government and the elected representative of the government are responsible for the people of India. In a ‘republic’, the political sovereignty vests in the hands of people and the head of the state are only a person elected by the people for a fixed term.\(^{132}\)

In addition to these, our preamble has secures social, economical, political justice equality of status and opportunity to all including fraternity to all. There are so many other provisions in the Constitution which enable India as a ‘Social Welfare State’.

Part IV of the Constitution of India is concerned with Directive Principles of the state policy. This part is the foundation of social welfare system. However, these principles are neither enforceable nor binding on the state but are simply guidelines for the state, which the state has to consider at the time of policy making. Part IV is just like alight which shows a path to the state. Earlier, it was believed that the state was mainly concerned with the maintenance of law & order and protection of life, liberty & property of its subjects, such a restrictive role of the state is no longer a valid concept in the modern context. We are living in an era of welfare state which requires it to promote the prosperity & well-being of

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\(^{130}\) (1994) 3 SCC 1.

\(^{131}\) AIR 2003 SC 3176.

\(^{132}\) ibid.
the people. The Directive Principles lay down certain economic and social policies to be followed by the various governments in India. They impose certain obligation on the state to take positive action in order to promote welfare of the people and achieve economic democracy.\textsuperscript{133}

The Directive Principles is the ideals which the Union and State Government must keep in mind while formulating it’s policies. They lay down certain social, economical and political principal suitable in peculiar conditions prevailing in India. The idea of welfare state envisaged by our constitution can only be achieved if the states endeavour to implement them with high sense of moral duty.

The Supreme Court has held some Directive Principles as Fundamental Rights through judicial activism. In \textit{Randhir Singh v. Union of India}\textsuperscript{134}, the Supreme Court has held that principle of “equal pay for equal work” though not a fundamental right but it is certainly a constitutional goal, so it can be enforced. In \textit{H.M. Hoskot v State of Maharashtra}\textsuperscript{135} and \textit{Hussainara Khatoon v. Home Secretary, State of Bihar},\textsuperscript{136} the Supreme Court has declared that “legal aid” & “speedy trial” are fundamental rights under Article 21 which are also provided in Directive Principles under Article 39A. In \textit{Mohini Jain v. State of Karnataka}\textsuperscript{137} and \textit{Unni Krishnan v. State of A.P.},\textsuperscript{138} the Supreme Court has held that ‘right to Education’ is a fundamental right under Article 21. This right to education has been recognised as a separate fundamental right by the Parliament under Article 21A which has been inserted in the 86\textsuperscript{th} Constitutional (Amendment) Act, 2002.


\textsuperscript{134} AIR 1982 SC 879.

\textsuperscript{135} AIR 1978 SC 1548.

\textsuperscript{136} AIR 1979 SC 1332.

\textsuperscript{137} (1992) 3 SCC 666.

\textsuperscript{138} (1993) 1 SCC 645.
By these cases, it is clear that the Judiciary is playing a pivotal role to promote Indian state as a social welfare state. In addition to these, Public Interest Litigations (PILs) have also played an important role in this field and have maintained social order. All efforts seems to have been made towards a socialist state where the basic needs of the citizen of the state need to be fulfilled.

The classification of enumerated rights can be based on who they are directed against and whether they involve a ‘duty of restraint’ or a ‘duty to facilitate entitlements’. The language of a substantive right usually indicates whether it is directed against state agencies, private actors or both. For instance in the Indian Constitution, civil-political rights such as ‘freedom of speech, assembly and association’ are directed against the State, since the text expressly refers to the State’s power to impose reasonable restrictions on the exercise of the same. This implies that under ordinary conditions the State has an obligation not to infringe on these liberties. This ‘duty of restraint’ forms the basis of rights with a ‘negative’ dimension. Hence in the early years of the Indian constitutional experience, civil liberties and the protection against deprivation of life and liberty were understood mainly as imposing duties of restraint on governmental agencies as well as private citizens. However, in contrast to these justiciable ‘negative’ rights the directive principles of state policy allude to several socio-economic objectives which had a ‘positive’ dimension. Even though the directive principles are non-justiciable, there language is couched in the terms of positive obligations on governmental agencies to enable their fulfillment.\(^{139}\)

The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to

safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.140

The Indian Courts have responded to this hierarchy between ‘negative’ and ‘positive’ rights by trying to collapse the distinction between the same. While the fundamental rights of citizens enumerated in Part III of the Constitution are justiciable before the higher judiciary, Part IV deals with the ‘Directive Principles of State Policy’ that largely enumerate objectives pertaining to socio-economic entitlements. The Directive Principles aim at creating an egalitarian society whose citizens are free from the abject physical conditions that had hitherto prevented them from fulfilling their best selves. They are the creative part of the Constitution, and fundamental to the governance of the country. However, the key feature is that the Directive Principles are ‘non-justiciable’ but are yet supposed to be the basis of executive and legislative actions. It is interesting to note that at the time of drafting of the Constitution, some of the provisions which are presently part of the Directive Principles were part of the declaration of fundamental rights adopted by the Congress party. K.M. Munshi (a noted lawyer and a member of the Constituent assembly) had even included in his draft list of rights, the ‘rights of workers’ and ‘social rights’, which included provisions protecting women and children and guaranteeing the right to work, a decent wage, and a decent standard of living. Subsequently, the objective of ensuring these entitlements was included in the Directive Principles.141

Today the Government, in a welfare State is the regulator and dispenser of special services and provider of a large number of benefits. The valuables dispensed by Government take many forms, but they all share one characteristic.


141 The framers included ‘Directive Principles of State Policy’ following the example of the Irish Constitution.
They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds: leases, licences, contracts and so forth. With the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, it cannot be said that they do not enjoy any legal protection nor can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure.142

The Supreme Court in *Vincent vs. Union of India*143 opined that, "In a welfare State, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health. In a series of pronouncements during the recent years, this court has culled out from the provisions of Part-IV of the Constitution, the several obligations of the State and called upon it to effectuate them in order that the resultant picture by the constitution fathers may become a reality."

In *Kirloskar Brothers Ltd. v Employees State Insurance Corporation*144, the Supreme Court opined that “The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations under taken by the Government in the welfare State. The Government discharges this obligation by running hospitals and health centers which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital

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142 Ramana Dayaram Shetty. *v. The International Airport Authority of India*, AIR 1979 SC 1628

143 AIR (1987) SC 990

144 1996 (2) SCC 682
to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21."

A recent judgment in the case of *Lala Ram (D) By L.R. v. Union of India* the Supreme Court vide judgment dated 24.01.2013 tried to elaborate the meaning of a welfare State. It held A welfare state denotes a concept of government, in which the State plays a key role in the protection and promotion of the economic and social well-being of all of its citizens, which may include equitable distribution of wealth and equal opportunities and public responsibilities for all those, who are unable to avail for themselves, minimal provisions for a decent life. It refers to “Greatest good of greatest number and the benefit of all and the happiness of all”. It is important that public weal be the commitment of the State, where the state is a welfare state. A welfare state is under an obligation to prepare plans and devise beneficial schemes for the good of the common people. Thus, the fundamental feature of a Welfare state is social insurance. Anti-poverty programmes and a system of personal taxation are examples of certain aspects of a Welfare state. A Welfare state provides State sponsored aid for individuals from the cradle to the grave. However, a welfare state faces basic problems as regards what should be the desirable level of provision of such welfare services by the state, for the reason that equitable provision of resources to finance services over and above the contributions of direct beneficiaries would cause difficulties. A welfare state is one, which seeks to ensure maximum happiness of maximum number of people living within its territory. A welfare state must attempt to provide all facilities for decent living, particularly to the poor, the weak, the old and the disabled i.e. to all those, who admittedly belong to the weaker sections of society. Articles 38 and 39 of the Constitution of India provide that the State must strive to promote the welfare of the people of the state by protecting all their economic, social and political rights. These rights may cover, means of livelihood, health and the general well-being of all sections of people in society, specially those of the young, the old, the women and the relatively weaker sections of the society. These groups generally require special protection measures in almost every set up. The happiness of the people is the
ultimate aim of a welfare state, and a welfare state would not qualify as one, unless it strives to achieve the same.

With the advance of industrialization the Laissez Faire Theory was gradually replaced by the theory of the Welfare State, and in legal parlance there was a corresponding shift from positivism to sociological jurisprudence. The 19th Century had not yet fully got over laissez faire, and it was only in the 20th Century that the concepts of social justice and social security, as integral parts of the general theory of the Welfare State, were firmly established. In India, Article 38(1) of the Constitution states "the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life". Thus, it is the duty of the State under our Constitution to function as a Welfare State, and look after the welfare of all its citizens.\textsuperscript{145}

In \textit{Common Cause, A Registered Society v. Union of India},\textsuperscript{146} the two Judge Bench considered the legality of discretionary powers exercised by the then Minister of State for Petroleum and Natural Gas in the matter of allotment of petrol pumps and gas agencies. While declaring that allotments made by the Minister were wholly arbitrary, nepotistic and motivated by extraneous considerations the Court said: “The Government today in a welfare State provides large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases, contracts, quotas and licences etc. Government distributes largesses in various forms. A Minister who is the executive head of the department concerned distributes these benefits and largesses. He is elected by the people and is elevated to a position where he holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people”.

\textsuperscript{145} \textit{Union of India v. Prabhakaran Vijaya Kumar}, (2008) 9 SCC 527.

\textsuperscript{146} (1996) 6 SCC 530
The allotment of land by the State or its agencies/instrumentalities to a body/organization/institution which carry the tag of caste, community or religion is not only contrary to the idea of Secular Democratic Republic but is also fraught with grave danger of dividing the society on caste or communal lines. The allotment of land to such bodies/organizations / institutions on political considerations or by way of favoritism or nepotism or with a view to nurture the vote bank for future is constitutionally impermissible. This, however, does not mean that the State can never allot land to the institutions/organisations engaged in educational, cultural, social or philanthropic activities or are rendering service to the Society except by way of auction. Nevertheless, it is necessary to observe that once a piece of land is earmarked or identified for allotment to institutions/organisations engaged in any such activity, the actual exercise of allotment must be done in a manner consistent with the doctrine of equality.147

In an appeal before the Supreme Court for compensation due for the land taken by the government authorities, without resorting to any procedure prescribed by law, the Court opined that depriving the appellants of their immovable properties, was a clear violation of Article 21 of the Constitution. In a welfare State, statutory authorities are bound, not only to pay adequate compensation, but there is also a legal obligation upon them to rehabilitate such persons. The non-fulfillment of their obligations would tantamount to forcing the said uprooted persons to become vagabonds or to indulge in anti-national activities as such sentiments would be born in them on account of such ill-treatment. Therefore, it is not permissible for any welfare State to uproot a person and deprive him of his fundamental/constitutional/human rights, under the garb of industrial development.148

Asserting the importance of pensionary benefits to all the retired employees the Supreme Court in D.S. Nakara and Others v. Union of India149, has very clearly recorded the following :- " Having set out clearly the society which we

149 (1983) 1 SCC 305.
propose to set up, the direction in which the State action must move, the welfare State which we propose to build up, the constitutional goal of setting up a socialist State and the assurance in the Directive Principles of State Policy especially of security in old age at least to those who have rendered useful service during their active years, it is indisputable, nor was it questioned, that pension as a retirement benefit is in consonance with and in furtherance of the goals of the Constitution. The goals for which pension is paid themselves give a fillip and push to the policy of setting up a welfare State because by pension the socialist goal of Security of cradle to grave is assured at least when it is mostly needed and least available, namely, in the fall of life."

Addressing to one of the most important issues in recent times the Supreme Court in Dev Sharan v. State of U.P.150 opined that admittedly, the Land Acquisition Act, a pre-Constitutional legislation of colonial vintage is a drastic law, being expropriatory in nature as it confers on the State a power which affects person's property right. Even though right to property is no longer fundamental and was never a natural right, and is acquired on a concession by the State, it has to be accepted that without right to some property, other rights become illusory. This Court is considering these questions, especially, in the context of some recent trends in land acquisition. This Court is of the opinion that the concept of public purpose in land acquisition has to be viewed from an angle which is consistent with the concept of a welfare State. It further expressed its view that the concept of public purpose cannot remain static for all time to come.

In Bhimandas Ambwani (D) Thr. Lrs. v. Delhi Power Company Ltd. the Supreme Court vide order dated 12 February, 2013, directed the Land Acquisition Collector to make the award after hearing the parties for the land was taken over about half a century ago and stood completely developed. The Court expressed anguish and opined depriving the appellants of their immovable properties, was a clear violation of Article 21 of the Constitution. In a welfare State, statutory authorities are bound, not only to pay adequate compensation, but there is also a legal obligation upon them to rehabilitate such persons. The non-fulfillment of

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150 (2011) 4 SCC 769
their obligations would tantamount to forcing the said uprooted persons to become vagabonds or to indulge in anti-national activities as such sentiments would be born in them on account of such ill-treatment. Therefore, it is not permissible for any welfare State to uproot a person and deprive him of his fundamental/constitutional/human rights, under the garb of industrial development.

Despite complicated social realities, it is submitted that Rule of Law, independence of the judiciary and access to justice are conceptually interwoven. All the three bring to bear upon the quality of aspirations which are guaranteed under our Constitution. In order to fulfil the aspiration, it is important that the system must be a successful legal and judicial system. This would involve improvement of better techniques to manage courts more efficiently, cutting down costs and duration of proceedings and to ensure that there is no corruption in the judiciary and the establishment of the judiciary and would also require regular judicial training and updating. Merely widening the access to justice is not enough to secure redress to the weaker sections of the community. Post Independence, it was evident that litigation in India was getting costlier and there was agonizing delay in the process. After the adoption of the Constitution and creation of a Welfare State, the urgency of some structural changes in the justice delivery system is obviously a major requirement.151

After independence the concept of social justice has become a part of our legal system. This concept gives meaning and significance to the democratic ways of life and of making the life dynamic. The concept of welfare state would remain in oblivion unless social justice is dispensed with. Dispensation of social justice and achieving the goals set forth in the constitution are not possible without the active, concerted and dynamic efforts made by the person concerned with the justice dispensation system. The prevailing ailing socio- economic-political system in the country needs treatment which can immediately be provided by judicial incision. Such a surgery is impossible to be performed unless

the Bench and the Bar make concerted effort. The role of the members of the Bar has thus assumed great importance in the post independent era in the country.\textsuperscript{152}

From the analysis of the above, it is clear that the appropriate balance between different activities of the State is the very foundation of the socio-economic security and proper enjoyment of the right to life. It is the function of the State to secure to its citizens social, economic and political justice, to preserve liberty of thought, expression, belief, faith and worship” and to ensure equality of status and of opportunity and the dignity of the individuals and the unity of the nation. This Court has a duty to interpret statutes with social welfare benefits in such a way as to further the statutory goal and not to frustrate it. In doing so this Court should make an effort to protect the rights of weaker sections of the society in view of the clear constitutional mandate. Thus, social justice, the very signature tune of our Constitution and being deeply embedded in our Constitutional ethos in a way is the arch of the Constitution which ensures rights of the common man to be interpreted in a meaningful way so that life can be lived with human dignity.

6.5. GLOBALISATION, LIBERALISATION, PRIVATISATION, AND THE CONCEPT OF WELFARE STATE.

India is considered to be the largest democracy of the world, which is governed by an elaborate and detailed written constitution. The Preamble of the Constitution has used the terms like “Socialist”, “Social and Economic Justice”, “Equality” etc, these terms indicate that the state would extensively involve in social welfare of people, and would try to establish an egalitarian society.

Moreover a separate chapter of Directive Principles of State Policy has been devoted towards the welfare responsibilities of the government, which lays down the norms of ideal governance for people’s welfare. However on proper analysis it can be seen that the current economic policies of the government, which are largely influenced by globalisation and capitalism, are not in

\textsuperscript{152} Ramon Services Pvt. Ltd. v. Subhash Kapoor, (2001) 1 SCC 118.
conformity with its welfare obligations. On the one hand economy is growly very fast but its benefit is confined to 10-15% population; the rich poor divide is increasing continuously; the agriculture sector is neglected from the focus of economic development; the small scale industries have been devastated by the impact of neo-liberal policies; the regional disparities have been increased substantially. There is an urgent need to change the economic policies with people focussed plan both in terms of expenditure and implementation, with special focus on development of agriculture, elimination of poverty and inequality, enforcement of corporate environmental responsibility, revival of small scale industries, and financial inclusion.\textsuperscript{153}

India is considered to be a welfare state and moreover the largest democracy in the world. The people in India have been considered as the supreme authority in our country, as it is declared by the Preamble of Indian Constitution that sovereignty vests not in the Parliament but in the people of Union of India. “Social Welfare” has been (at least theoretically) at the centre of our policy making from the time of independence itself. From the “First Five Year Plan” itself Programmes and schemes have been launched related to social welfare issues as like agriculture and rural development, employment and labour welfare, healthcare, education, etc. Indeed in the initial 20-25 years in spite of scarcity of economic means the government was focussed on the welfare policies and inclusive development. In today’s time it seems that the concept of social welfare has not been taken by the government as sincerely, as it must have. The attitude of the government is not very friendly and cooperative towards the people, and it is visible from the recent debate on the Lokpal Bill and the controversy relating to the determination of poverty line for poor people.\textsuperscript{154}

The government does not seem to be sincere about its responsibility towards serving the people as many scams and irregularities have come up in the

\textsuperscript{153} www.vifindia.org accessed on 25.11.2012.

\textsuperscript{154} Recently Planning Commission deputy chairman Montek Singh Ahluwalia says the poverty line for poor is Rs. 26/- in rural and Rs. 32/- in urban areas, The Times of India, October 2, 2011.
central and state governments. The skewed policies relating to the expansion of capitalism, the forceful acquisition of lands from poor peasants, and neglect for the development of agriculture and rural development are making the situation worse.\textsuperscript{155}

In \textit{Narmada Bachao Andolan v. Union of India}\textsuperscript{156}, there was a challenge to the validity of the establishment of a large dam. It was held by the majority at page 762 as follows :-

“\textit{It is now well settled that the Courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the Courts are ill-equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution.}"

It is evident from the above that it is neither within the domain of the Courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our Courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical.

Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial

\textsuperscript{155} ibid.

\textsuperscript{156} (2000) 10 SSC 664.
and error" as long as both trial and error are bona fide and within limits of authority.\textsuperscript{157}

Rawls in his "Theory of Justice"\textsuperscript{158} stated that: "From the beginning I have stressed that justice as fairness applies to the basic structure of society. It is a conception for ranking social forms viewed as closed systems. Some decision concerning these background arrangements is fundamental and cannot be avoided. In fact, the cumulative effect of social and economic legislation is to specify the basic structure. Moreover, the social system shapes the wants and aspirations that its citizens come to have. It determines in part the sort of persons they want to be as well as the sort of persons they are. Thus an economic system is not only an institutional device for satisfying existing wants but a way of creating and fashioning wants in the future. How men work together now to satisfy their present desires affects the desires they will have later on, the kind of persons they will be. These matters are, of course, perfectly obvious and have always been recognised. They were stressed by economists as different as Marshall and Marx. Since economic arrangements have these effects, and indeed must do so, the choice of these institutions involves some view of human good and of the design of institution to realize it. This choice must, therefore, be made on moral and political as well as on economic grounds."

Justice K.K. Mathew, a former Judge of the Supreme Court, in his book\textsuperscript{159} has stated that that "Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind. The institution performs many different functions. One of these functions is to draw a circle around the activities of each private individual or Organisation. Within that circle, the owner has a greater degree of freedom than without." The learned Judge stated that "In a society with a mixed economy, who can be sure that freedom in relation to property might not be regarded as an aspect of individual freedom? People without property have a tendency to become slaves. They

\textsuperscript{157} supra

\textsuperscript{158} Rawls in his "Theory of Justice" at p.259

\textsuperscript{159} Justice K.K. Mathew, 'Democracy, Equality and Freedom' at p.37
become the property of others as they have no property themselves. They will come to say: "make us slaves, but feed us”. Liberty, independence, selfrespect, have their roots in property. To denigrate the institution of property is to shut one's eyes to the stark reality evidenced by the innate instinct and the steady object of pursuit of the vast majority of people. Protection of property interest may quite fairly be deemed in appropriate circumstances an aspect of freedom.”

At page 39160, he further stated that "There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely. This is why the Constitution-makers wanted that the ownership of the material resources of the community should be so distributed as to subserve the common good. People become a society based upon relationship and status.” He further stated that "the economic rights provide man with freedom from fear and freedom from want, and that they are as important if not more, in the scale of values,"

The Supreme Court Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde161 quoted the speech of Dr. B.R. Ambedkar, while winding up the debates on the Draft Constitution, on the floor of the Constituent Assembly that the real reason and Justification for inclusion of the Directive Principles in the Constitution is that the party in power disregard of its political ideologies, will not sway away by its ideological influence but "should have due regard to the ideal of economic democracy which is the foundation and the aspiration of the Constitution." "Whoever may capture the governmental power will not be free to do what he likes to do in the exercise of the power. He cannot ignore them. He may not have to answer for the breach in a court of law, but he will certainly have to answer for them before the electorate when the next election comes.” Dr. Ambedkar further stated that: "We must make our political democracy a social democracy as well. Political democracy,, cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items

160 supra

161 1995 SCC, Supl. (2) 549
in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. In politics we will be recognising the principles of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one vote one value. If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up”.

The development of a global economy has implications for national welfare policies. The nation state is being 'hollowed out', with power being dispersed to localities, independent organisations, and supra-national bodies (like NAFTA or the European Union). Mishra argues, in Globalization and the Welfare State\textsuperscript{162}, that globalization limits the capacity of nation-states to act for social protection. Global trends have been associated with a strong neo-liberal ideology, promoting inequality and representing social protection as the source of 'rigidity' in the labour market. International organisations like the World Bank and International Monetary Fund have been selling a particular brand of economic and social policy to developing countries, and the countries of Eastern Europe, focused on limited government expenditure, selective social services and private provision.

The welfare state has after the end of the Second World War become the most used system of making capitalism and democracy compatible in the affluent countries of the West. Thereby it has disproved Karl Marx and John Stuart Mill who thought that those two were incompatible. Since the emergence of the welfare state came about a new concept, globalization has been evolved and deals with the intensification of cross border social transactions. Every state has to compete economically with all other states including far away countries with

different political systems, language and culture. Will the globalization change the welfare state?\textsuperscript{163}

The validity of the decision of the Union of India to disinvest and transfer 51% shares of M/s Bharat Aluminium Company Limited (hereinafter referred to as 'BALCO') came up for consideration before the Supreme Court. The Court opined that in a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the Court. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the Courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate forum is the Parliament and not the Courts.\textsuperscript{164}

The Preamble of our Constitution uses two other concepts which create responsibilities on the state to involve actively in social welfare, namely “social” and “economic justice”. Under the concept of social justice the state is required to ensure that the dignity of socially excluded groups is not violated by the powerful, and they are considered on equal footing with others. In Consumer Education and Research Centre v. Union of India\textsuperscript{165} the Supreme Court has held that “Social justice, equality and dignity of person are corner stones of social democracy. The concept ‘social justice’ which the Constitution of India engrafted,


\textsuperscript{164} \textit{Balco Employees Union (Regd.) v. Union Of India}, (2002) 2 SCC 333.

\textsuperscript{165} AIR 1995 SC 922.
controls of diverse principles essential for the orderly growth and development of personality of every citizen.”

Under economic justice it is contemplated that the state would not make any distinction among its citizens on the basis of their possession of economic resources. Economic justice also requires the state to try to narrow down the gap of resourceful and poor by distributive justice in terms of income and wealth. To achieve the ideals of social and economic welfare the state is required to involve in different social welfare schemes as like reservation for SC/ST/OBCs, MGREGA, Mid Day Meal Scheme, Sarva Sikha Abhiyan, etc.166

However recently seeing some light the Supreme Court in a case for reinstatement of a worker, have opined that this Court has a duty to interpret statutes with social welfare benefits in such a way as to further the statutory goal and not to frustrate it. In doing so this Court should make an effort to protect the rights of weaker sections of the society in view of the clear constitutional mandate. Thus, social justice, the very signature tune of our Constitution and being deeply embedded in our Constitutional ethos in a way is the arch of the Constitution which ensures rights of the common man to be interpreted in a meaningful way so that life can be lived with human dignity. Any attempt to dilute the constitutional imperatives in order to promote the so called trends of Globalisation, may result in precarious consequences. At this critical juncture the judges' duty is to uphold the constitutional focus on social justice without being in any way misled by the glitz and glare of globalization.167

The stock plea raised by the public employer in the cases of illegal retrenchment, with the attractive mantras of globalisation and liberalization, that the initial employment/engagement of the workman- employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment, cannot be accepted by courts being unmindful of the accountability of the wrong doer and indirectly punishing

166 ibid

the tiny beneficiary of the wrong ignoring the fact that he may have continued in
the employment for years together and that micro wages earned by him may be
the only source of his livelihood. It needs no emphasis that if a man is deprived of
his livelihood, he is deprived of all his fundamental and constitutional rights and
for him the goal of social and economic justice, equality of status and of
opportunity, the freedoms enshrined in the Constitution remain illusory.
Therefore, the approach of the courts must be compatible with the constitutional
philosophy of which the Directive Principles of State Policy constitute an integral
part and justice due to the workman should not be denied by entertaining the
specious and untenable grounds put forward by the employer - public or
private.\textsuperscript{168}

With the advent to new globalised policies there have been a continuous
changes in the law of the land. Notable one law namely the Arbitration and
Conciliation Act, 1996 has been resorted to in disputes regarding business in the
current economic scenario. The Arbitration and Conciliation Act, 1996 made
certain drastic changes in Law of Arbitration to meet the liberal policy and
globalisation of commerce and delay in disposal of cases in Court. This Act is
codified in tune with the model law on International Commercial Arbitration as
adopted by United Nation Commission on International Trade Law (UNCITRAL)
with main objective to amplify the powers of Arbitral Tribunal and minimize the
supervisory role of Courts in the Arbitral process.

A Coram of 11 Judges, not a common feature in the Supreme Court of
India, sat to hear and decide \textit{T.M.A.Pai Foundation v. State of Karnataka}\textsuperscript{169}. It
was expected that the authoritative pronouncement by a Bench of such strength on
the issues arising before it would draw a final curtain on those controversies. The
subsequent events tell a different story. It is observed that the 11-Judge Bench
decision in \textit{Pai Foundation case}\textsuperscript{170} is a partial response to some of the challenges
posed by the impact of Liberalisation, Privatisation and Globalisation (LPG), but

\textsuperscript{168} supra

\textsuperscript{169} (2002) 8 SCC 481

\textsuperscript{170} supra
the question whether that is a satisfactory response, is indeed debatable. It was further pointed out that 'the decision raises more questions than it has answered'\textsuperscript{171}

The new economic policy namely the Liberalisation, Privatisation and Globalisation (LPG), model has had a huge negative impact on the labour rights. It seems that the labour rights in the country are taking the bite. Earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention to the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

We may refer to the latest of a series of decisions on this question. In \textit{U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey}\textsuperscript{172}, the Supreme Court following \textit{Allahabad Jal Sansthan v. Daya Shankar Rai}\textsuperscript{173} and \textit{Kendriya Vidyalaya Sangathan v. S.C. Sharma}\textsuperscript{174} held as follows: A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.

Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the court realising that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was

\textsuperscript{171} \textit{Annual Survey of Indian Law}, 2002 at p.251, 254.

\textsuperscript{172} (2006)1 SCC 479

\textsuperscript{173} (2005) 5 SCC 124.

\textsuperscript{174} (2005) 2 SCC 363.
spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. The changes brought about by the subsequent decisions of the Supreme Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalisation, privatisation and outsourcing, is evident. No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case.\(^\text{175}\)

The Supreme Court in *Jagbir Singh v. Haryana State Agriculture Marketing*\(^\text{176}\), dealing with an industrial dispute contending that the services were retrenched illegally in violation of Section 25F of Industrial Disputes Act, 1947 wherein the claimant claimed reinstatement with continuity of service and full back wages, while granting compensation has held that it would be, thus, seen that by catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee. Therefore, the view of the High Court that the Labour Court erred in granting reinstatement and back wages in the facts and circumstances of the present case cannot be said to suffer from any legal flaw. However, in our view, the High Court erred in not awarding compensation to the appellant while upsetting the award of reinstatement and back wages. As a matter of fact, in all the judgments of this Court referred to and relied upon by the High Court while upsetting the award of reinstatement and back wages, this Court has awarded compensation. While awarding compensation, the host of factors, inter-alia, manner and method of


\(^{176}\) *AIR 2009 SC 3004.*
appointment, nature of employment and length of service are relevant. Of course, each case will depend upon its own facts and circumstances.

The new economic policy namely the Liberalisation, Privatisation and Globalisation (LPG), model has had a huge negative impact on social justice legislation particularly in cases of affirmative action. Reservation is aimed at securing equal and protective discrimination. Recently, the purpose of reservation although in a different context has been stated by the Supreme Court in *A.I.I.M.S. Students Union v. A.I.I.M.S*\(^{177}\). It was observed: "Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation.

Any reservation, apart from being sustainable on the constitutional anvil, must also be reasonable to be permissible. In assessing the reasonability one of the factors to be taken into consideration would be whether the character and quantum of reservation would stall or accelerate achieving the ultimate goal of excellence enabling the National constantly rising to higher levels. In the era of globalisation, where the nation as a whole has to compete with other nations of the world so as to survive, excellence cannot be given an unreasonable go by and certainly not compromised in its entirety.\(^{178}\)

The Court further opined that Public health can be improved by having the best of doctors, specialists and super specialists. Under-graduate level is a primary or basic level of education in medical sciences wherein reservation can be understood as the fulfilment of societal obligation of the State towards the weaker segments of the society. Beyond this, a reservation is a reversion or diversion

\(^{177}\) 2002 (1) SCC 428

\(^{178}\) supra
from the performance of primary duty of the State. Permissible reservation at the lowest or primary rung is a step in the direction of assimilating the lesser fortunes in mainstream of society by bringing them to the level of others which they cannot achieve unless protectively pushed. Once that is done the protection needs to be withdrawn in the own interest of protectees so that they develop strength and feel confident of stepping on higher rungs on their own legs shedding the crutches. Pushing the protection of reservation beyond the primary level betrays bigwigs desire to keep the crippled crippled for ever. Rabindra Nath Tagores vision of a free India cannot be complete unless knowledge is free and timeless striving stretches its arms towards perfection.\textsuperscript{179}

6.6. CURRENT ECONOMIC POLICIES AND NEGLECT FOR SOCIAL WELFARE.

The model of globalisation was adopted in the hope that it would bring prosperity to the nation in the terms of higher production and economic growth. Indeed from 1991 onwards the gross domestic product of our country has gone up 8-9\%, and India has emerged as global economic power. India has attracted a great deal of foreign investment, and the amount of international trade has increased manifold. But it has been observed by the scholars that the benefits of globalization has been confined to elite sections of society, and its impact in terms of social welfare has been by and far negative.\textsuperscript{180}

The economic policies of our country are focussing (from 1991 onwards) more and more on the expansion of capitalism and privatisation, and continuously focus is diluted from the issues of social welfare. There has been an inherently negative impact of the neo-liberal economic policies. There has been a considered increase in the Rich Poor Divide. The gap between the rich and poor has been

\textsuperscript{179} supra

\textsuperscript{180} www.vifindia.org accessed on 25.11.2012.
widened all over the world. At global level the richest 10% of the population earned 79 times higher than the poorest 10% used to, in 1980; till 2003 the income of top 10% population was 117 times higher than those of poorest 10%.\textsuperscript{181} In India the high rate of GDP has substantially benefitted only the upper 10-15% people, and depressed employment for marginalised section of society.\textsuperscript{182} The top 10% of the population has a share of around 52% in the national wealth, and on the other hand the share of bottom 10% has been reduced to 0.21%\textsuperscript{183}.

There has been continuous neglect for agriculture. From 1991 agriculture and farmers have been neglected by the government, and the average budgetary expenditure for irrigation is less than 0.35%.\textsuperscript{184} The agriculture investment, has been decreased. The expenditure on agriculture has decreased continuously. In the last many years there were many cases of suicides by the farmers, which is the evidence of pitiful conditions of agrarian sector.

There has been devastation of Small Scale Industries. It was observed that more than 3 lakh small scale industries and more than three lakh handloom and power loom units were closed down due to the impact of globalization, because of decreasing bank loans to the SSIs. The allotment of funds to the SSIs has also been decreasing continually in terms of percentage. Even in the terms of growth performance the SSIs are lagging behind from the time of inception of globalization. The SSIs are very important units for providing self employment in rural and suburban area, and they have potential to make people self sufficient,

\textsuperscript{181} supra

\textsuperscript{182} Praful Bidwai, ‘Shining and Starving’ (2011) 28(17) Frontline,

\textsuperscript{183} Praful Bidwai, ‘The Question of Inequality’ (2007) 24(21) Frontline,

hence by neglecting the SSIs the government is definitely deviating from its welfare obligations towards people.\textsuperscript{185}

There has been great ecological damage as there has been total indifference from the side of government, and it has compromised the environment frequently for the sake of foreign investment. It has been seen that the government has failed to enforce the corporate environmental responsibility, so much so that the people affected by the Bhopal disaster could not be provided adequate compensation till now.\textsuperscript{186}

Regional Disparities in Development has been one of the major factors for some states lacking behind. It has been seen that the impact of the economic policies of the government has not resulted in inclusive and equitable development, but rather big disparities have arisen in different regions. Generally speaking the southern states and western states have acquired accelerated economic growth, and the north eastern and central parts of nation are lagging behind. Financial inclusion, has been is a distant dream. Financial inclusion which has been an issue of concern from the time of independence itself is still a distant dream. Half of the population in India does not possess a bank account, 90\% people have no access to credit or life insurance cover, and 98\% had no participation in the capital market.\textsuperscript{187}

It seems that the Courts have also the effects of liberalisation in their judgments. In 1988 a case concerning the regularization of the services of a large number of casual (non-permanent) workers in the posts and telegraphs department of the Government, the Court was prepared to invoke the Directive Principles of

\textsuperscript{185} C Narasimha Rao, “Globalisation, Justice, and Development” (Serials Publication, New Delhi 2007), pg 280.

\textsuperscript{186} ibid.

\textsuperscript{187} Business Standard, ‘Financial Inclusion Imperative to Reap Demographic Dividend’ (January 24, 2011)
State Policy and recognize the lack of choice of the disadvantaged worker. It said that the Government cannot take advantage of its dominant position, and compel any worker to work even as a casual labourer on starvation wages. It may be that the casual labourer has agreed to work on such low wages. That he has done because he has no other choice. It is poverty that has driven him to that state. The Government should be a model employer. We are of the view that on the facts and in the circumstances of this case the classification of employees into regularly recruited employees and casual employees for the purpose of the paying less than the minimum pay payable to employees in the corresponding regular cadres particularly in the lowest rungs of the department where the pay scales are the lowest is not tenable. However, in October 2005 the question whether this decision requires reversal was considered by the present Supreme Court in a case involving the question of regularizing the services of causal workers who had been working for the state government in Karnataka for period ranging between ten and twenty years.

This trend can also be attributed to the impact of the economic policies that have accompanied liberalization. In 1983, the Court was prepared to recognize the right of workmen of a company to be heard at the stage of the winding up of such company. The Court invoked Article 43A, a constitutional directive principle, which required these State to take suitable steps to secure participation of workers of Management.\(^\text{188}\)

However, in 2001, in a challenge by workmen to the decision of the Government to divest its shareholding in a public sector undertaking in favour of a private party, the Court refused to recognize any right in the workmen to be consulted. The Supreme Court has also declined to read into the law concerning abolition of contract labour any obligation on the employer to re-employ such labour on a regular basis in the establishment.

In the context of both the right to work and right in work, the trend of judicial decisions has witnessed a moving away from recognition and enforcement

\(^{188}\) *National Textiles Workers Union v. P.R. Ramakrishnan*, (1983) 1 SCC 228.
of such rights and towards deferring to executive policy that has progressively
denuded those rights.\textsuperscript{189}

There is no express recognition of the right to shelter under the Indian
Constitution. The judiciary has nevertheless stepped into recognize this right as
forming part of Article 21 itself. However, the Court has never really
acknowledged a positive obligation on the State to provide housing to the
Corporation},\textsuperscript{190} where the Court held that the right to life included the right to
livelihood, it disagreed with the contention of the pavement dwellers that since
they would be deprived of their livelihood if they were evicted from their slum
and pavement dwellings, their eviction would be tantamount to deprivation of their
life and hence be unconstitutional. This trend has continued ever since. However
in a case involving Municipal Corporation of Delhi the Court held that the
Municipal Corporation of Delhi had no legal obligation to provide pavement
squatters alternative shops for rehabilitation, as the squatters had to legal
enforceable right. In Sodan Sing’s case, the Supreme Court reiterated that the
question whether there can be at all be a fundamental right of a citizen to occupy a
particular place on the pavement where he can squat and engage in trade must be
answered in the negative. In a case concerning slum dwellers in Ahmedabad,
despite the Court making observations about the Directive Principles of State
Policy creating positive obligation on the State ‘to distribute its largesse to the
weaker sections of the society envisaged in Article 46 to make socioeconomic
justice in a reality, no actual relief was granted to the slum dwellers. As in the area
of the right to work, there has been a marked regression in the area of the right to
shelter, compounded by the bringing of PIL cases to the courts by other classes of
residents seeking eviction of slum dwellers as part of the protection and
enforcement of the former’s rights to a clean and healthy environment.

\textsuperscript{189} supra

\textsuperscript{190} (1985) 3 SCC 545.
The Supreme Court in *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation*¹⁹¹, by quoting Mahatma Gandhi has opined that Mahatma Gandhiji, the father of the nation, in *Swaraj* at page 92, stated that, "from the very beginning it has been my firm belief that agriculture provides the only unfailing and perennial support to the people of this country. India lives in villages". Villagers are poor and most of them are unemployed or underemployed who need productivity which would add to the wealth of the nation. This vast human resources and man power remain idle, since majority own little or marginal land holdings out depend on agriculture as their livelihood. Cottage, agro-based or medium industries in rural areas give them economic status to the owner, employment potential for sustenance to the workmen and fair price to the producer. The father of the nation laid, therefore, emphasis to establish cottage industries, "to utilize the idle hours of the nation and bring work to the people in their homes, particularly when they had no other work to do." He further stated, "I want the dumb millions of our land to be healthy. I want them to grow spiritually. If we feel the need of the machine we certainly will have them. Every machine that helps an individual has a place". But he emphasised only on such industries which would be, "self-sufficient, self-reliant and free from exploitation".

The founding fathers of the Constitution in Article 43 directed that, "the State shall endeavour to promote cottage industries on an individual and cooperative basis in rural areas". Without social progress and economic development, democracy and freedom would not take firm roots. Without social stability, it would be impossible to achieve economic development. Without economic development there would be no social progress and without social progress it would be impossible for the people to take the destiny in their own hands in a democracy. Out Constitution, therefore, accepted mixed economy as the base and the economic policy and planning echo regeneration of social and economic justice. Articles 38 and 39 aim in that pursuit that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the inequalities in income should be minimised. Facilities and opportunities should be provided to eliminate inequalities

in status and opportunity among the individual and groups of people. Our Bharat needs simultaneously greater progress by building industries with modern technological advances on all fronts and should create greater employment opportunities. To accelerate economic development the fiscal resources, human resources, their abilities and expertise need harness. In the mixed economy the public undertakings as well as private sector need necessary assistance and encouragement. The growth of the private sector should not be stifled, cribbed or cabined. The bureaucracy should adopt positive approach to stimulate production and productivity in every sector of economy so as to increase the size of the national cake. 192

Scheduled Castes and Scheduled Tribes are the weaker sections of the society who have been deprived of their economic status by obnoxious practice of untouchability and the tribes living in the forest area far away from the civilised social life. To augment their economic status and to bring them on par into the main stream of the society, the State with a view to render economic justice envisaged in the Preamble and Articles 38 and 46 of the Constitution distributed the material resources, namely, the land for self-cultivation. It is an economic empowerment of the poor. It is common knowledge that many a member of the deprived classes live upon the agriculture either by cultivation on lease hold basis or as agricultural labour. Under these circumstances, the State having implemented the policy of economic empowerment to do economic justice assigned lands to them to see that they remain in possession and enjoy the property from generation to generation. 193

Right to development is an inalienable human right by virtue of which every human person is entitled to participate in contribution to, and to enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised. All human rights derive from dignity and worth in man. Democracy blossoms the person's full freedom to achieve 193

192 supra

excellence. The socio-economic content in directive principles is all pervasive to make the right to life meaningful to the Indian citizens. For national unity, equality of status and dignity of persons envisaged in the Constitution, social and economic reforms in a democracy are necessary. Welfare is a form of liberty inasmuch as it liberates men from social conditions which narrow their choices and brighten their self development. Article 46 of the Constitution mandates the State to promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Political democracy must be made a social democracy as a way of life. It recognises and affords to realise liberty, equality and fraternity as the principles of life. Economic empowerment, thereby, is the foundation to make equality of status, dignity of person and equal opportunity a truism. Social revolution through rule of law lies in effectuation of the fundamental rights and directive principles a supplementary and complementary to each other. Political democracy would stabilize socio-economic democracy to make it a way of life. It was, therefore, held that the State is enjoined to provide adequate means of livelihood to the poor, weaker sections of the society, the dalits and tribes and to distribute material resources of the community to them for common welfare etc. Therefore, civil, political, social, economic and cultural rights are necessary to the individual to protect and preserve human dignity, social and economic rights are sine quanon concomitant to assimilate the poor, the depressed and deprived, i.e., the dalits and tribes in the national main stream for ultimate equitable society and democratic way of life to create unity, fraternity among people in an integrated Bharat. 

With the advent of globalization, we are witnessing a shift from Formalism to a Value-laden approach to law.

In lines of the new economic policy the Supreme Court have propounded a new concept "Level playing field", In Reliance Energy Limited v. Maharashtra

The Court held that standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". In includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of *I.R. Coelho vs. State of Tamil Nadu*, that Article 21/14 is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is

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196 (2007) 2 SCC 1
legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

However earlier in the case of *Union of India v. International Trading Co.*\(^{197}\), the Division Bench of this Court speaking through Pasayat, J. had held: It is trite law that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

Indian Supreme Court has achieved world-wide acclaim in fashioning new rights under Part III of the Constitution and also using Directive Principles as interpretive devices for giving a contemporaneous meaning to Part III. Innovations in the field of PIL or Social Interest Litigation as some people like to call it, have been institutionalized; methods and rules in that regard have been streamlined to a great extent through later directives of this court. The journey of PIL from rhetoric to a trusted court procedure showcases in ample the potential of constructive exchange between organs of polity, remaining well within their limits. At the same time, we are not unmindful of some decisions which have brought disrepute to the institution as well the innovation itself.

James Madison once when similarly situated remarked, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. As has been mentioned, subsequent directives of SC have come down heavily on such instances. Although this phase has been widely documented but the last such mention was by Sandra Fredman\(^{198}\) where the author (Sandra Fredman) sees inspiration in the wide-ranging work of Indian Supreme Court for European Court of Justice.

\(^{197}\) (2003) 5 SCC 437

It was noted therein: "Two points should, however, be noted (about Indian Supreme Court's record on Public Interest Law). First, the Court has adapted its procedure to enable it to adjudicate polycentric issues more appropriately. Wide standing rules require the court to conduct some of its own fact-finding, sometimes through establishing its own commissions. It has also fashioned its own remedial orders to provide ongoing management.

For example, in the "Right to Food" case, it has issued a continuing mandamus to require states to fully implement specific schemes including mid-day meals at school. Secondly, affirmation of wide duties is often used to counter maladministration rather than to initiate new projects. Thus the right to livelihood of pavement dwellers gave rise only to a duty to consult before removing them; and the right to a road gave rise only to a duty to complete a project for which funds had already been allocated. In the right to food case, a primary problem was maladministration: the Court found that about half of the food subsidy was being spent on holding excess stocks; reducing stocks would free up large resources to distribute food and provide hot mid-day meals for school children.

On the other in the Annual Report of the National Human Rights Commission\(^\text{199}\), this is what is stated about our country: “It is said that one third of the world’s poor are Indians, who lacked clean drinking water, basic sanitation and minimum standards of health care, food and nutrition….Persistence of such a situation constitutes a failure of governance which had urgently to be remedied for it is on the pillars of good governance that promotion of human rights in the final analysis rests.”

Ensuring food security is the dying need of the hour. The green revolution converted India, from a begging bowl into a bread basket. Now there is a talk about the need for second Green Revolution. However such revolution in no where in sight. Over 40 per cent of farmers interviewed by the National Sample Survey

Organization has expressed a desire to quit farming if there is another option available.²⁰⁰

Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated equals. Thus, any public employment has to be in terms of the constitutional scheme. A sovereign government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary appointments or engaging workers on daily wages. Going by a law newly enacted, The National Rural Employment Guarantee Act, 2005, the object is to give employment to at least one member of a family for hundred days in an year, on paying wages as fixed under that Act. But, a regular process of recruitment or appointment has to be resorted to, when regular vacancies in posts, at a particular point of time, are to be filled up and the filling up of those vacancies cannot be done in a haphazard manner or based on patronage or other considerations. Regular appointment must be the rule.²⁰¹

The deprivation of the weaker section we had for long but time has now come to cry halt and it is for the law courts to rise up to the occasion and grant relief to a seeker of a just cause and just grievance. Economic justice is not a mere legal jargon but in the new millenium, it is the obligation for all to confer this economic justice to a seeker. Society is to remain, social justice is the order and economic justice is the rule of the day. Narrow pedantic approach to statutory documents no longer survives. The principle of corporate jurisprudence is now being imbibed on to industrial jurisprudence and there is a long catena of cases in regard thereto the law thus is not in a state of fluidity since the situation is more or


less settled. As regards interpretation widest possible amplitude shall have to be offered in the matter of interpretation of statutory documents under industrial jurisprudence. The draconian concept is no longer available. Justice social and economic, as noticed above ought to be made available with utmost expedition so that the socialistic pattern of the society as dreamt of by the founding fathers can thrive and have its foundation so that the future generation do not live in the dark and cry for social and economic justice.202

One of the earliest pronouncements on the subject came from this Court in *Rustom Cavasjee Cooper v. Union of India* 203 (commonly known as “Bank Nationalization Case”) wherein this Court held that it is not the forum where conflicting policy claims may be debated, it is only required to adjudicate the legality of a measure which has little to do with relative merits of different political and economic theories. The Court observed: “This Court is not the forum in which these conflicting claims may be debated. Whether there is a genuine need for banking facility in the rural sector, whether certain classes of the community are deprived of the benefit of the resources of the banking industry, whether administration by the Government of the commercial banking sector will not prove beneficial to the community and will lead to rigidity in the administration, whether the Government administration will eschew the profitmotive, and even if it be eschewed, there will accrue substantial benefits to the public, whether an undue accent on banking as a means of social regeneration, especially in the backward areas, is a doctrinaire approach to a rational order of priorities for attaining the national objectives enshrined in our Constitution, and whether the policy followed by the Government in office or the policy propounded by its opponents may reasonably attain the national objectives are matters which have little relevance in determining the legality of the measure. It is again not for this Court to consider the relative merits of the different political theories or economic policies.” This Court has the power to strike down a law on the ground of want of authority, but


203 (1970) 1 SCC 248
the Court will not sit in appeal over the policy of the Parliament in enacting a law. The Court cannot find fault with the Act merely on the ground that it is inadvisable to take over the undertaking of banks which, it is said by the petitioner, by thrift and efficient management had set up an impressive and efficient business organization serving large sectors of industry.”

In *Premium Granites v. State of T.N.* 204 this Court clarified that it is the validity of a law and not its efficacy that can be challenged. “It is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right.”

In *Delhi Science Forum v. Union of India* 205, a Bench of three learned Judges of the Supreme Court, while rejecting a claim against the opening up of the telecom sector reiterated that the forum for debate and discourse over the merits and demerits of a policy is the Parliament. It restated that the services of this Court are not sought till the legality of the policy is disputed, and further, that no direction can be given or be expected from the courts, unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provisions.

In *BALCO Employees’ Union (Regd.) v. Union of India* 206, this Court further pointed out that the Court ought to stay away from judicial review of efficacy of policy matters, not only because the same is beyond its jurisdiction, but also because it lacks the necessary expertise required for such a task. Affirming the previous views of this Court, the Court observed that while dealing with economic

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204 (1994) 2 SCC 691.


legislations, the Courts, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those cases where the view reflected in the legislation is not possible to be taken at all. The Court went on to emphasize that unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere.

In BALCO\textsuperscript{207}, the Court took notice of the judgment in Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India\textsuperscript{208} and observed that some matters like price fixation are based on such uncertainties and dynamics that even experts face difficulty in making correct projections, making it all the more necessary for this Court to exercise non-interference. “The function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts.”

In \textit{State of Madhya Pradesh v. Narmada Bachao Andolan}\textsuperscript{209}, the Supreme Court said that the judiciary cannot engage in an exercise of comparative analysis over the fairness, logical or scientific basis, or wisdom of a policy. It held that the Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer, or more scientific or logical, or wiser. The wisdom and advisability of the policies are ordinarily not

\textsuperscript{207} Supra.

\textsuperscript{208} (1992) 2 SCC 343.

\textsuperscript{209} (2011) 7 SCC 639.
amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power.

In Villianur Iyarkkai Padukappu Maiyam v. Union of India\textsuperscript{210}, this Court held as follows: “It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to “trial and error” as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts.”

In Bajaj Hindustan Limited v. Sir Shadi Lal Enterprises Limited\textsuperscript{211}, this Court held “that economic and fiscal regulatory measures are a field where Judges should encroach upon very wearily as Judges are not expert in those matters”.

The Supreme Court in Bhavesh D. Parish v. Union of India\textsuperscript{212}, took the view that, in the context of the changed economic scenario, the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalisation of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all.

In Arun Kumar Agrawal v. Union of India, the Supreme Court on 09 May 2013 has again expressed that the process concerning economic and commercial

\textsuperscript{210} (2009) 7 SCC 561.

\textsuperscript{211} (2011) 1 SCC 640.

\textsuperscript{212} (2005) 5 SCC 471.
matters is one which gives liberty to States and its instrumentalities to take appropriate decision after weighing advantages and disadvantages of the same and this Court sitting in this jurisdiction, is not justified in interfering with those decisions, especially when there is nothing to show that those decisions are contrary to law or actuated to mala fide or irrelevant considerations.

It is clear from the above observations of this Court that it will be very difficult for the courts to visualise the various factors like commercial/technical aspects of the contract, prevailing market conditions, both national and international and immediate needs of the country. However in some cases where procedure in public policies are not transparent the Court have taken up the cause.

In *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.*\(^{213}\), the Supreme Court has opines that the natural resources are vested with the Government as a matter of trust in the name of the people of India. Thus, it is the solemn duty of the State to protect the national interest. Even though exploration, extraction and exploitation of natural resources are within the domain of governmental function, the Government has decided to privatisse some of its functions. For this reason, the constitutional restrictions on the Government would equally apply to the private players in this process. Natural resources must always be used in the interests of the country, and not private interests. In a constitutional democracy like ours, the national assets belong to the people. The Government holds such natural resources in trust. Legally, therefore, the Government owns such assets for the purposes of developing them in the interests of the people. In the present case, the Government owns the gas till it reaches its ultimate consumer.

The structure of our Constitution is not such that it permits the reading of each of the Directive Principles of State Policy, that have been framed for the achievement of conditions of social, economic and political justice in isolation. The structural lines of logic, of ethical imperatives of the State and the lessons of history flow from one to the other. In the quest for national development and unity of the nation, it was felt that the “ownership and control of the material resources of the community” if distributed in a manner that does not result in common good, it

\(^{213}\) (2010) 7 SCC 1.
would lead to derogation from the quest for national development and the unity of the nation. Consequently, Article 39(b) of the Constitution should be construed in light of Article 38 of the Constitution and be understood as placing an affirmative obligation upon the State to ensure that distribution of material resources of the community does not result in heightening of inequalities amongst people and amongst regions. In line with the logic of the constitutional matrix just enunciated, and in the sweep of the quest for national development and unity, is another provision. Inasmuch as inequalities between people and regions of the nation are inimical to those goals, Article 39(c) posits that the “operation of the economic system” when left unattended and unregulated, leads to “concentration of wealth and means of production to the common detriment” and commands the State to ensure that the same does not occur.

The country witnessed a similar political spat a little while earlier, based on the allocation of the 2G spectrum. On that occasion the controversy was brought to this Court by way of a public interest litigation, for determination as to whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution? The allocation of spectrum to the licensees are declared illegal and are quashed. TRAI was directed to make fresh recommendations for grant of licence, investigation was directed by the CBI, Directorate of Enforcement and others agencies. The judgment whereof is reported as Centre for Public Interest Litigation v. Union of India.\(^{214}\) Extensive revenue loss, in the course of allocation of the 2G spectrum was duly noticed. On each occasion when the issue of allocation of natural resources, results in an alleged loss of revenue, it is portrayed as a loss to the nation. The issue then becomes a subject matter of considerable debate at all levels of the Indian polity. Loss of one, essentially entails a gain to the other. On each such occasion loss to the nation, translates into the identification of private players as the beneficiaries. If one were to accept the allegations appearing in the media, on account of defects in the disposal mechanism, private parties have been beneficiaries to the tune of lakhs of crores of Indian Rupees, just for that

\(^{214}\) (2012) 3 SCC 1
reason. In the current debate, rival political parties have made allegations against those responsible, which have been repudiated with counter allegations.

Recently in the case of *Vodafone International Holdings v. Union of India*\(^{215}\) the Supreme Court quashed the order of the High Court order which had held that an acquisition of a company abroad for operation in India is liable to pay tax in India. The Supreme Court has held that the sale of CGP share by HTIL to Vodafone would amount to transfer of a capital asset within the meaning of Section 2(14) of the Indian Income Tax Act and the rights and entitlements flow from FWAs, SHAs, Term Sheet, loan assignments, brand license etc. form integral part of CGP share attracting capital gains tax. Consequently, the demand of nearly Rs.12,000 crores by way of capital gains tax, in my view, would amount to imposing capital punishment for capital investment since it lacks authority of law and, therefore, stands quashed.

One of the most notable features of economic globalization has been the increased importance of foreign direct investment around the World. Some view it as an engine of economic growth and development while others look upon it as a panacea for all ills. Liberalization policies have led to rapid growth in FDI flows in recent years. Basing on the benefits associated with FDI several developing, as well developed countries compete fiercely for FDI. They try to attract foreign investors by providing financial and fiscal incentives, undertaking corporate restructuring and economic reforms and inviting foreign investors in the privatization of state-run units. Recently the Government have cleared a bill and made way for FDI in retail.

The Supreme Court has cleared the hurdles for the implementation of FDI in multi-brand retail sector saying that the “consumer is king and if that is the philosophy working behind the policy then what is wrong”. A bench headed by Justice R M Lodha comprising justices Madan B Lokur and Kurien Joseph observed the following: that the policy aimed at throwing out the middleman, who are curse to Indian economy has to be welcomed. It further held that the policy does not suffer from any unconstitutionality or illegality requiring it

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\(^{215}\) (2012) 6 SCC 613
to be quashed as The impugned policy cannot be said to suffer from any of the vires. It opined that this court does not interfere in the policy matter unless the policy is unconstitutioonal, contrary to statutory provisions or arbitrary or irrational or there is total abuse of power. It held that the policy was for the benefit of the consumer, farmers and the retailers with the objective to eliminate middlemen. The policy is to free the economy from the middleman. Middleman is sucking our economy. These are suckers to be thrown out for direct benefit of consumers. If that is the objective of the policy what is wrong with it.”

There has been a consistent effort for privatization of education in India. In a socialist pattern the state is under the responsibility to provide education to its citizen, but the concern is what will it happen when the education system will completely be run under the globalization, liberalization, privatization model. Recently a news paper\textsuperscript{216} reported that a 20 year student to fund her education had put on sale her virginity on internet. One Natsu from Japan won the bid for $7,80,000.

What the people of this country have been witnessing, particularly in the last ten years, is the aggressive commodification of higher education. All issues of access, equity and quality raised by our policy planners are just slogans to mislead the people and they have not presented any balance between these issues.

Policies and economics should be in the sprit of the Constitution.\textsuperscript{217}


\textsuperscript{216} Virginity on Sale, \textit{“The Telegraph”}, dated 26.10.2012, at page 2

been circulated are draft v) The Higher Education and Research Bill, 2010 and vi) The Universities for Innovation Bill, 2010.

The foreign educational institutions will launch courses which the market needs, create false impression about their courses through advertisements, charge exorbitantly high fees for courses which have immediate employment potential. Since competition entails reduction in costs, infrastructure, laboratories and libraries will find least investment and the teachers and non-teaching staff will be appointed without necessary qualifications on such terms which will be exploitative as is in existence in most private institutions in the country today. The Universities for Innovation Bill will provide an alternative route to foreign universities for establishing their campuses in India. This route will give them greater power, freedom and prestige with the removal of most of the restrictions, proposed in the foreign educational institutions bill.

The General Agreement on Trade in Services (GATS) covered in the WTO, a product of the Uruguay Round, is a legally enforceable agreement aimed at deregulating international markets in services, including education. Before this agreement, trade agreements used to be in relation to tariffs and eliminating other barriers for the goods produced in one country and sold in other countries.

Young women in USA and Europe, main forces behind the GATS and WTO, are resorting to selling their eggs for thousands of pounds a time to childless couples as a way of paying off their fees and student loans they had taken to meet the cost of higher education. The average graduate begins the search for a job with debts of more than 10,000 pounds. According to a report, “American clinics are allowed to reward donors handsomely for the unpleasant and potentially risky procedure. Some of them, aware of British students’ financial problems are now targeting women here. Graduates and those with high IQs are in particular demand. Many commissioning couples, desperate to have children, are also prepared to pay premium prices for specific physical attributes and good looks.” Depending upon the looks, educational background like Ph.D., ‘good’ family profile, rare ethnic groups like Jewish, Asians and east Africans, the women get about 2,400 to 10,300 pounds. Eggs are collected from women by administering drugs to induce artificial
menopause. The menstrual cycle is then restarted with more drugs designed to cause multiple eggs to ripen, instead of the normal one-a-month released naturally. A young healthy donor can produce 15 or 20 eggs, sometimes many more, in a single cycle of treatment. The procedure is very painful and sometimes causes severe trauma to the donor. According to another report, one girl (18 years of age) under debt while pursuing higher education decided to sell her virginity to the highest bidder. She claimed “she has been inundated with offers, including one of 10,000 pounds, since she placed an advert on the Internet.218”

It is the responsibility of the whole society to rise to the occasion and take measures so that the process of dismantling the higher education system in the country is reversed and not allowed to be an Educational Industrial Complex.

The Constitution is a living and organic document. It cannot remain static and must grow with the nation. The Constitutional provisions have to be construed broadly and liberally having regard to the changed circumstances and the needs of time and polity. India is a democratic country with a written Constitution. Rule of Law is the basis for governance of the country and all the administrative structures are expected to follow it in both letter and spirit. It is expected that Constitutionalism is a natural corollary to governance in India. But the experience with the process of governance in India in the last six decades is a mixed one.

The idea of welfare state is that the claims of social justice must be treated as cardinal and paramount. Social justice is not a blind concept or a preposterous dogma. It seeks to do justice to all the citizen of the state. Democracy, therefore, must not show excess of valour by imposing unnecessary legislative regulations and prohibitions, in the same way as they must not show timidity in attacking the problem of inequality by refusing the past the necessary and reasonable regulatory

218 MID-DAY (Mumbai), 2004, “Student puts her virginity on sale to highest bidder”, January 28.
measures at all. Constant endeavour has to be made to sustain individual freedom and liberty and subject them to reasonable regulation and control as to achieve socio-economic justice. Social justice must be achieved by adopting necessary and reasonable measures. That, shortly stated, is the concept of social justice and its implications. Citizens zealous of their individual freedom and liberty must cooperate with democracy which seeks to regulate freedom and liberty in the interest of social good, but they must be able to resist the imposition of any restraints on individual liberty and freedom which are not rationally and reasonably required in the interests of public good, in a democratic way.

It is in the light of these difficult times that the rule of law comes into operation and the judges have to play their role without fear or favour, uninfluenced by any considerations of dogma or isms. The term social justice is a blanket term so as to include both social justice and economic justice.

Since no society is static, and social processes are constantly changing, a good legal system is one which ensures that laws adapt to the changing situations and ensure social good. Any legal system aiming to ensure good should ensure the basic dignity of the human being and the inherent need of every individual to grow into the fullness of life. The hope of the Indian masses does not lie in the legal system alone, but in their conscious awakening and fight for social and economic justice. Knowledge of their legal rights however, can be an important motivating force in this. Many NGO's and individuals are emerging in different parts of the country to take up the cause of social change and change for a more just India, where justice will not merely be talked about in intellectual discussions on the intricacies of law, or written about in books, which the masses can't read, or exchanged for good old money, but actually lived and experienced by the majority of the people.

Prof. Upendra Baxi in his book entitled stated:\(^219\):

The processes of globalization, thriving upon the heavily critiqued ideologies of developmentally and its eventual demise, seek to reproduce the soft

\(^{219}\) Prof. Upendra Baxi, *The Future of Human Rights*
state. That notion is, however, now reconstructed in several important ways. The 'progressive state' at least in, and for, the South, in now conceived not as a state in its internal relations with its own people but in relation to the global community of foreign investors. A progressive state is one that is a good host state for global capital. A progressive state is one that protects global capital against political instability and market failures. A progressive state is one that represents accountability not so much directly to its peoples, but to the World Bank and international Monetary Fund. A progressive state is one that instead of promoting world visions of a just international order learns the virtues of debt repayment on schedule. Finally, a progressive state is one that gleans conceptions of good governance neither from the histories of struggles against colonization and imperialism nor from its internal social and human rights movements but from the global institutional gurus of globalisation.

Democracy must forever guard against the temptation to transform itself into a system under which the ruling majority claims infallibility for itself.220

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