" CONSTITUTIONAL AMENDMENTS AND HUMAN RIGHTS :THE INTERFACE "

AN ANALYSIS OF THE IMPACT OF AMENDMENTS TO THE CONSTITUTION OF INDIA ON HUMAN RIGHTS ISSUES

National Institute on Human Rights,
NLSIU, Bangalore
March 2009

ACKNOWLEDGEMENTS

This project was initiated in the proposal stage by Ms. Nimisha. The substantive research and contents of the project has been a combined efforts of the following LL.M II Year (Human Rights) students-

- Davis Pandan : Introductory Chapter
- Shradha Barnwal : Gender Justice
- Saurabh Dhawan : Personal Liberty
- Irangowda Kabbur : Reservations
- Daniel Mathew : Land Reform

The students received guidance from Prof. B.B.Pande, NIHR Chair Professor on their specific areas of research. Prof Pande's expert inputs were instrumental in shaping the project. Ms.Anuradha Saibaba, Faculty Coordinator of NIHR coordinated the entire project and facilitated the space for discussion, improvisation and guidance. The editing, proof reading and fine tuning of the project was also undertaken by her. We wish to express our since thanks to NHRC for financial assistance.

INDEX

RESEARCH PARAMETRS

PROBLEM STATEMENT, HYPOTHESIS, OBJECTIVES, METHODOLOGY, AND PLAN OF STUDY

A. PROBLEM STATEMENT

A preliminary assessment of the impact of economic globalisation and the proliferation of free market economy witness that constitutions of nations are directly or indirectly influenced by globalisation.[1] Sometimes the claims of economic globalisation even run counter to the values of the constitution itself, especially of human right concept.[2] This creates stress in the working of constitutions.[3] However such stress may not be equally felt in the constitution as a whole.[4] Economic globalisation tries to create convergences in laws and legal systems.[5] The compatibility of national laws and legal system with constitution being vital, constitutions or parts of it come under stress when the demands of convergence run contrary to constitutional prescriptions and human right protection.

One may observe that most of the changes brought in the legal system of a nation today through constitutional amendments are for the purpose of facilitation of trans-border trade and market access in particular.[6] The talk is about the possibility of creating an 'economic constitution that will enhance

---

[1] See, Infra n. 35, 36 and 37. The experience of India and China are examples.

[2] To cite examples, the Preamble of the Constitution of India declares the character of the nation and its economy as "Socialist." Whereas, the current experiences reveal the adoption of a free market economy since the year, 1991. India has not made any changes in the text of the constitution so far. The Chinese experience witnesses a different approach. China has responded with explicit amendments to the 1982 Constitution of the People's Republic of China in the years 1988, 1993, 1999 and 2004. For a general discussion on amendments till 1999. See, Lin Feng, *Constitutional Law in China*, Hong Kong: Sweet and Maxwell, 2000, pp. 11-20

[3] The rationale behind the 2004, 1999, 1993 and 1988 amendments of the Chinese Constitution were to synchronise the fundamental reform of Chinese economy to the constitution. It is said that there were actions taken in pursuance of the agenda of market economy which were against the then existing constitutional provisions. For example the land use rights given to multinational companies in Shenzen province were constitutionally wrong. The 1988 amendment cured the defect. Such practices even caused development of a thought stream by scholars called 'benign constitutional violation'. The theory argues that such constitutional violations are unavoidable and should be tolerated. Ibid., p 19.

[4] Some part of the constitution may be more affected than the other. For example, the legislative competence of taxation. To illustrate, the List II of Schedule 7 of the Constitution of India gives legislative competence on taxation with the state governments, for example entries 51 to 60 that relate to taxation on production and sale of goods and commodities. The trade agreements which the Central Government enters into may result in adding conditions to the legislative capacity and thereby affect the federal structure as well. While there may be restrictions on the legislative capacities, the part of the constitution that detail legislative procedure may not suffer any stress.

[5] Basel II of the Basel Committee on Banking Supervision calls for International Convergence of Capital Measurement and Capital Standards. The requirement to synchronize domestic patent laws to TRIPS could be another example.

[6] The experience of China, once it has resolved to change from planned economy to market economy. See, Hunag Lie, 'Constitutionalism and China', in *Constitutionalism and China*, Li Buyun (ed.), China: Law Press, 2006, p. 30. It is noted therein that once it is determined to build market economy, it need to generate compatible environments like; democracy, rule of law and

financial development by setting standards for a market economy than protection of human rights'.[7] More will be the concern when such changes create inequity in society and constitutions remain mute spectators unable to provide solutions for the aggrieved of the human right violations in the country.

B. HYPOTHESIS

The proposed research commences from the above premise and will proceed on a hypothesis that the current attempts of making constitutional amendments would promote human rights. Researcher would undertake a study of the impact of constitutional amendments on human rights, especially of personal liberty, land reforms, reservation and gender justice.

The study proposes to analyse that how far constitutional amendments of the Indian constitution promoted human rights especially in the fields of personal liberty, land reforms, reservation and gender justice. It is expected that the result of such a study would reveal the dynamics of relationships between free market economy and constitutional amendments. The fast track changes in the legal, administrative, social, and judicial areas in these nations, to the researcher, has potential of affecting constitutions and result in convergence forming a market friendly constitution.

C. OBJECTIVES

To outline the Constitutional Amendments relating to Human Rights and to analyze whether the same are in consonance to the original intentions of the Constitution framers and also if they further the cause of the Human Rights in question.

-To study and understand the background, politics and developments of constitutional amendments in India.

-Undertake critical examination of the reasons for convergence of constitutional principles and constitutions, and to differentiate the phases of convergence.

-To analyse whether all the constitutional amendments in India promoted human rights of the citizens

-Analyse the impact of constitutional amendments on personal liberty, land reforms, reservation and gender justice under Indian constitution.

---

human rights, which for the author is incompatible with the planned economy and more akin to market economy. It is observed that, while in Marxism it the economics that determine politics, now in China, it is market economy that will determine the constitutionalism and future. Such aspects are expected to be the impact of ushering in market economy.

[7] Supra n. 6. The author explains the implication of an economic Constitution as one that aims at market economy with a ***minimum social welfare***, in that a ***minimum of social rights*** is guaranteed. (Emphasis added)

D. METHODOLOGY

The research will be a doctrinal research and will not be employing empirical methods. Researcher would use the methods of qualitative analysis. Case study and case analysis methods will also be adopted to understand the existing response strategies within nations. Case study and analysis will have two dimensions viz. experience of nations in responding to convergence attempts and executive and judicial responses to human rights.

E. SCOPE AND LIMITATIONS

The project gives a broad over view of the interrelation between Human Rights and the Constitution of India and how the Rights are completely based on the safeguards provided by the Constitution. For the purposes of this project, four fields, namely amendments in the field of personal liberty, land reform, reservation issues and gender justice have been considered. The procedure that underwent their amendments, the debates behind them and the subsequent laws enacted to substantiate the amendments have been discussed in the project.

F. RESEARCH QUESTIONS

1) **What is the relation between Human Rights and Indian Constitution?**
2) **Can amendments be made to the rights provided under the Constitution?**
3) **Do such amendments necessarily need to be in furtherance of the rights provided or can they go to the extent of completely removing their status as a right?**
4) **How far is the judiciary empowered to safeguard the rights in case the parliament attempts to play any mischief?**

G. PLAN OF STUDY

This project attempts to outline a few amendments out of ninety four amendments to the Indian Constitution with regard to Human Rights, and comments on whether the same conformed to the anticipations and visions of the framers of the Constitution, or if they have been in total violation of the same. More importantly, the project attempts to examine if those amendments in the field of personal liberty, land reform, reservation issues and gender justice have furthered the cause of Human Rights as the need demands in today's context or if they have been brought about due to the political ambitions of the legislators and other such reasons. For this purpose, the amendments to the Right of Property and Right to Free and Compulsory Education have been dealt with in detail in the project.

a. Background, Theories, Politics and Context of Constitutional Amendment and Human Rights

The study starts from the hypothetical premise that there is a phenomenon called amendment of constitution and whether it is resulted in protection of human rights. It also seeks into the point that whether these constitutional amendments are the demands of free market economy which affects human rights. This part of the study is intended to substantiate the argument that there was a move for convergence, which could be categorized as the unconstitutional constitutional amendments: definition and theory, convergence and neo-convergence explained, the concept, politics and future of constitutional amendment in India, problem statement and hypothesis, objectives, methodology and plan of study

b. Personal Liberty

Individual dignity and personal liberty are the quintessential elements of human existence. The edifice of human rights firmly stands on the bedrock of "dignified" existence of human being and fullest efflorescence of individual personality is unattainable without the "Right to personal liberty". The vanguards of individual liberty venerated it as a natural and inalienable right, not to be eroded by the State. The writings of John Locke and J S Mill are reservoirs of legalistic and philosophical foundations of personal liberty and individualism. The author deals in interpretation of Constitutional amendments by the Judiciary with regard to personal liberty, to understand the intentions of the legislators to enact such amendments, and also how these amendments have affected the human rights (personal Liberty) directly and indirectly.

c. Land Reform

With independence dawned the understanding that an important function of a modern state is to formulate policies for facilitating and ensuring capital accumulation, allocating resources for development and distributing the surplus for the common good. Also realized was that in attempts geared for social transformation, land occupied a pivotal place. Thus land policies were required to deal with not only production but also with distribution of produced goods and the productive assets to provide meaningful employment. Such policies were bound to affect assorted interests involved in land. Those who possessed large chunks of land had managed to accumulate large amounts of surplus and accordingly made all efforts to preserve their control over land and thereby their power and status in a caste based and hierarchical society. On the other hand those who have been deprived of

productive resources and production struggled to regain control over land and other resources[8]. With this background context analyzing constitutional amendments relating to land reform from a human rights angle makes for a fascinating read.

d. Reservation Issue

The preamble of Constitution assures justice, social, political as well as equality of opportunity and status to every citizen of India. In pursuance of this assurance Articles 14, 15 and 16 have been enacted which embody certain fundamental rights guaranteed by the constitution. From time immemorial the Scheduled Caste and Scheduled Tribes have faced inequalities and reason may be due to injustices committed by the upper case on those belonging to the lower castes by denying them a proper social status and opportunities for their betterment. Therefore they lagged behind and their condition worsened. The Constitutional frames had a vision and had analysed law; politics and social philosophy then existing and so committed and framed the better Constitution. Meanwhile the amendment to the preamble, the fundamental rights and the directive principle ever the past 60 years indicates the changing conveyors between Constitutional amendments and Human Rights.

In them certain provisions are aimed at speedy uplift to weaker section of the society in order to resume equality of status and of opportunity. Even recently in 2005, the 93rd constitutional amendment was passed which added clause (5) to Article 15 thus enabling the state to provide reservation in a new grab for other backward classes. The Supreme Court agreed with the parliament by upholding the validity of the amendment in *Ashoka Kumar Thankur v. Union of India.* The primary question that will be answered by the project is whether the relation between the Constitutional amendments and human rights has been strengthened or weakened. Human Rights cannot be fossilized and are given a new dimension by Constitutional amendments. They are constantly expanding and are given effect to by the amendments an example being the expansion of the policy of reservation of Other Backward Classes.

e. Gender Justice

Everybody counts in applying democracy. And there will never be a true democracy until every responsible and law-abiding adult in it, without regard to race, sex, colour or creed has his or her own inalienable and unpurchasable voice in government. Since very long women has been treated as a second category of citizen. For a very long time she was not even considered as a person. All early

[8] Shah, Ghanshyam and Shah, D.C (ed), *Land Reforms in India: Performance and Challenges in Gujarat and Maharastra,* Vol 8. Sage Publications, New Delhi, 2002, p 19.

human rights documents excluded women, slaves and certain other categories of people from its application. Considering all this the constitution makers in India took a great care in codifying certain measures for the protection of women. But as far as the mandate of gender justice is concerned Indian constitution did not have enough proactive measures. To fill the void subsequent amendments were done in the constitution of India. How effective these amendments are and have they actually contributed towards the object for which they were brought in is still a moot question. The paper is an attempt to find out the human rights aspect of constitutional amendments with special reference to gender justice.

In these days of globalization, the global picture of women is most ignoble and inequitable. Women constitute 50 per cent of the world's population, and account for 66 per cent of the work done, but they have only a share of 10 per cent in the world's income and own one per cent of the world's property. Gender equity: Engendering all areas of public policy, elimination of adverse sex ratio, and provision of support services to working women, taking into account the multiple burdens on a woman's day to day life. The battle for gender justice has been a long-drawn struggle. The sustained efforts of several social reformers, even in the face of resistance from social orthodoxy, have given impetus to the cause of gender justice. Constitutional provisions, various laws, and judgments of courts have made their own contribution to the cause of gender justice. However, more fundamental is the work and role of social reformers who sought to change the mind-set of orthodox tradition-bound society and usher in women's reforms in the social, economic and educational fields. Gender injustice is a problem that is seen all over the world.

CHAPTER 1-

I. INTRODUCTION

Constitutions are generally considered to be the fundamental law of the land across jurisdictions. Whether written or unwritten, they mirror an amount of certainty. Constitutions usually contain the philosophy of rights, duties and liabilities of the state as well as its citizens, and the structure of governance. Within the paradigm of certainty, is the necessity for these documents to imbibe flexibility for the purpose of endurance. The terms certainty and flexibility may be an oxymoron but the working of different constitutions reflect how nations have across the globe struck a balance between these contradictory claims.[9] Constitution, being an organic document, is influenced by the surroundings in its formation[10] and development.[11] The factors that influence constitutional development and its impact on different constitutions have always fuelled the imagination of comparative constitutional scholarship.

The constitution is an act of the people, not an act of any authority, or of a government, though it creates a government. It can be written or unwritten. According to F. A. Hayek, "*a constitution is nothing but a device for limiting the power of government. At the same time present day citizens are sometime myopic; they have little self control, are sadly undisciplined, and are always prone to sacrifice enduring principles to short-run pleasures and benefits. Hence, a constitution is the institutionalized cure for the chronic myopia; it dis-empowers temporary majorities in the name of binding norms.*"[12] Thus, for both the government, who governs and the citizens who are being governed a constitution is imperative. It is a social contract between the government, society and ordinary citizens. The sanctity and inviolability of a Constitution would be upheld if its not susceptible to change frequently or easily. At the same time, it should be understood that a constitution is a dynamic document. It should grow with a growing nation, and it should adapt to the changing needs and circumstances of a growing and changing society.

---

[9] The theory of implied limitations present in the Constitutions of Germany and followed by the judiciary of India and Bangladesh could be an example. For a detailed discussion see, A. G Noorani, 'Behind the 'Basic Structure ' Doctrine', *Frontline* Volume 18 - Issue 09, Apr. 28 - May 11, 2001. Author states that the higher judiciary of Pakistan is also actively considering the inclusion of the theory in their constitutional law jurisprudence. Also see, Douglas Linder, 'What in a Constitution Cannot be Amended', 23 *Arizona Law Review*, <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/unamendable.html>

[10] The Constitutions of post-colonial countries share common traits in their constitutions. The constitutions of the countries like Australia, Canada and New Zealand are examples.

[11] The influence of Marbury v. Madison in the constitutional review jurisprudence and the influence of international human rights norms in national constitution making and interpretation

[12] *Id*

The goal of any constitution should be to achieve political stability and efficiency in public service and to bring happiness, prosperity and dignity to people's lives. Looking into the present state of our society, there is no doubt that if we are to achieve these objectives many chapters and articles of our constitution must be re-examined; especially the philosophy, the fundamental principles of the State policy, fundamental rights and liberties, and duties and responsibilities of the citizens, issues related to separation of powers, checks and balances, regulatory frame work, diffusion of power, all of which need to be revised and rewritten.

UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: DEFINITION AND THEORY

The concept of an "*unconstitutional constitutional amendment*" (UCA) appears to some as an oxymoron; if the constitution is the supreme law of the land, and if its procedural rules for amendment are properly followed, then how can an amendment to the constitution nevertheless be deemed unconstitutional? Putting aside the cumbersome nomenclature, this theory of understanding and interpreting a constitutional document need not be viewed as being internally inconsistent, as will be explained in the following sections. Furthermore, though the theory of UCA's does not exist in most legal systems, it has been expressly adopted in two countries, with others having potential to employ the theory in the future.[13]

A. Unconstitutional Constitutional Amendments: A Definition.

Unconstitutional constitutional amendments are best understood by distinguishing between the *procedural* and *substantive* elements of amending a constitution. All constitutions have an amendment process specified in the constitution, which almost certainly involves a more restrictive process for passage than doe's ordinary legislation.[14] All of these procedural requirements can be seen within the United States. The normal process of amending the United States Constitution is by a super-majority vote (of two-thirds of both houses of Congress) and ratification by three-fourths of state legislatures.

---

[13] Sam Brooke, *Constitution-Making And Immutable Principles* (Sam Brooke: Master of Arts in Law and Diplomacy Thesis Spring, 2005) Available at< http://fletcher.tufts.edu> on 23th October, 2008.

[14] Stephen Holmes and Cass R. Sunstein, The Politics of Constitutional Revision in Eastern Europe, in Responding To Imperfection: The Theory And Practice Of Constitutional Amendment (Sanford Levinson, ed., 1995) 278.

Alternatively, two-thirds of the states can call for a National Convention to propose amendments (which then must be ratified by the states).[15]

In most systems, once these procedural hurdles are met, the constitution has been amended. There is no examination of the content of such amendments.[16] This approach is fundamentally based on the idea that legitimacy for alteration of the constitution is found in the *source* of the amendment, and not in its actual *substance*. The theory of UCA's goes beyond the *source*, focusing as well on the *substance* of the amendment. Procedural requirements remain, but even if these procedures were properly followed, the amendment will still be subject to a pseudo-judicial review. Thus, what could be a "*constitutional amendment*" in the sense of satisfying the procedural requirements could still be deemed "unconstitutional" by the judiciary, based on its substance, resulting in an unconstitutional constitutional amendment.

The theory of UCA's is not intended to make constitutional amendments impossible, but rather, it desires to simultaneously permit some flexibility in adjusting the constitution, while still shielding certain core aspects of the constitution from amendment.[17] To achieve this end, two distinct approaches have been used. One is to explicitly preclude the amending of portions of the constitution from within the constitution itself. The second approach has been to look outside of the explicit text of the constitution to other, fundamental, concepts which cannot be violated, thus limiting the amendment process. The first form of an embedded textual limitation can be exemplified by a clause in the constitution stating that a certain article or section cannot be amended. Alternatively, a clause could make specific reference to an unamendable concept.

In both these approaches, the UCA theory ultimately represents a super-entrenched concept which is unassailable through the amendment process, and thus will survive as long as the constitution itself. Alternatively, UCA's can be based on something other than the text of the constitution. Namely, the judiciary could elicit certain "*overarching principles*," "*fundamental principles*," or a "*basic structure*" of the

---

[15] Art. V of U.S. Constitution gives this provision. Whereas, in the Massachusetts state constitution, an amendment must be passed by two successive legislatures, via a special joint session; it will then be submitted to the voters in the form of a referendum.

[16] Thus, in the United States, a federal amendment's legitimacy comes solely from the fact that it has been adopted by the democratic institutions of the federal and state legislatures, or from a national assembly convened for the purpose of amending the constitution

[17] GRUNDGESETZ [Constitution] art. 79 cl. 3 (F.R.G.) ("Amendments of this Constitution affecting . . . the basic principles laid down in Articles 1 and 20 are inadmissible.").

constitution. These would not be explicit from the text, but could be drawn from them, when reading the constitution as a whole.

B. Unconstitutional Constitutional Amendments and Liberal Democracy

Liberal democracy is based, fundamentally, in the concept that the sovereign power of the state is vested in the people. As a corollary, legitimacy must also find its basis in the people. The theory of unconstitutional constitutional amendments poses a dilemma for liberal democracy for two reasons. First, the theory of UCA's poses a check on the political process, and as such, it poses a check on the free will of the people. Of course, procedural requirements play a similar role, but there remains a big difference between super-majority requirements and UCA's. Second, a theory of UCA's places the final determination of substantive issues in the hands of the judiciary, a body that is not directly responsible to the public. This legitimacy is encouraged by the idea that the courts are merely applying the law, as written by the legislature.

As with constitutional principles, there is no easy answer to these perplexing questions. However, often such limitations might be desirable. First, it can be argued that, even in a democracy, the people don't possess complete freedom. One view that has been suggested is that a democracy cannot "legitimately use democratic processes to destroy the essence of democracy," which can be described as the "meaningful participation in self-government."[18] In particular, a majority, or even a super-majority, should not be permitted to deny the right of participation in self-government to current minorities; for that matter, even if 100% of the population agreed that democracy should end, this, too, might be prohibited in order to protect the rights of members of future generations.[19] This view is not without controversy, but it suggests to a larger, and perhaps less controversial, view: democracies are not necessarily a process of majoritarian rule. Alternatively, a constitution could hypothetically include higher standards for certain fundamental rights in the constitution, such that it would be very, very hard to change, but not impossible.

India's Basic Structure

The Supreme Court of India has also adopted the concept of UCA's by articulating that there is a "basic structure" to the Indian Constitution. Thus, though Article 368 of the Indian Constitution

[18] Walter F. Murphy, Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity, in Responding To Imperfection: The Theory And Practice Of Constitutional Amendment (Oxford: Oxford Publication, 2004)179.
[19] *Id.*

(authorizing amendments) allows the Parliament to amend any part of the constitution, it "does not enable Parliament to alter its basic structure or the framework of the Constitution."[20] If an otherwise permitted amendment were to violate this basic structure, the Court can invalidate it. The source of the "basic structure" theory is especially interesting. There is no explicit textual basis for this concept in the Indian Constitution.[21] The stated basis for this rationale was that the word "amend" is inherently a limited word, and that if an amendment were to violate the basic structure of the constitution, then it would cease being an amendment, and become something more.

The constitution only permits amendments by Parliament. This legal argument of narrowly reading the word "amend" does not tell the whole story of this concept. Rather, the "basic structure" concept emerged from a separation of powers struggle between the Court and the Parliament. The Court, after repeatedly rejecting laws related to certain fundamental rights (especially property rights), found an aggressive Parliament that was increasingly willing to use the amendment procedure to enact their policies. This Parliamentary activity culminated in what has historically been seen as an abuse of power, in the form of an emergency rule being declared in 1975. For the next twenty-two months, the Parliament suspended several fundamental rights, including Article 21, the protection of life and personal liberty-the linchpin of the Constitution of India. This abuse of Parliamentary powers, more than anything else, gave credence to the concept of a judicial check on the amendment process.

The "basic structure" is a quite undefined concept. In only one case a majority of the justices agreed on a concept be-fitting to the "basic structure doctrine." In the *Minerva Mills* case, the Court struck down an amendment that would have prevented the Court from ruling on future Parliamentary amendments, and a majority agreed that a limited Parliamentary amendment power was a part of the "basic structure" of the Constitution. Several other issues have been raised by different judges periodically as being within the rubric of the "basic structure," like the sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, and the fundamental rights of citizens. However, none of these specific issues have ever been endorsed by a majority, and as such, these determinations have limited jurisprudential value.[22]

---

[20] Minerva Mills Ltd. v Union of India, A.I.R. 1980 S.C. 1789.

[21] Venkatesh Nayak, *The Basic Structure of the Indian Constitution*, 10, *at* http://www.humanrightsinitiative.org/publications/const/the_basic_structure_of_the_ind an_constitution.pdf. Availed on 15th 2008.

[22] *Id.*

Post the 1975 emergency the issue of the "basic structure" was under constant litigation. Perhaps realizing its own potential for abuse the Parliament expressed willingness to curtail its own power. It is also fair to say that since the emergency rule, the Supreme Court has also been more active in entrenching fundamental rights, especially Article 21's right to life and personal liberty. Thus, just as the Court has become a more significant protector of the citizen's rights, it seems that India's constitution has been amended eighty-two times. In comparison, the United States Constitution has been amended only twenty-seven times, even though it has been in existence four times longer than the Indian Constitution. Parliament is more cautious in abridging these rights. However, there is no reason to assume that the "basic structure" debate is over. From the perspective of UCA's as a concept, unquestionably the most interesting element here is that the Courts created this concept of a "basic structure" in response to what was perceived as an abuse of the political process by Parliament. India's amendment process is procedurally quite lax. It thus proved prone to abuse, and it was only at this time that the Supreme Court took a more activist stance to correct this political imbalance. While this move by the Court may have been questioned at first, after 1975, there was little debate on the merits of a strong Court to protect fundamental rights.

PART II

CONVERGENCE AND NEO-CONVERGENCE EXPLAINED

It is felt that, lately globalization and precisely the economic globalization, is one of the major influencing factors in the formation[23] and working of constitutions.[24] The impact of the process of globalization is felt in the legal system as a whole.[25] Since the legal system is designed and supported by constitutions, an impact on it is inevitable. The varied claims of globalization on constitutions, it is observed that, is creating an environment of convergence. This convergence aims at harmonization, which would in turn facilitate the demands of globalization, and, specifically the economic globalization. Convergence is not a novel concept in constitutional law.[26] One may observe the presence of attempts of convergence in the lives of constitutions in past and present. The purpose of the study is to fragment the convergence moves on the basis of the objectives behind such convergences and to study the impact of free market economy on constitutions, which could forge convergence in constitutions.

I propose to distinguish the present move of convergence as a corollary to the economic globalization, from the earlier existed model of convergence, the objective of which was transcendence of the principles of constitutionalism and human rights. I would refer the current continuing model as neo-convergence.

One of the contemporary developments in constitutional jurisprudence is the pursuit to study the convergence.[27] Harmonization through convergence has always been an area of attention for

---

[23] Constitution of the federal Republic of Iraq, Article 25: The State guarantees the reform of the Iraqi economy in accordance with modern economic principles to ensure the full investment of its resources, diversification of its sources and the encouragement and the development of the private sector.

[24] Paradigm shift in constitutional interpretation in India in tune with pro-liberalisation and free market economy. See for example, Balco Employees Union v. Union of India, (2002) 2 SCC 333. State of U.P v. Jai Bir Singh JT 2005 (5) SC 170

[25] John H. Jackson, *The Jurisprudence of GATT and the WTO*, Melbourne: Cambridge University Press, 2000, pp. 198- 254 and 297 – 327. He discusses the impact of GATT and WTO on the domestic law of the United States.

[26] Kim Lane Scheppele, 'The Migration of Anti- Constitutional Ideas: The Post 9/11 Globalisation of Public Law and the international State of Emergency', in *The Migration of Constitutional Ideas*, Sujith Choudhuri (ed.), Cambridge: Cambridge University Press, 2006, p. 350. It is argued that until last few years, the influence on domestic constitutions have been most strongly felt in the area of human rights.

[27] Convergence of constitution in itself is not a new phenomenon as post-Second World War Constitutions have been influenced by certain identifiable principles. See generally, 'Convergence and Divergence of Constitutional Paradigms in the Globalized World', Paper for the Vth Congress of the International Association of Constitutional Law, Rotterdam, 1999 <http://users.otenet.gr/~gkatr/3.htm#_ftnref57> This paper traces *inter alia* the convergence within the western legal civilization. See also, Sujith Choudhury (ed.), *The Migration of Constitutional Ideas*, supra n. 7. Similar studies are been taken up within the European Union constitutional scholarship. See for example, Kevin Harrison and Tony Boyd, *The Changing Constitution*, Edinburg: Edinburg University Press, 2006; James T. Mc Hugh, *Comparative Constitutional Traditions*, New York: Peterhang, 2002, Gordon Anthony, *UK Public Law: The Dynamics of Legal Integration*, Oxford: Hart Publishings, 2002.

comparative constitutional jurists. The comparative constitutional law literature uses terminologies like migration, transplant, borrowing and cross-fertilization to signify influence of one constitution or constitutional pattern over others [28] or influence of certain principles [29] or agendas [30]. These terminologies denote a process through which an effect is produced and I shall call it convergence.

Convergence in the constitutions of the past phase is most glaring in the post-colonial nations. The organisation of states in Europe, the nations liberated from the colonial and despotic regimes, could be identified as having homogenized fundamental principles in developing their Constitutions.[31] The principles of constitutionalism and its perceived universal character were the driving force for unification strategies in the early phase of convergence. Rule of law, separation of powers, limited government, entrenched rights and independence of judiciary were the major features that sought replication. Since constitution in a liberal democracy is considered to be an instrument for the promotion of the ideals and philosophies of a nation, the universalization of the principles of constitutionalism and democracy were considered to be positive and appropriate.[32] This phase is classified as the early period of convergence.

Distinct from this is the current move for convergence. This, the researcher would argue that, have different rationale than the earlier mentioned phase and therefore would call it the new phase of convergence. The current phase of constitutional convergence is propelled apparently by the demands of good governance and economic transition.[33] The dynamics of convergence in constitutions include, use of foreign laws in the interpretation of constitutions, utilisation of foreign model in the process of constitution making, usage of constitutional theories as benchmarks for assessment of particular

---

[28] The similarity of post-colonial constitutions is an example. See, supra n. 2. See also, Lawrence W. Beer, 'The Influence of American Constitutionalism in Asia', in *American Constitutionalism Abroad: Selected Essays in Comparative Constitutional History*, George Athen Billias (ed.), Connecticut: Greenwood Press, 1990, p. 113

[29] The influence of human rights treaties are evident in constitutions like the Constitution of Cambodia, Afghanistan and the amendments brought into the Constitution of Sri Lanka

[30] The impact UN resolution 1373, post 9/11 on the security laws of nations. Even the civil liberties guaranteed under the constitutions are undermined. For example; freedom of expression, freedom of movement. See, Kim Lane Scheppele, Supra n. 7, pp. 350-351

[31] Supra n. 8, Paper for the Vth Congress of the International Association of Constitutional Law. The paper states that the continuous osmotic procedure have created concept pillars for constitutions like; principle of democracy, embodiment of fundamental rights, protection of human dignity besides rule of law

[32] Ibid. The reasons for adoption of the prevalent western notions of constitutionalism, per the paper, have been ideas about modernisation, liberalisation and nationalism.

[33] See, 'IMF and Good Governance', at <http://www.imf.org/external/np/exr/facts/gov.htm>
'The IMF's Approach to Promoting Good Governance and Combating Corruption-A Guide', at <http://www.imf.org/external/np/gov/guide/eng/index.htm#care> 'Partnership for Sustainable Global Growth Interim Committee Declaration Washington D.C.', September 29, 1996, at <http://www.imf.org/external/np/sec/pr/1996/pr9649.htm#partner> See generally, <http://www.adb.org/Documents/Periodicals/ADB_Review/2005/vol37-2/unbroken-line.asp> 'Promoting Sound Development Management', at <http://www.adb.org/Governance/default.asp>

decisions and by interactions between agencies at national and supranational level.[34] Normative constitutional theory which set out the notions of liberal democratic constitutionalism is also considered to be a narrative of convergence.[35]

The focus of the proposed research is the emergence of a human right conscience for administrative, economic and functional relation between national and supranational entities and governments, to see how it acts as the vehicle of convergence in constitutions for better reality of protection of human right.[36] The impact of convergence does not remain in the harmonisation of abstract principles of theories but has required specific changes within the constitutions.[37] The European integration has provided us with glaring examples of the effects of such convergence.[38] The initial attempt of economic integration of the EU has grown beyond that specific objective into the whole range of governmental activity that has an implication even on the sovereignty of the nations.[39]

Jürgen Habermas gives an account of the initial current justification for the unification of Europe. It is observed that the first phase of the Euro-federalists was moved by the history of constant warfare between the European nations and the need for containing the power of post-fascist Germany.[40] These two original reasons, for him, are no more relevant as the present, reason being, "the straightforward economic argument that a unified Europe was the surest path to growth and welfare."[41] The trans-border free movement of people, goods and services being the mantra of the day, the outcomes provide the legitimatization for unification[42] and convergence.

The fallout of convergence could be positive and negative.[43] From a constitutional perspective, the supranational to national demands could be said to have implications on the hitherto held supremacies

---

[34] Sujith Choudhury, 'Migration as a New Metaphor in Comparative Constitutional Law', in *The Migration of Constitutional Ideas*, Sujith Choudhuri (ed.), supra n.7, p. 13.

[35] Ibid., p.16

[36] Michelle Sager, *One Voice or Many: Federalism and International Trade*, New York: LFB Scholarly. Publishing, 2002, pp. 139-141.The author analyses Crosby v. National Foreign Trade Council 530 US 363, 2000, to show how international trade intersects with federalism in the U.S.

[37] The amendments in the Constitution of People's Republic of China with regard to property. See infra, n. 36.

[38] Kevin Morrison and Tony Boyd, *The Changing Constitution*, Edinburg: Edinburg University Press, 2006, pp. 171- 172. The British membership in the EU, it is argued, has more profound impact on the British Constitutional system than any other process. The observation is that the changes seldom are an outcome of the intentions of the British Parliament or the people but are the results of processes in which Britain is one among the many participants.

[39] Ibid., p. 173

[40] Jürgen, Habermas, 'Why Europe Need a Constitution', *New Left Review* ,11 September-October 2001, p. 5

[41] Ibid.

[42] Ibid.

[43] The claim of global capital to have an investment environment with rule of law and transparent governance will ultimately benefit the nation and its polity. Whereas certain claims of privatisation and relegated state role in service and key sectors may create

of nation states.[44] Such implications on the domestic legal system and specifically on the constitutions are treated as unjustified, more so if the demanded changes are not a result of equitable negotiations and lack democratic legitimacy.

The impact of economic integration and the claim of free market economy, due to globalisation, result in legal convergences and constitutional law is expected to be comparative and transnational in scope to facilitate the process and outcome.[45] It is argued that international trade instruments have required an additional norm of constitutionalism – market friendliness.[46] Changes in constitution seldom will be a direct demand of any trade convention/agreement but the participating countries are left with fewer choices not to change in tune with the overarching principles.[47] The changes required for human right integration and facilitation of market oriented legal system will primarily be as the following:

- Changes in the policy of nations.[48]
- Changes in certain laws of the nations.[49]
- Changes in the administrative structure.[50]
- Changes in the judicial approach.[51]

In short it affects all branches of the government; the executive, judiciary and legislature. It is imperative that an action that affects all branches of government will create repercussions in constitutions either direct or indirect. The vehicle of this change is governance reform in general and legal reform in particular.

---

undesired consequences to the rights and welfare of the common mass, especially in third world countries. See, Amartya Sen, 'Right to Education' Speech delivered in a Seminar organised by the Confederation of Indian Industry, New Delhi, on 19-12-07.

[44] The Preamble of the Constitution of India promises a "Sovereign, democratic, socialist republic" to its polity. The demands of supranational agencies affect the sovereignty at two levels, national sovereignty- by external interference, and parliamentary sovereignty- by requiring certain laws to be passed in a prescribed manner.

[45] Mayo Moran, 'Inimical to Constitutional Values: Complex Migration of Constitutional Rights', in *The Migration of Constitutional Ideas* Sujith Choudhuri (ed.), Supra n.7. p. 233

[46] James T. McHugh, Supra n. 8, p. 216. Points out how GATT seeks to establish an overriding economic system for the global community

[47] Ibid. It is highlighted by the author that WTO and regional trade agreements like NAFTA for example, try to merge diverse legal cultures to serve transnational purposes. The participating nations of such covenants have to accept the demand and respond in similar way.

[48] The Import Export Policy, Labour Policy are examples

[49] Intellectual Property Laws are examples which are required to be converted to transnational standards within a given time frame.

[50] The channels of administration is expected to be clog less and revamped. The structural adjustment policies and good governance initiatives are examples for the same.

[51] Judicial changes are expected at levels of establishment and functioning. Expects a legal system based on rule of law with an imperative independent judiciary. The function of the judiciary on the other hand would be to orient its decisions keeping in mind the changed economic scenario.

This reform agenda is posited as a precondition for future relationship between nations and institutions. Foreign assistance and aid are directed to promote the development of rule of law, legal and institutional requisites of sustainable democracy and for markets. More specifically, the principle goals include economic restructuring and democratic transition; the subsidiary goals include fostering the rule of law, civil society, checks and balances in government structures, legal accountability of the executive power, the free flow of information about the government, privatisation of state- owned assets, the market-compatible law reforms."[52]

Here, the convergence becomes a part of the reform agenda. This research intends to study the direct and indirect consequences of such convergence on constitutions. The object of the study is to specifically analyze the impact free market economy on Indian Constitutional principles of human rights. The non-Western world does not enjoy the advantage of human rights lawlessness. It does, however, enjoy other advantages occasioned by the presence of human rights.[53] Globalization is changing the conditions under which India and Indian societies are integrated into world politics and the world economy. Among human rights activists and some human rights scholars, there is a debate about whether globalization is "good" or "bad" for human rights.

Globalization cannot be stopped, and its forces will undermine what is left of purely local societies. To argue whether globalization as a process is "good" or "bad" is as irrelevant as arguing whether the transition from an agrarian to an industrial society.[54] One solution that may partially alleviate the problems caused by globalization is the "leapfrogging" of human rights across time and space, as discussed below. The global human rights regime and the global human rights process can perhaps remedy some of the dangers of the global economic system. Undoubtedly, however, the process of globalization is causing human rights abuses in the short term, some of them very severe.[55] As Nobel laureate Amartya Sen argues, *"In the context of economic disparities, the appropriate response has to include*

---

[52] The present reform agenda is identified to have two prong programme; creation of a national and international financial architecture with a particular purpose as one, and economic and political development as second. Loukas A. Mistelis, *Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform - Some Fundamental Observations*, International Lawyer (Fall 2000) V 34 (3) pp. 1055-1069.

[53] Rhoda E. Howard-Hassmann, "Globalisation and Human Rights", *Human Rights Quarterly* 27 (2005) 1.

[54] Peter Schwab & Adamantia Pollis, Globalization's Impact on Human Rights, in Human Rights: New Perspectives, New Realities (Oxford: Hart Publishings, 2002) 276.

[55] Robert McCorquodale & Richard Fairbrother, Globalization and Human Rights, *Human Rights Quarterly* 21 (2004) 25.

concerted efforts to make the form of globalization less destructive of employment and traditional livelihood, and to achieve gradual transition."[56]

The optimistic logic about the relationship between globalization and human rights specifies the intervening variables between wealth and human rights. Globalization opens up markets; markets are the basis of the liberal economic order; the liberal economic order is the basis of democracy; democracy is the basis of human rights.

[56] Amartya Sen, *Development as Freedom* (Oxford: Oxford Publication,1999) 67.

PART-III

THE CONCEPT, POLITICS AND FUTURE OF CONSTITUTIONAL AMENDMENTS IN INDIA

While India's constitution was in the making, Pandit Nehru made a very powerful plea in the Constituent Assembly about future changes. He said: "*While we want this constitution to be as solid and permanent as we can make it, there is no permanence in constitutions. There should be certain flexibility. When the world is in turmoil and we are passing through a very swift period of transition, what we may do today may not be wholly applicable tomorrow.*" When Thomas Jefferson and Pandit Nehru spoke of amending their nations' respective constitutions, they definitely did not envisage amendments tailor-made to suit individual needs or to dis-empower citizens or to change basic features. It is not my intention to analyze in details the constitution, but only the issue of amendments to Indian Constitution (first to the 94th), especially how these amendments have changed the feature and character of the constitution and its impact on the society.

Amendments are, among other things, recognitions of the imperfection of existing schemes of government. The relative ease or difficulty of amendment has significant implications for the ways that governments respond to problems that call either for new structures of governance or new powers for already established structures.[57] 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 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

[57] Constitutional Politics: Essays on Constitution Making, Maintenance, and Change, Edited by Sotirios A. Barber & Robert P. George Paper | 2001

special majority (Article 57, 73, 162, Chapter 1V of Part V, Chapter V of Part V1, Seventh Schedule, representation of the State in Parliament and provisions dealing with amendment of the Constitution).

During the 60 years of the Constitution, more than 94 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 and the 94th amendment took place in 2006.

The amendment process was incorporated in the Constitution by the Draftsmen of the Constitution to help India adapt itself to the changing circumstances. Society is never stagnant. It is ever- changing. Therefore the amending procedure was made partly flexible so as to make it easy for the Legislature. But the Parliament started thinking that it has unlimited amending power. It assumed itself to be the supreme law when the Constitution is the supreme law of the land. The Parliament started making amendments which were destroying the basic structure of the Indian Constitution. But after the landmark decisions of *Keshavnand Bharati and Minerva Mills* the Court by its power of judicial review has curtailed the amending power of the Parliament.

The amendments made by the Parliament can no more affect the basic structure of the Constitution. But, looking at the ease with amendments can take place depending on the whims and fancies of the ruling government and the politics in the politics of India we cannot say how long the rights of the citizens are safe and unobstructed the constitutional amendments have indeed acted as a catalyst for greater participation by women in governance, but the legislation now needs to be fine-tuned: women should be given more than a single term in a reserved constituency to make a real difference, and every effort should be made to provide them with literacy training.

A. Why focus on the Constitutional Amendment

Ever since 1950, it has been well recognised by all political forces that the constitution of India has serious flaws. The most telling fact is that between 1950 and 2006, an average of two constitutional were passed each year. By the beginning of the 1990s, however, India's political crisis had deepened to such an extent that it became difficult for any ruling party to muster the two-thirds majority required for a constitutional amendment. The main compulsions behind the review are to have

> (i) a stable government, (ii) be in step with the demand of the international financial organisations which want to penetrate directly into various regions of the country and local business houses who also want to make such links directly and (iii) deflect the international pressure that India lacks the stature of a big power because it is wanting in mechanisms to empower women, curb child labour, suppress insurgency and so on.[58]

The amendments that are done all arise out of these compulsions. It can be shown in each case that these amendments will place political power in India further away from the hands of the people. The tenor of the debate is that if the system as established by the constitution has failed in alleviating poverty, or if it has failed to enable people from being the decision makers, blame should not be placed on the constitution. Rather, it is on the people who came to power since 1950. Fifty seven years later, we have both the challenge and the opportunity to reflect and give our views on these matters..[59]

In a nutshell, the question is not whether the constitution should or should not be amended. Rather the question is what the content of the new constitution amendment should be. The people of India must use this opportunity to resolve the problem of rights in their favour, in the favour of progress of humanity and establish a new electoral process so that it will not be possible to be left out of governance in future. Such a project will provide people with a point of convergence, a definition to their identity and a project through which they can affirm what they are capable of in terms of nation building.

The choices are clear. Either we keep waiting for people of "good character" to emerge within a system that has created possibilities for the worst to seize power. Or we create new mechanisms so that all the people can play their role and ensure that people who are accountable to the polity emerge.

---

[58] M.V. Pylee, *Our Constitution, Government and Politics* (New Delhi: Vedam Publications, 2007) 231.

[59] *Ibid* at. 80.

These choices are going to be determined not by ignoring the constitutional amendment but by dealing with the problems of the constitutional working. The key question will be whether those in power can legitimise their acts by hiding behind retrogressive constitutional provisions or whether people will be inspired by the ideals of inalienable rights that belong to them by virtue of the fact that they are human beings.

B. Amendment Politics, Constitutional Change and the Social Revolution

Independent India has witnessed a struggle for judicial supremacy and deep transformations of parliamentary governance. Naturally, since the inauguration of the Constitution, those who possessed or managed political authority objected to the transfer of their 'political property rights' to India's apex courts. However, the first judicial rumblings against zamindari abolition and other land reform legislation in the 1950s unmistakably set the tone that would allow India's judges to reinvent themselves in the style of judicial activism in the 1980s. Although the delegation of power to judiciaries, has often been accompanied by deep political hostility towards judges, it has also come to be viewed as a necessary evil; and even a polity that was inspired by the Westminster model of parliamentary sovereignty has succumbed to American-style judicial review, where 'separation' of powers means 'checks and balances' among co-equal branches of government.

Such separation-of-powers games between India's government legislators and judges are ritually rehearsed under the following headlines: parliamentary sovereignty; ultra vires doctrines; judicial review; concept of a basic structure of the constitution; separation of powers; *Golak Nath, Keshavananda v. State of Kerala, Minerva Mills*; 24th , 42nd, 43rd and 44th Constitution Amendment Acts; the story then continues with the emergence of public interest litigation, India's rights revolution and an unparalleled transformation of judicial behaviour in terms of social activism.

Today, there "is no area where the judgments of Supreme Court have not played a significant contribution in the governance – good governance – whether it be – environment, human rights, gender justice, education, minorities, police reforms, elections and limits on constituent powers of Parliament to amend the Constitution."[60] As well as this, the Indian Supreme Court has come to provide the single most important avenue for political activists, organized groups of every stripe and even opposition parties to challenge the government of the day.

---

[60] Speech of the Chief Justice of India, Y. K. Sabharwal, "Role of Judiciary in Good Governance" (2006: 11), at: <http://www.supremecourtofindia.nic.in/new_links/ Good%20Governance.pdf>.

Above all, it is not only astonishing to note the exceptionally bold and copious rulings of the court after the emergency, but, what is more, since the end of the 1980s the judges have repeatedly claimed the power of "the last word" and successfully imposed their will on the executive and legislative.[61]The social revolution played an important part all the way through. What is more, the social revolution has become a centre-piece of the key decisions on the substantive limits of constitutional amendments in Indian constitutional history.

In *Golak Nath*, reversing precedents was the first case that directly challenged Parliament, defending the property rights of an individual and arguing in favour of implied limitations on amending power. As the judges denied Parliament the right to abridge the fundamental rights as laid down by Part III of the Constitution, Parliament, with a strong Congress majority, simply set itself on collision course with the judges since the social revolution could not be achieved without essential modification of the right to property. Three judges delivered the minority opinion and followed the opinion of the legislators as the "social revolution in our country may require more rapid changes."[62]

As the formal procedures for amending the Indian Constitution [63]are simple, and at most require that an amendment bill is passed "in each House by a majority of the total membership of that House, and by a majority of not less than two-thirds of the members of that House present and voting," the massive mandate of the 1971 elections made it easy for the dominant Congress party to amend the Constitution in response to unpleasant judicial pronouncements and to keep 'conservative' judges away from the social revolution.[64] Congress's electoral success became the democratic mandate to pass and implement further constitutional amendments in accordance with a socialist electoral campaign.

---

[61] See, for instance, People's Union for Civil Liberties v Union of India AIR 2003 SC 2363

[62] *Golak Nath v. State of Punjab* AIR 1967 SC 1643 (par. 292).

[63] Article 368.

[64] Specific parts of the constitution can even be amended by simple majority. In addition to the special majority requirements outlined here, amendments that affect certain aspects of centre-state relations in India's federal make-up, also require the ratification by at least half of the States' legislatures. Again, the requirement of ratification by half of the States did not present a problem before the 1980s for most Congress governments could easily gather the necessary support in the States. After Golak Nath, the Supreme Court had continued to challenge Parliament by interfering with bank nationalization and the abolition of privy purses.

Eventually, the 24th and the 25th Amendment were passed, thus, allowing for large scale nationalizations in industry and commerce – and "saving" the social revolution from a conservative and capricious Supreme Court. In terms of theory, India's colonial tradition of parliamentary sovereignty (Westminster style) clashed with a written constitution and judicial review (American style). In terms of practice, India's judges did not prove sensitive enough to understand the rules of the game and it is worthwhile it is worthwhile remembering that the court's frontal assault on parliament's sovereignty was at first unsuccessful and politically costly.

Failing to adapt to the strong position of the legislator, the *Kesavananda Bharati* case did not shift judicial policies towards the social revolution as much as the legislators had hoped. Reassessing the role and relevance of the Directive Principles of State Policy, as laid out in Part IV of the Constitution, which "*set forth the humanitarian socialist precepts that were the aims of the Indian social revolution,*"[65] the majority of the judges still declared that *Golak Nath* had been wrongly decided and upheld the 24th and 25th Amendment.

Yet, the judges arrived at this decision in a very confusing and contradictory way, extending the power of judicial review via the invention of the *basic structure doctrine*, which proclaims certain basic features of the Constitution to be beyond Parliament's power of amendment. Again, Indira Gandhi amended the Constitution to override this decision – this time however, she was not empowered by elections but empowered herself by declaring an internal emergency (1975-1977), which gave her the power to push the 42nd Amendment through a Parliament controlled via emergency rule.

At the end of the 1970s the following compromise emerged: After Indira Gandhi lost the 1977 elections, the Janata government would try to override the 42nd Amendment, yet, needed the support of the Congress to pass constitutional amendment bills so that the 44th Amendment falls short of a complete repudiation of the 42nd Amendment. In the bargaining process surrounding the 44th Amendment, the left-leaning Janata government ensured an end to the disputes over the constitutional status of the right to property by removing it from the fundamental rights section of the Indian Constitution once and for all.

---

[65] *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461 (par. 489).

At the same time, the basic structure doctrine has been accepted by the legislators, so that the judges have safeguarded their right to control the constitutional amendment process. The Supreme Court, now more to separation-of-power games, has accepted the end result without reservations; judicial activism would return to the Indian polity in the 1980s, yet, with a shift in emphasis from property- to civil rights. In *Minerva Mills*, the nationalisation of a textile undertaking called Minerva Mills, under the provisions of the *Sick Textile Undertakings (Nationalisation) Act, 1974* was challenged and the court was asked to declare the unconstitutionality of Sections 4 and 55 of the *Constitution (42nd Amendment) Act, 1976.*

The majority of the Supreme Court seized the opportunity to reaffirm the basic structure doctrine and confirmed the unconstitutionality of the specific parts of the 42nd Amendment. The informal constitutional consensus which has emerged since the 1980s is based on (1) the acceptance of the basic structure doctrine by all political institutions (2) the Supreme Court is exercising maximum restrain when an amendment is challenged as unconstitutional (3) judicial activism in the name of the social revolution has shifted away from interference with economic policies to the field of civil, social and economic rights.

The balance between fundamental rights and the directive principles of State policy, i.e. the social revolution, is thus moving towards a state of "stable equilibrium" as hung parliaments and weak coalitions provide the judges with a window of opportunity to change the balance of power in their favour. Once more, the social revolution provided a welcome and sturdy ideological backbone, this time in the context of judicial activism. For instance, the social revolution mandate is an essential element of one of the most important public interest litigation decisions, *S.P. Gupta v. Union of India*,[66] with Justice Bhagwati's long and famous exposition on the question of *locus standi* and liberalization of standing, setting the tone of judicial activism in India.

It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned national charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. These

[66] *S.P. Gupta v. Union of India* AIR 1982 SC 149 (par. 27).

ideological fundaments of the Constitutional ideology have remained untouched as liberalization has changed India's political economy.

C. Reforming the constitution: towards liberalization or human rights?

The political economy of "socialism" has triggered important constitutional amendments to achieve the desired goals of the social revolution: The 1st Amendment created the 9th schedule, the 7th Amendment introduced new land laws, expropriatons following the 17th Amendment were struck down by the *Golak Nath* decision, correspondingly the 24th, 25th and 27th amendment diluted Golak Nath while the 42nd amendment overrode *Kesavananda.* Liberalization policies, so far, have neither translated into mass politics nor into a constitutional reform debate. On the contrary, the constitutional reforms envisaged by policy-makers give preference to the social revolution ideology and a high level of stateness.

As a result the final report of The National Commission to Review the Working of the Constitution (NCRWC) submitted its Final Report in spring 2002 mirrors many of the dominant ideological currents of the constitutional reform debates. The absence of any suggestions to constitutionalize certain aspects of economic reforms or to re-introduce a fundamental right to property supports the contestations advanced in this article. Even the former Prime Minister Atal Behari Vajpayee, key initiator and staunch defender of the Review Commission, did not talk about the need for inserting liberal economic policies in the constitutional text but much rather warned of "an open-door policy" and affirmed the relevance of protecting small and cottage industries to increase employment as well as greater state investments in the agricultural sector.

The report of the committee to review the working of this constitution not only provides further justification for the existence of these terms and ideologies but also seeks to ensure that they are strengthened and more rigorously integrated with state policy. To do this they take recourse not only to history but also current trends in growth, seeking to use the instrumentality of the state in a more "state of the art" manner. The measures suggested by the reviewers seek to establish liberal economic policies as merely another tool for creating state capacity, which will help eradicate some of the problems that had not been effectively addressed by the system of licensing and government-owned public sectors.

There is also no doubt that welfare rights should be enhanced: "A new article, say article 21-C, may be added to make it obligatory on the State to bring suitable legislation for ensuring the right to rural wage employment for a minimum of eighty days in a year.[67] The role of the judiciary in the integration of directive principles of state policy and the fundamental rights has been commended by the NCRWC, which calls this process "constitutionalising" social and economic rights. Yet, in the eyes of the Commission this process has not been adequate to fulfil the goals of the founding fathers. The Commission reinforces the need to strive for both common good and against common detriment.[68]

Nehru was an outstanding institution builder. Despite his serious differences with the conservative justices of the Supreme Court, Nehru respected their authority and nurtured both the party and the governmental level institutions. In contrast, Indira Gandhi was interested in building only micro-level institutions and depended mainly on the bureaucracy to implement her policies. She tried to control the judiciary through politically motivated promotions of justices and by constitutional amendments.[69]

These lofty ideals and principles are there in our Constitution and the ones being raked up and dissected threadbare in the wake of amendments and resolutions have no bearing on the pressing needs of our current nation. All these ploys are politically, religiously, communally and even regionally and linguistically motivated, and this politicking of the Constitution is being carried out so take-it-for-granted that it has become a private script of those who rule and misrule the nation.

And in order to be a real Republic of some order in this time and age, a nation has to have a constitution, which is relevant to the needs of the times, recognising the realities, human rights and above all it should sound reasonable and be understandable to the last voter of the nation, no matter that voter is an MP or an MLA or a common man.

D. Recent Developments in the Constitutional Amendment and Indian Judiciary

The 'Ninth Schedule' was inserted into the Constitution in 1951, originally to shield agrarian land reform laws from judicial scrutiny. However, this scheme, which originally comprised of thirteen

---

[67] Report of the National Commission to Review the Working of the Constitution, vol. I, 91, par. 3.13.2. (Lok Sabha Secretariat 1999).

[68] Report of the National Commission to Review the Working of the Constitution, vol. II, 85 (Lok Sabha Secretariat 1999).

[69] Lawrence M. Friedman et Rogelio Pérez-Perdomo (eds.), *Legal Culture in the Age of Globalization. Latin America and Latin Europe* (Stanford, California: Stanford University Press, 2003) 528.

legislations in 1951, had mushroomed to include 284 laws by 2006, many unrelated to land reform or ending feudalism. It was thus a subject of frequent criticism since it curtails the power of 'judicial review'.

In recent years, two cases involving the power of the courts to review Parliament's legislative and non-legislative functions- i.e. the *Coelho* and *Raja Ram Pal* cases- have demonstrated that the Indian Supreme Court is embarking on a new era of judicial review. The *Coelho* case[70] decided whether the Supreme Court could review acts of Parliament placed within the Ninth Schedule, and the *Raja Ram Pal* case,[71] passed judgment on whether Parliament's internal procedures (in this case, expulsion of Members of Parliament on account of corruption charges) were justiciable. In the *Coelho* decision, the Supreme Court held that it could strike down any law inserted into the Ninth Schedule if it were contrary to Constitutional provisions. It stated:

> *The jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power. It also stated that, 'It cannot be said that the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution.*[72]

In the *Raja Ram Pal* case, the Supreme Court disposed of the arguments regarding the unconstitutionality of the expulsion of Members of Parliament while simultaneously upholding the principles of judicial review. The court began by stating that the Constitution was the "supreme *lex* in this country" and went on to state that:

> *Parliament is a coordinate organ and its views do deserve deference even while its acts are amenable to judicial scrutiny ... mere co-ordinate constitutional status ... does not disentitle this Court from exercising its jurisdiction of judicial review* [73]

The court also acknowledged that although it may not question the truth or correctness of the material ... [nor] substitute its opinion for that of the legislature, proceedings of Parliament which may be tainted on account of substantive or gross illegality or unconstitutionality could still be reviewed by the

---

[70] I.R. Coelho (Dead) By Lrs v. *State of Tamil Nadu & Others*, (2007) 2 SCC 1 [hereinafter *Coelho*]

[71] Raja Ram Pal v. Hon'ble Speaker, Lok Sabha & Others, (2007) 3 SCC 184 [hereinafter Raja Ram Pal]

[72] Supra note 75.

[73] Supra note 76.

judiciary. These two decisions reassert the Constitutional scheme of a balance of power between the legislative and judicial branches, and also ensure that politicians will now no longer be able to evade the scrutiny of a watchful judiciary.

IV. THE RELATION BETWEEN CONSTITUTIONAL AMENDMENTS AND HUMAN RIGHTS

A. HUMAN RIGHTS UNDER THE CONSTITUTION OF INDIA

The Constitution of India is one of the most rights-based constitutions in the world. It can be regarded as a testament of Human Rights. Drafted around the same time as the *Universal Declaration of Human Rights (1948),* the Indian Constitution captures the essence of human rights in its Preamble, and the sections on Fundamental Rights and the Directive Principles of State Policy.The Constitution of India in 1950 guaranteed its citizens seven basic rights: the right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, cultural and educational rights, the right to property, and the right to constitutional remedies. These rights were placed in a special section of the Constitution on Fundamental Rights.

In addition, a chapter entitled the Directive Principles of State Policy was also incorporated into the Constitution. Some of the provisions there in are in the nature of economic rights which the Indian state was not in a position to guarantee in 1950 itself, but which were to be realized in the succeeding years. The others are prescriptive policies which guide the Government of India. One such policy prescriptive even asks the Indian State to endeavor to promote international peace and security, to maintain just and honorable relations between nations, to foster respect for international law and treaty obligations in the dealings of organized peoples with one another, and to encourage settlement of international disputes by arbitration [Article 51]. Thus, such directives and prescriptive set up a standard for India which has to be achieved with respect to human rights.

To go into the question of human rights and economic development in India, one will have to take note of the preamble to the Constitution and also sections of economic relevance in both the Fundamental Rights and the Directive Principles chapters. At the outset, a reference to the Objectives Resolution adopted by the Constituent Assembly on 22 January 1947 would be in order, for one can find in it the basic philosophy that motivated the makers of the Constitution. Paragraphs 5 and 6 of the Resolution noted the need for ensuring political and economic rights and also for protection of minorities, backward and tribal areas, and depressed and other backward classes:

- *(5) Wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before law; freedom of thought, expression, worship, vocation, association and action, subject to law and public morality; and*
- *(6) Wherein adequate safeguards shall be provided for minorities, backward and tribal areas and other backward classes.*

In the preamble, citizens of the country- a "Sovereign Socialist Secular Democratic Republic" are assured of, besides other things "justice, social, economic and political", "equality of status and of opportunity", and promotion of "fraternity, assuring the dignity of the individual and the unity and integrity of the nation." From these assurances it is clear that the objective of the framers was to ensure a society based on the concept of a welfare state. The citizen was to be the beneficiary of not merely civil and political rights, but also of many economic guarantees. The incorporation of the chapter on Directive Principles of State Policy was thus rendered axiomatic.

On summation, it can be said that there are four specific trajectories of human rights discourse in the Indian context:

1. Civil and Political Rights,
2. Rights of the Marginalized (such as women, Dalits and Adivasis),
3. Economic, Social and Cultural Rights, and
4. The Right to Transparent and Accountable Governance.

Though each of these trajectories is interconnected, they were promoted by different sets of actors (often with varying ideological affiliations) at different points in time. There has always been tension and lack of mutual appreciation between those who promoted civil liberties and the left-oriented groups who worked towards the structural transformation of socio-economic conditions and consequently of the State.

B. IMPORTANT CONSTITUTIONAL AMENDMENTS AND ITS RELATIONAS WITH HUMAN RIGHTS

It is interesting to compare the law as it stands today with what it was at the time when the Constitution came into force. Within a short span of twenty-five years, Article 31 was subjected to not less than seven amendments of which the most important are first (1951), fourth (1955), seventeenth (1964) and twenty-fifth (1971).

1st AMENDMENT: This amendment resulted in the insertion of Article 31A retrospectively from 26-1-1950; insertion of Article 31B and insertion of Schedule 9 containing a list of 13 Acts of the State Legislatures.

The Statement of Objects and Reasons of the First Amendment Act makes it clear that the insertion of these provisions was aimed at securing the constitutionality of agrarian reform legislation, and avoiding a repeat of *Kameshwar Singh* v. *State of Bihar*.[74]

- **Article 31A**: Article 31A of the Constitution provides that a law in respect of the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall not be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31.
- **Article 31B**: Validation of certain Acts and Regulations- Without prejudice to the generality of the provisions contained in A. 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

A reading of Article 31B establishes that it operates to immunize legislations from challenge on the grounds that they violate fundamental rights. Furthermore, it acts retrospectively to confer validity on Acts and Regulations which have been previously declared void under Article 13, such that these Acts and Regulations are to be treated as having been valid since their inception. On a plain reading, this seems a drastic provision- several members of Parliament who opposed the First Amendment criticized it as undemocratic, on the grounds that it eradicates the judicial review of laws as against the provisions of Part III.[75] It has also been argued that Article 31B represents a wrong method of constitutional amendment, which should ideally consist in the laying down of certain broad principles, the implications of which are left to the judiciary to concretize.[76]

---

[74] Latter reversed in *State of Bihar* v. *Kameshwar Singh* AIR 1952 SC 252.
[75] Baldev Singh, "Ninth Schedule to Constitution of India: A Study", Vol. 37(4), *Journal of the Indian Law Institute*, 457, at 464.
[76] M.P. Jain, *Indian Constitutional Law*, 4th ed. Rep., (Agra: Wadhwa and Company Law Publishers, 1994), 693-695.

These provisions silenced not only the courts, but also emasculated Article 13(1) and (2). Even if any of the acts had driven a coach and a pair through the Fundamental Rights guarantees, it could not be questioned and if it was in fact unconstitutional, it would become constitutional.[77] It is also argued that this was not an amendment of the Constitution but a frustration of the Constitution and that to make its application retrospective amounts to forgetting the distinction between a Constitution and a law.

Soon after its inception, the constitutionality of the First Amendment Act was challenged in *Shankari Prasad Singh* v. *Union of India*[78]. The grounds for challenge were, inter alia, that Articles 31A and 31B made changes in A.s 132 and 136 in Chapter IV of Part V and Article 226 in Chapter V of Part VI, and accordingly that they required ratification under clause (b) of the proviso to Article 368, in the absence of which they were void. It was also contended that Article 31B was unconstitutional, as the laws which were included in the Ninth Schedule by the Act related to matters enumerated in List II, in respect of which only State legislatures and not Parliament had the power to make laws[79].

These arguments were rejected by the Court, which held, first, that the Amendment only excluded a certain category of cases from the discipline of Part III, and did not curtail the jurisdiction of the Courts, and further that the operation of Article 31B involved the amendment of the Constitution, the power to do which lay with Parliament. It was also argued by the petitioner that the amendment was a 'law' under Article 13(3) and hence void under Article 13(2). This plea was not accepted by the Court, which relied on a supposed distinction between constituent and legislative powers to exclude constitutional law from the purview of Article 13(2). Thus, the constitutionality of the 1st Amendment, incorporating Articles 31A and 31B, was upheld by the Court. There were no further additions to the Ninth Schedule until the 4th Amendment Act of 1955.

However, further jolts were yet to come in the form of other cases. In *State of West Bengal* v. *Bela Banerjee*[80], *Subodh Gopal* v. *State of West Bengal*[81], *Dwarakadas Shrinivas* v. *bolapur Spinning and Weaving Co. Ltd.*[82], and *Saghir Ahmed* v. *State of Uttar Pradesh*[83] the Supreme Court rendered decisions that notwithstanding the first amendment, payment of assessment and amount of compensation to be paid

---

[77] M. Hidayatulla, *Right to Property and The Indian Constitution* (Calcutta: Arnold-Heinemann Publishers Pvt. Ltd., 1983) at page 150.
[78] AIR 1951 SC 458.
[79] Entries 1 to 13 of the Ninth Schedule were inserted by the First Amendment Act.
[80] AIR 1954 SC 171.
[81] AIR 1954 SC 92.
[82] AIR 1954 SC 119.
[83] AIR 1954 SC 729.

was justiciable and 'taking away' even for a temporary period was tantamount to the lawful owner's deprival of possession and hence compensation was payable. To overcome these hurdles, the **Fourth Amendment** (1954) was made to Article 31A. This amended Article 31(2) with a view to make the question of 'adequacy of compensation' as non-justiciable. The courts were now debarred from going into the question whether the quantum of compensation provided by law for a property being acquired or being requisitioned was 'adequate' or not.[84]

In the case *Bhuri Nath* v. *State of Jammu and Kashmir*[85] the Supreme Court explained the purport of this amendment as follows: the word 'compensation' could not mean a full and fair money equivalent, for if it did, the law would have remained unchanged and the fourth amendment would have failed its purpose. It removed the restriction on legislative power in the sense that for the law to be valid, it was no longer obligatory to provide for the payment of full and fair money equivalent.

In 1964, the **Seventeenth Amendment** was added to extend the scope of land reform legislation to ryotwari and other tenures. With this, it was felt that the law relating to right to property appeared to have acquired a settled interpretation.However, after 1970, the decision of the celebrated Bank Nationalization case[86] changed the scenario. This case arose out of the nationalization of 11 commercial banks in 1969 and the question of proportionality/adequateness/reasonableness of compensation arose. The government cited *Shantilal* case and said that the Court cannot go into the questions relating to propriety of principles relating to compensation. The Supreme Court, in this court declared the relevant law to be unconstitutional by a majority of 10 to 1. Also in *Golakhnath* v. *State of Punjab*[87], the Supreme Court held that thereafter the Parliament had no right to amend any portion of Part III.

This view was not palatable to the Central Government which thought that it ran counter to what the Fourth Amendment was designed to achieve and that it would create difficulties in the way of the government's socio-economic program.[88] This directly led to the enactment of the 24th and 25th amendments. By the **Twenty-fourth Amendment**, the right of the Parliament to amend Part III was affirmed. And by the **Twenty-fifth Amendment** (1971), clause 2 of Article 32(2) was amended, proviso to 31(2) (b) was added and 31C was newly inserted.

---

[84] *Supra Note* 8 at page 1268.
[85] AIR 1997 SC 1771.
[86] *RC Cooper* v. *Union of India* AIR 1970 SC 564.
[87] AIR 1967 SC 1643.
[88] *Supra Note* 8 at page 1271.

Finally, in 1978, the **44th Constitutional Amendment** removed the Fundamental Right to property by repealing Articles 32(1) and 31(2). The right to property has now been converted into an ordinary right which can now be regulated by an ordinary law. The same amendment also introduced Article 300A in the Constitution which gives some protection to property. It merely states: "No person shall be deprived of his property save as by authority of law".

Though the right under Article 300A is not a fundamental right, nevertheless, it does not make much of a difference except that a writ petition is not maintainable under Article 32 in the Supreme Court. A person challenging the violation of Article 300A must go to a High Court under Article 226 with his writ petition.[89] The right under Article 300A is not a basic feature or structure of the Constitution. It is only a Constitutional right.[90]

It ensures that a person cannot be deprived of his property merely by an executive fiat. It protects property against executive action. The rights in property can be curtailed, abridged or modified by the state only by exercising its legislative power. Hence, deprivation of property can only be done according to law. However, the question arises as to how property can be protected against legislative action. But as the wordings of Article 300A correspond precisely to those of Article 31(1), all judicial pronouncements made under Article 31(1) are to remain relevant for the purposes of Article 300A also.

The following amendment, which is the latest one with respect to **Education,** has been considered for the purpose of analyzing the role played by amendments for the furtherance of Human Rights.

86th Amendment (93rd AMENDMENT Bill): It splits Article 45 and makes Article 21A under Fundamental rights, modified Article 45 under Directive Principles of State Policy and adds Article 51A(k) to the Fundamental Duties. Its structure is as follows:

- **Article 45**: The state shall endeavor to provide early childhood care and education for all children until they complete the age of six years.
- **Article 21A**: The state shall provide free and compulsory education for all children of the age of 6 to 14 years in such manner as the State may, by law, determine.

---

[89] *Supra Note* 8 at page 1300.

[90] *SB Narayanacharya Public Trust* v. *State of Gujarat* AIR 2001 Guj 208.

- **Article 51A(k)**: Parent/guardian to provide opportunities for education to his child or ward between the age of 6 and 14 years.

Free and compulsory education for children up to the age of 14 was to be realized within ten years of adopting the Constitution of India. It took nearly forty five years and a Supreme Court Judgment to move the Government of India to draft the first bill to amend the Constitution so as to make education a fundaments right. From the time the bill was drafted till the amendment was passed in 2002 under a different government, the need for such an amendment was questioned in many circles. Moreover, there was fear that 'compulsory' education may mean harassment of poor and illiterate parents by officials. Eventually, during the debate in Parliament, there was a consensus that the compulsion was on the State to provide education and that the amendment was necessary to make the right justiciable.[91]

Till date, there have been no central laws that make this right justiciable. About nineteen states and two union territories had compulsory education laws, but they were not being implemented in many cases.[92] Six years after an amendment was made in the Indian Constitution, the Union Cabinet cleared the Right to Education Bill. It is now soon to be tabled in Parliament for approval before it makes it the fundamental right of every child to get free and compulsory education.[93]

Key provisions of the Bill include: 25% reservation in private schools for disadvantaged children from the neighborhood at the entry level; reimbursement of expenditure incurred by schools by the government; no donation or capitation fee on admission; and no interviewing the child or parents as part of the screening process. The Bill also prohibits physical punishment, expulsion or detention of a child, and deployment of teachers for non-educational purposes other than census or election duty and disaster relief. Running a school without recognition will attract penal action.

During the freedom struggle, there was a constant demand for the Right to Education along with other Fundamental Rights. Therefore, in accordance with Article 26 of the UDHR, the founding fathers of our Constitution vide Articles 41, 45 and 46 provided for the Right to Education in Part IV of the Constitution. As observed, the Constitution makers, though they realized the significance of the Right to Education, placed it under the State List in the Seventh Schedule to the Constitution. But in reality,

---

[91] Sourced from <http://pmindia.nic.in/nac/concept%20papers/educationFeb18.pdf> (last visited on 4th November, 2008).
[92] *Id.*
[93] Sourced from < http://www.digitallearning.in/news/news-details.asp?newsid=15691> (last visited on 10th November, 2008).

due to the initiation of the national policy on education and the leading role of Ministry of Education, it remained in the domain of the Central Government. The change has come only after the **42nd Amendment** to the Constitution in 1976, which has placed education in the Concurrent list by transferring item 11 of the state list to item 25 of the Concurrent list.

According to the data collected, nearly one third of the 105 million children aged six to ten were not in school in 1993. Also, the drop rates from the first to the fifth standards approach one third of those who enroll. Hence the learning achievement is low. At this juncture, where the executive failed to implement the constitutional mandate of Article 45, the judiciary stepped into their shoes. In the case of *Mohini Jain* v. *State of Karnataka,*[94] while deciding upon the issue of capitation fee in educational institutions, the Supreme Court converted Article 41 into Article 21 and held that right to life is the compendious expression for all those rights which the court must enforce, because they are basic to the dignified enjoyment of life, and that the Right to Education flows directly from the right to life.

Immediately thereafter, in the next year, in *Unni Krishnan JP* v. *State of AP,*[95] the court slightly modified its position and held, "the citizens of this country have a fundamental right to education and the said right flows from Article 21, but the same however is not absolute and that its contents and parameters have to be determined in light of Articles 45 and 41." This hence narrowed down the scope of the right as enunciated in *Mohini Jain's* judgment.

However, after both these judgments, the process of realizing the right to education was accelerated. The influence of several international instruments over the Indian Government was also observed. Apart from Article 26 of the UDHR, the Right to Education is also provided under Article 13 of the ISESCR 1966 and Articles 28 and 29 of the Convention on the Rights of the Child 1989. In September, October and November of 1996, a committee of Education Ministers of States met and came out with a report in 1997 that the Constitution of India should be amended to make the right to free elementary education up to the age of 14 years a fundamental right, and that it should simultaneously also have an explicit provision to make it a fundamental duty of every citizen who is a parent to provide opportunities for elementary education.

In furtherance of this, the Constitution Amendment Bill was introduced in the Parliament in 1997 which proposed to amend article 21 of the Constitution by introducing the clause 'the state shall

[94] AIR 1992 SC 1858.
[95] AIR 1993 SC 2178.

provide free and compulsory education to all citizens of the age six to fourteen years', but however, till 2001, this bill could not make much headway. In this process it underwent a change and was reintroduced as the 93rd Constitutional Amendment Bill in 2001. This was passed by the Parliament as the Constitution (Eighty-sixth) Amendment Act, 2002 and inserted a new article 21A. This thus gave Article 45 a new life.

However, the segmentation of the ages between both the articles is a much debated and criticized issue. Now, Article 45 mandates education for children of the age up to 6 years and Article 21A envisages the right to education for all children of the age of six to fourteen years. It has been difficult to understand the wisdom and logic of the Government, because, by this, the children of the age 1-6 years are completely left out from the preliminary stage of education and gives a false implication that in the pre-primary stage of education, the State has no responsibility. Teachers and workers working in such education institutions are also out of state funding.

V. CONCLUSION

'New changes' responds to differences with the past. 'Difference' from the past has to do with changes not only at the local level but also at the international level. International political conditions, local and regional economic and social changes, scientific revolution and technological advancement, globalization and growing interdependence all create new conditions for self-determination in social and political settings of a particular time.. Over the past fifty seven years, the institutions of governance have consistently been losing their credibility and legitimacy in the eyes of the people. The electoral mechanisms and the political institutions are viewed as unrepresentative and unaccountable, and as the means by which wealthy and powerful vested interests gain control over power. The question of what will assist the people of India to empower themselves.

The most fundamental problem is to repatriate sovereignty into the hands of the Indian people, and this must be enshrined by politically empowering them through a renovation of the democratic process. This must change the present dichotomy between rulers and ruled – between the [96]existences of an elite governing structure separate from those who are the governed. These amendments are attempts to legitimise what is going on, both in the eyes of the people and also internationally. The discussion over the National Commission on Women, the reservation of seats for women and so on is inspired by events outside India in a direct manner. There is nothing there which will abolish the privilege distribution system that is established through the constitution. Similarly, when it comes to the suppression of the people through draconian laws or other forms of state terrorism, there is no demand for any change or amendment from the official circles.

Dicey once wrote in his book on the English Constitution that the British Parliament was so paramount that if it passed an act that all blue-eyed babies be put to death, all such babies would have to be killed till another Parliament repealed the law. However, in our country, even if all the members of the two Houses of Parliament and all the members of all the Legislatures of the States passed such a law unanimously and the President and the Governors assented to this outrageous Bill, the Courts would still strike down the law as void. But if the Parliament by two-thirds majority in both Houses of Parliament enacted this as an amendment in the Constitution and the President assented to this

[96] R. Gopalan, *Contemporary Debates over the Reform of the Indian Constitution* (New Delhi: Oxford Publication, 2005) 30.

inhuman law, the massacre of the blue-eyed babies would have to begin. The Courts would be powerless to do anything in this behalf (in referral to *Shankari Prasad's* case).[97]

Hence as observed, it is not mere interpretations that Court gives to the Rights provided under the Constitution, but the specific amendments to the Constitution that play a major role in both enhancing or completely removing the scope of a certain right as guaranteed to Indian citizens. An interpretation arrived at by the courts (for eg. that of Article 21, 14, 15, 16 etc.) over various number of decisions, arguments and even increased bench strengths can be completely reversed by a single amendment made by the Constitution.

However, for the purposes of the project, it is essential to observe if the mentioned amendments have enhanced the purpose enshrined in the Constitution or if they had been mere ploys of the legislature to remove the obstacles in their way. When it comes to the question of Right to Education and the 93rd Amendment which introduced Article 21A, it can be observed that this is certainly in furtherance of the original objectives of the Constitution framers. The target period of ten years has always remained an extended target period but was never enforced. This amendment and the subsequent Bill passed by the Parliament would definitely be a great step towards educational empowerment.

However, the numerous amendments to Article 31 confound us to the illusion that the Right to Property has been done away with. The idea of total nationalization of the means of production, that is, abolition of private ownership is nowhere in the Constitution or the Amendments; even the remotest analogy to the Soviet Union or People's China is out of the question.[98] But for the non-justiciability of the compensation to be paid for acquisition or requisition for a public purpose, and the exceptions stated in Articles 31A, 31B and 31C, Article 31 stands as it was inscribed into the Constitution. The sanctity of private property remains untouched as before and the owner of a property cannot be deprived of it except in the manner prescribed in Articles 31 (1) and 31 (2). This unmistakably reveals that private ownership of the means of production, guaranteed under Article 19 (1) (f), and subject to 19 (5), still remains the foundation of law and of all socio-economic relations.

The amendments have perhaps tamed and subdued private property relations in a few selected fields, but without really affecting the right of ownership of the means of production. In the second place, the amendments are introduced with a view to subserve the Directive Principles of State Policy which

---

[97] *Supra Note* 9 at page 159.
[98] T.K. Tope, "Forty Fourth Amendment and the Right to Property", Vol. 4, *Supreme Court Cases (Journal)*, 1979, 27.

are meant to overcome the ugly and undesirable features in the body politic in the name of extending social justice to the oppressed and the downtrodden. This aspect of the matter clearly reveals the socio-political philosophy of the framers of the Constitution and what the Constitution actually spells out. The Constitution-makers held the right of private ownership of the means of production as sanctified, forming the basis of all property relations. At the same time they were apprehensive lest these relations become capitalistic in character.

The Directive Principles of State Policy indicate their apprehensions. They were opposed to monarchy and feudalism from which the country had suffered most. The legacies of the new India included, along with monarchy and feudalism, capitalist relations slowly exhibiting their sharp edges. The path of Constitution-making was paved with stout intentions for a welfare state avoiding the contradictions and crises of capitalism. After twenty-four years, it has become obvious that welfarism even when dubbed as 'socialism', is nothing more than the imposition of a few ceilings or controls, and the issue of licences or permits. The abolition of private ownership of the means of production is not, and has never been, on the agenda.[99]

The question is whether this type of controlled economy can pay for the required or desired welfare measures and still leave scope for rapid economic growth, capital formation and the removal of poverty. This is where Parliamentarism, comes in. Almost all parties in India except the Marxists hold that a socio-economic order based on the freedom to own private property is the very core of a free society.[100] But they are under pressure to do 'something' to alleviate the lot of the masses without whose vote they cannot hope to be in power or in active politics for long. Caught in this dilemma, Parliamentarians; steeped in the sanctity of private property, make amendment after amendment to the Constitution in a wild goose chase.

It is submitted that the Right to Property, as it stands today, in order to be violated, required a valid law empowering the executive to either requisition or acquire the said land. This necessarily requires Parliamentary action. It is observed that, in order to maintain their long standing goals of winning in subsequent elections and maintaining majority in the current government, the hands of the ruling party are tied up when it comes to taking adverse actions. Hence, they would choose to refrain from taking

---

[99] L. Srikanth, "Property Rights Under the Constitution", *Social Scientist*, Vol. 3, No. 9 (Apr., 1975), pp. 65-71.
[100] *Supra Note* 25.

any unruly decision with respect to acquiring any land as they want. Thus we are protected from any kind of arbitrary action.[101]

In conclusion, I quote Justice H.R.Khanna who says that "*if no provision were made for amendment of the Constitution, the people would have recourse to extra constitutional methods like revolution to change the Constitution*". This is revealing in that if this is taken as a yardstick, the recourse to revolution must be extremely pressing in India than anywhere to have justified the need for such a large number of amendments to what is hailed as a model constitution in the first place!.

[101] P.K. Tripathi, "Right to Property after Forty Fourth Amendment- Better Protected than Ever Before", Vol. 67, *All India Reporter (Journal)*, 49.

CHAPTER 2-

IMPACT OF CONSTITUTIONAL AMENDMENTS ON HUMAN RIGHTS: RIGHT TO PERSONAL LIBERTY ASPECT

The chapter on personal Liberty endeavours to bring into picture the amendments that have been enacted and whether they have any direct or indirect impact on Human Rights, the urgency and the need which formed the basis of these enactments. This portion also lays emphasis on understanding as to what has been the role of judiciary in interpreting these Constitutional amendments. Constitutional Amendments have opened many variances and dimensions to produced a balance between the exercise of power and the glorification of personal liberty and in light of that the paper removes the obfuscations that have camouflaged the faults and the purposes for which these amendments had been enacted and have the legislators achieved the goals for which deliberations were done in enacting the series of Constitutional amendments or these amendments can only be categorized as the political mischief.

Jurisprudential Aspect

Liberty – a cherished right

Individual dignity and personal liberty are the quintessential elements of human existence. The edifice of human rights firmly stands on the bedrock of "dignified" existence of human being and fullest efflorescence of individual personality is unattainable without the "Right to personal liberty". The vanguards of individual liberty venerated it as a natural and inalienable right, not to be eroded by the State. The writings of John Locke and J S Mill are reservoirs of legalistic and philosophical foundations of personal liberty and individualism.

In essence, John Locke's rendition of liberty had the underpinnings of natural law which is evident from his exposition in *Two Treatises* – *"The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule"*[102]. Individual being the kernel, 'Life, liberty and estate' were tagged as natural rights which transcended beyond the power of State. According to Locke, the key to proper governance is maintaining personal

[102] James Tully, pg – 284, *An approach to political philosophy: Locke in contexts*, Cambridge University Press 1993.

liberty, and the State should work towards the best interest of individual. The very existence of State is conditioned by preservation of individual liberty, which is an innate, inherent and natural right, founded on the law of nature and personal liberty is vested in individuals not due to any extraneous reasons but due to the fact of his very personality.

One of the foremost crusaders for preservation of liberty was John Stuart Mill who asserted that "Over himself, over his actions and thoughts the individual is sovereign" and "All the restraint is an evil". Mill articulates that any interference with individual's liberty of action is not justified except to prevent him from inflicting harm on others. *Liberty* is placed on the highest pedestal as there cannot be self realization or self development of individuals without liberty. For Mill, liberty is not an abstract idea or a natural right to be asserted by man, but a concrete right to be judged by its utility[103].

Harold J. Laski, an ardent champion of liberty endorsed the view that liberty can never exist in the presence of special privileges and unless one enjoys the same access to power as others, one lives in an atmosphere of contingent frustration. He further expatiates that there can be no liberty when rights of some depend upon the pleasures of another. Common rule must bind those who exercise power as well as those who are subjects of power. The incidence of state action should be unbiased. It is true that society is composed of varied personalities and different interest's are involved, and the degree of efforts one will make, the amount of knowledge one possesses, certainly bend the authority's support in favour of some special interests. But the most we can do for the maintenance of freedom is to seek the system which will minimize the bias involved. [104] Laski's concept of liberty is essentially impregnated with equality and justice.

John Rawls further developed the idea of liberty by blending it with justice and enunciated that 'equal liberty' is the first tenet of justice. Accordingly, liberty needs to be understood as deeply entwined with individuals' privileged moral status and with a resulting entitlement to equal consideration and respect. In this view, the notion of liberty is inseparably connected with the claim about the special dignity and worth of individuals[105].

However, a discourse on liberty is incomplete without defining the limits of exercise of such a right since it is pertinent that 'absoluteness' of any right extirpates the existence of equal and parallel rights

---

[103] R M Bhagat, pg 720, *Political thought – Plato to Marx*, New Academic Publishing Co. 2006
[104] Ajay Kumar Singh, *The role of judiciary in the protection and promotion of human rights - Perspectives on human rights*
[105] Colin Bird, pg – 31, *The myth of liberal individualism*, Cambridge University Press 1999.

vested in others. It is more as a matter of expediency rather than calibrated choice that some limits are prescribed on the exercise of those rights. The eternal significance of Rousseau's veritable words – *'Man is born free; and everywhere he is in chains'* is reflected in the need for social order.

A careful balancing of conflicting interests postulates that individual freedom is not an unbridled right to do anything. An individual is free to do anything in so far as he does not obliterate the equal rights of others. Therefore, law is the conduit through which rights are refined, trimmed and defined in precise terms. The content of the rights is so defined as to absorb and synthesize the legitimate interests of other individuals in society and in case of liberty, as with power, the achievement of justice lies, not in equal distribution, but in disallowing certain liberties altogether and in restraining the exercise of those that are allowed[106].

Liberty – an immutable human right

Human Rights are inherent and fundamental to human existence and personal liberty is an inextricable strand of basic human values; cherished, preserved and strengthened by law. The preamble and the purposes and principles of United Nations Charter reinforce the incontrovertible significance of human rights. While preamble reaffirms the faith in fundamental human rights and in the dignity and worth of human person, the purposes and principles of United Nations lend credence to this faith by aiming towards promotion and respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion[107]. Article 56 of the Charter further states that all members pledge themselves to take joint and separate action in co-operation of the United Nation for the above purpose. Thus, human rights are a legitimate concern of the international family[108].

The Universal Declaration of Human Rights, 1948 clearly envisages the protection of human rights of individuals of every state irrespective of caste, creed, sex, religion, social background and the member states have pledged to achieve in co-operation with the UN, the promotion of universal respect for and observance of human rights and fundamental freedoms.

Law – Static or Dynamic

The Constitution has been revered as fundamental law of the land, a *grund norm* and the fountain head of all other laws, which must confirm to its mandate. The stability of Constitution infuses substance

---

[106] R W M Dias, pg – 109, *Jurisprudence*, Butterworth & Co., fifth ed. 1994
[107] Article 1(3) Charter of United Nations, 1945
[108] J S Verma, pg- 44, *The new universe of human rights*, Universal law publishing co., New Delhi, 2004.

into other laws which must be in congruence with it. A legal order completely devoid of stability would be nothing but a cluster of ad hoc measures designed to cope merely with ephemeral exigencies of the moment.[109] Law being the cement which holds social structure together, must intelligently link the past with the present without ignoring the pressing claims of the future.[110] An ideal system of law would presumably be one in which the necessary revisions of the law were brought about at an appropriate time by orderly procedures and with a minimum of hardship upon those who might become innocent victims of the change[111]. Contextually, the constitutional amendments catapult change; yet in certain circumstances trample upon the fundamental freedoms of individuals. A constitutional amendment directly may not extirpate the fundamental rights, but may become the breeding ground for unreasonable and arbitrary laws which fetter individual liberty.

[109] Edgar Bodenheimer, pg- 253, *Jurisprudence: the philosophy and method of the law*, Universal law publishing co., New Delhi 2004
[110] *Ibid*
[111] *Ibid* pg – 256

I. CONSTITUTIONAL AMENDMENTS – The Background, Developments and Judicial Approach

HISTORICAL BACKDROP-

In 1975 Mrs. Gandhi, who at the peak of her popularity four years earlier secured 43% of the votes, similarly exploited the Indian Constitution. She made President Ahmed invoke the Republic's Article 352 which gave emergency powers and suspend enforcement of fundamental rights. The emergency legislation permitted arrest without trial, imposed censorship and denied people the rights of equality, life and personal liberty. In addition, the Government monopoly of radio, the one means of reaching the whole country, and later its creation of one government-run national news agency that replaced four independent ones, meant that a steady stream of propaganda could be pumped out stressing all the benefits the Emergency was supposedly bestowing on the ordinary man and painting anyone who opposed what was happening as "anti-national."

As a consequence of the suspension of Article 21-which lays down that no one should be deprived of personal liberty except in accordance with procedures established by law-the government was able to (1) prohibit and punish any expression of opinion unpalatable to it; (2) sup- press publication of any news; (3) confiscate any printed matter or literature including foreign periodicals; (4) prohibit any meeting, public or private; and (5) arrest any person and detain him in custody without any obligation to disclose the grounds of detention, and prescribe such condition and length of detention as it desired[112].

On June 29, 1975 the president promulgated an ordinance through which grounds no longer needed to be given to anyone, even to the judiciary, for a person's detention i.e. prohibition of bail to the detenue and the powers to re arrest those whose detention period expired. Within six weeks of the Emergency declaration Mrs. Gandhi moved to have two constitutional amendments approved by Parliament-while most of the opposition sat in jail. On August 1st the 38th Amendment was passed. This made the declaration of Emergency final and conclusive and barred judicial review of ordinances and

[112] Please see website: http://www.jstor.org/action/doBasicSearch?Query=Setting+India%27s+Democratic+House+In+Order%3A+Constitutional+Amendments&wc=on&x=11&y=12

proclamations of emergency and enlarged the State's power to cut fundamental rights during an emergency.

Ten days later the 39th Amendment was passed whereby matters relating to the election of the Prime Minister were taken out and placed beyond the review of the courts. This was aimed at the petition of Raj Narain[113] who had stood against her for Parliament that Mrs. Gandhi was guilty of corrupt electoral practices, an Allahabad High Court judgement which found her guilty of the charge, and an appeal pending before a full bench of the Supreme Court. With this one Amendment the petition, the judgment and the Supreme Court's jurisdiction were removed. The two Amendments were designed to meet the immediate legal challenge to the dictatorship while the 42nd Amendment which came later was designed to institutionalize it[114].Prior to the 42nd Amendment the Fundamental Rights, which were enforceable by the courts, took precedence over the Directive Principles, which were not. When there appeared to be a conflict between the two, it was held that the courts should try to give effect to both by adopting the principle of "harmonious construction".

The **Forty second amendment** enacted during the Emergency was the most controversial comprehensive and far reaching amendment. It sought interalia to spell out expressly the idea of socialism, secularism, integrity of the nation in the Preamble, to add fundamental duties of the citizens and to make the directive principles more comprehensive and give them the precedence over fundamental rights. The Forty fourth amendments sought to remove or correct the distortions brought about during the period of emergency, also it strengthened the safeguards against the emergency provisions and made it impermissible for the executive to continue the Emergency beyond one month without parliamentary approval. This amendment had put the right to life and liberty on secure footing provided safeguards against the misuse of the emergency provisions.

What the Constitution makers had not envisaged are politically usurpatory amendments to suit the political party in power. Indira Gandhi's `Emergency'. The Emergency amendments (1975-76) including the infamous 42nd Amendment, which immunized Indira Gandhi's election, extended the life of a `lame duck' Parliament and re-worked governance to suit the Congress, were clearly usurpatory and a fraud on the Constitution. The BJP's hidden agenda which hinted towards exploring a Presidential system, fixed term Prime Minister ships, proportional representation, plans to take over judicial appointments and re-devising the federal system is no less politically motivated. This, too, is a

[113] Indira Gandhi v. Raj Narain, AIR 1975 SC 2299 (Prime Minister Election Case).
[114] ibid

fraud on the Constitution to achieve BJP purposes. The parallel between the Emergency amendments of 1975-76 and the BJP's conspiratorial initiative of 1999-2000 is almost exact. Both seek to legitimate constitutional change in the name of poverty (garibi hatao) and social justice to demand a concentration of power in the hands of the party in power in the name of stability[115].

By the constitutional 42nd Amendment Act of 76, a new provision was incorporated in the Constitution under **Article 39A**, for providing free Legal Aid and concept of equal justice found a place in our constitution Article 39A which was incorporated under part IV-Directive Principles of State Policy reads as under:- "Equal justice and free legal aid-The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities".

With the object of providing free legal aid, the Government of India had, by a resolution dated 26th September, 1980 appointed a Committee known as "Committee for Implementing Legal Aid Schemes" (CILAS) under the chairmanship of Mr. Justice P.N. Bhagwati (as he then was) to monitor and implement legal aid programmes on an uniform basis in all the States and Union Territories. CILAS evolved a model scheme for legal aid programmes applicable throughout the country by which several legal aid and advice *Boards were set up in the States and Union Territories.*

In the case of Hossainara Khatun Vs. State of Bihar[116] ,the Supreme Court held that the right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held to be implicit in the guarantee of Article 21. This was a case where it was found by Mr. Justice P.N. Bhagwati and Justice D.A. Desai that many under-trial prisoners in different jails in the State of Bihar had been in jail for period longer than the maximum terms for which they would have been sentenced, if convicted, and that their retention in jails was totally unjustified and in violation of the fundamental rights to personal liberty under Article 21 of the Constitution. While disclosing shocking state of affairs and callousness of our legal and judicial system causing enormous misery and sufferings to the poor and illiterate citizens resulting into totally unjustified deprivation of personal liberty, Justice P.N. Bhagwati (as he then was), made following observations in para 6 of the judgment, which are thought provoking:-

---

115 Rajeev Dhavan, The Constitution as a toy http://www.hindu.com/thehindu/2000/02/11/stories/05112523.htm
116 AIR 1979 S.C. 1371

'This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programmes, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them."

Two years thereafter, in the case of *Khatri Vs. State of Bihar*[117] (Bhagalpur Blinded Prisoners' case) Justice P.N. Bhagwati while referring to the Supreme Court's mandate in the aforesaid Hossainara Khatun's case, made the following comments, in para 4 of the said judgment :

"It is unfortunate that though this Court declared the right to legal aid as a fundamental right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence.....The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence, and whatever is necessary for this purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but the law does not permit any Government to deprive its priorities in expenditure but the law does not permit any Government to deprive its citizens of constitutional rights on the plea of poverty."

In 1986, in another case of *Sukhdas V. Union Territory of Arunachal Pradesh*[118], Justice P.N. Bhagwati, once again, while referring to the earlier decision of Hossainara Khatun's case and some other cases had made the following observations in para 6 of the said judgment:-

'Now it is common knowledge that about 70% of the people living in rural areas are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advise in time and their poverty magnifies the impact of the legal troubles and difficulties when they come. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant; they cannot even help themselves. The Law ceases to be their protector because they do not know that they are entitled to the protection of the law and they can avail of the legal service programmes for putting an end to their exploitation and winning their rights.

---

[117] AIR 1981 S.C.926
[118] AIR 1986 S.C. 991

The result is that poverty becomes with them a condition of total helplessness. This miserable condition in which the poor find themselves can be alleviated to some extent by creating legal awareness amongst the poor. That is why it has always been recognized as one of the principal items of the programme of the legal aid movement in the country to promote legal literacy. It would be in these circumstances made a mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal service, legal aid would become merely a paper promise and it would fail of its purpose."

It was in the above backdrop that The Parliament passed the *Legal Services Authorities Act, 1987*, which was published in the Gazette of India Extraordinary Part II, Section I No. 55 dated 12th October, 1987. Although the Act was passed in 1987, the provisions of the Act, except Chapter III, were enforced with effect from 9.11.1995 by the Central Government Notification S.O.893(E) dated 9.11.1995. Chapter III, under the heading "State Legal Services Authorities" was enforced in different States under different Notifications in the years 1995-98. In Haryana, it was implemented with effect from 3.4.1996.

This Act, as amended with effect from 12.6.2002, now provides for decision even on merits, by the Presiding Officers of the Permanent Lok Adalats constituted by the State Legal Services Authority, of those matters which relate to "public utility services" which have been duly defined in the Act[119].

Article 31 D inserted in **42nd amendment** "Article 31D conferred special powers on Parliament to enact certain laws in respect of anti-national activities. It is considered that these powers of Parliament to make laws for dealing with anti-national activities and anti-national associations are of a sweeping nature and are capable of abuse. It was, therefore, proposed to omit article 31D. **31D.** [*Saving of laws in respect of anti-national activities.*] *Rep. by the Constitution (Forty-third Amendment) Act,* 1977, *s.* 2 (*w.e.f.* 13-4-1978). Read with amendment of article 358. This Amendment deleted Article 31D, which had really been enacted to suppress dissent and political opposition. It had empowered the State to penalize "anti-national activity" and ban "anti-national associations." Certain other provisions which interfered with the jurisdiction and functioning of the High Courts and Supreme Court were also removed.

The main task of repairing the damage to the Constitution, however, was left to the 45th Amendment Bill. The 38th and 39th Amendments were removed completely, including the provision which had put the challenge of the election of the Prime Minister beyond judicial re- view, and the 42nd substantially. Although some legal critics feel that the 45th did not go far enough-for instance by removing the

[119] http://www.hslsa.nic.in/resume.htm

fundamental duties of the citizen which had been drafted by Mrs. Gandhi herself and in the fact that the President is still bound to act in accordance with the advice of the Prime Minister and Council of Ministers.

Article 31C. Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing [all or any of the principles laid down in Part IV] shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by [article 14 or article 19]; *and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy: Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.* ***Ins. by the Constitution (Twenty-fifth Amendment) Act, 1971, s. 3 (w.e.f. 20-4-1972*** was held constitutional and amendment of clause 4 and 5 of Article 368 as un constitutional in Minerva mills case.

Hence the aim of the 42nd Amendment was to destroy the idea that there were any basic features in the Constitution. The Government had made earlier attempts through the 24th and 25th Amendments to turn Parliament into an omnipotent legislature. The 42nd Amendment put any amendment of the Constitution by Parliament beyond the challenge of the courts. It removed any limitation on the power of Parliament and seriously undermined the role of the judiciary as envisaged by the Constitution.

It finally put Directive Principles above Fundamental Rights. Its value as a protection to the citizen was nil and with its passing a vital ingredient in the system of checks and balances was gone[120]. Article 31 C as amended by the 42nd (Clause 8), which disturbed the balance between Fundamental Rights and Directive Principles. The effect of this was that if Parliament passes a law which professes to implement all or any of the Directive Principles, it cannot be held to be invalid even though it patently violates Fundamental Rights.

After the end of internal emergency, the Constitution **(44th Amendment) Act,** 1978 was passed. Section 2, inter alia, omitted sub-clauses (f) of Article 19 with the result the right to property ceased to be a fundamental right and it became only legal right by insertion of Article 300A in the Constitution. Articles 14, 19 and 21 became enforceable after the end of emergency. The Parliament also took steps to protect fundamental rights that had been infringed during emergency. The *Maintenance of Internal*

120 http://www.jstor.org/action/doBasicSearch?Query=Setting+India%27s+Democratic+House+in+Order%3A+Constitutional+Amendments&wc=on&x=11&y=12

Security Act, 1971 and the *Prevention of Publication of Objectionable Matter Act, 1976* which had been placed in the Ninth Schedule were repealed. The Constitution (44th Amendment) Act also amended Article 359 of the Constitution to provide that even though other fundamental rights could be suspended during the emergency, rights conferred by Articles 20 and 21 could not be suspended. During emergency, the fundamental rights were read even more restrictively as interpreted by majority in Additional District Magistrate, Jabalpur v. Shivakant Shukla[121].

The decision in Additional District Magistrate, Jabalpur about the restrictive reading of right to life and liberty stood impliedly overruled by various subsequent decisions. A proclamation of emergency under Article 352 has virtually the effect of amending the constitution by converting it for the duration that of a unitary state and enabling the rights of the citizens to move courts for the enforcement of fundamental rights including right to life and liberty to be suspended. Any such proclamation can be for the period of 6 months and can be continued only by further resolution passed by the same majority.

Preventive detention

Article 22(4)[122] *shall stand substituted by the Constitution (Forty-fourth Amendment) Act, 1978, s. 3.*India's constitutional framers were faced with turbulent circumstances following Independence and the partition, the exigencies of which appeared to demand that preventive detention be incorporated into the constitution as a head of legislative power in normal times. The debates that preceded this decision were nevertheless heated and characterised by competing imperatives: that of entrenching the

---

[121] 1976) 2 SCC 521

[122] *"(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than two months unless an Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the said period of two months that there is in its opinion sufficient cause for such detention:*
Provided that an Advisory Board shall consist of a Chairman and not less than two other members, and the Chairman shall be a serving Judge of the appropriate High Court and the other members shall be serving or retired Judges of any High Court:
Provided further that nothing in this clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (a) of clause (7).
Explanation.—In this clause, "appropriate High Court" means,—
(i) in the case of the detention of a person in pursuance of an order of detention made by the Government of India or an officer or authority subordinate to that Government, the High Court for the Union territory of Delhi;
(ii) in the case of the detention of a person in pursuance of an order of detention made by the Government of any State (other than a Union territory), the High Court for the State; and
(iii) in the case of the detention of a person in pursuance of an order of detention made by the administrator of a Union territory or an officer or authority subordinate to such administrator, such High Court as may be specified by or under any law made by Parliament in this behalf.

maximum expanse of human rights and civil liberties for Indian citizens; and that of the need for government powers sufficient to combat the many threats to the budding nation.[123]

The drafting of the current article 22 of the Constitution (article 15A in the Constituent Assembly) concerning the protections afforded against arrest and detention was such that detainees under preventive detention were denied the right to legal representation of their choosing and presentation before a magistrate within 24 hours. Preventive detention was subject instead, where exceeding a period of three months, only to the satisfaction of an Advisory Board (constituted by people qualified to be, are, or have been a High Court Judge) that sufficient cause existed for the detention. And even then, the protection of an Advisory Board could be negated in cases specified by Parliament.

Preventive detention means the detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenue by legalprooof, but may still be sufficient to justify his detention in the interest of national security and the like[124]. Preventive detention is not punitive act and it is also not an alternative to criminal trial under the law. It does not empower the authority to punish a person without trial. Its purpose is to prevent a person from indulging in activities, such as smuggling or other anti social activities as provided in the preventive detention law[125].

The entry 9 of the List 1 of 7th schedule of the constitution empowers Parliament to make laws for preventive detention for reasons connected with Defence, Foreign affairs or the security of India.
Section 3(1) (a) of the national security Act, 1980 which has been enacted by Parliament in Exercise of the power by entry 9 of List I says:
"(1) The Central Government or the state Government may
(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers of the security of India, or... it is necessary so to do, make an order directing that such person be detained."

Preventive Detention law- The need

The trust placed in the legislature and executive to balance the needs of civil rights and state security with minimal scope for judicial interference has not been shown to be justified when considering the

123 M. V. Pylee, *Constitutional Government in India* (S. Chand, 2004), p142.
124 DD Basu, *Human Rights in Constitutional Law* wadhwa and Co. Nagpur, 2005 pg 589
125 Chowdarapu Raghunandan v state of T.N. (2002) 3 SCC 754

record of preventive detention laws and their implementation. The promulgation of the *Preventive Detention Act of 1950 (PDA)* as a temporary expedient (to lapse in one year) to counter social unrest and insurgencies set an ominous example as it was continuously re-enacted for two decades. The *Defence of India Act of 1962 (DIA)* was enacted in the first national emergency in the war against China, but similar to the PDA's longevity on the statute books long after the exigencies that justified its existence had faded, the DIA was allowed to lapse more than half a decade after the war with China ended, and then only reluctantly after fierce political opposition to the executive abuses under both the DIA and the PDA. Such abuses included use against political opponents and excessive use of detention on flimsy grounds[126]. In 1967, the year both Acts were permitted to lapse.

The *Maintenance of Internal Security Act (MISA)* gained notoriety as one of the worst instruments of executive abuse of power in India's history. Over the course of the Emergency, thousands were indiscriminately arrested from all corners of the political spectrum – including members of Prime Minister Indira Gandhi's own Congress Party – and sometimes subjected to torture. The number of people detained by the end of the Emergency was close to 111,000. Although the reaction against such executive excesses were marked by the Congress Party's first electoral loss in the 1977 elections, the lack of political will to forfeit or even constitutionally mitigate the extra-ordinary powers that permitted the Emergency was evident by the failure of the post-Emergency Janata Party government and successive governments to call into effect section 3 of the Constitution (44th Amendment) Act 1978 – an Act of Parliament intended to increase the protections for preventive detention in the Constitution.

The promulgation of the *National Security Act in 1980* and its successive amendments that lessened individual protections during the 1980s despite mounting evidence of its abuses confirmed the complacency of the legislature and executive in favouring heavy handed approaches to governance and state security[127]. Given the constitutional constraints of article 22(4-7), Much could be changed by ordinary legislative avenues, but this depends on the political dimension of preventive detention, which while retaining similarities to the discourse of the Constituent Assembly, is also weighed down by 60 years of simplistic justifying narratives that have obscured complex social and political problems. Civil unrest, war, subversive political groups, and now jihadist terrorism, to name merely a few, have served as sufficient justification for the invocation of the extra-ordinary powers that the Constituent Assembly was loath to accept under more tumultuous circumstances[128].

---

[126] http://www.hrdc.net/sahrdc/hrfeatures/HRF188.htm#_ftnref6
[127] ibid
[128] ibid

(Forty-eighth Amendment) Act, 1984, Fifty-ninth Amendment) Bill, 1988, (Sixty-third Amendment) Act, 1990, (Sixty-fourth Amendment) Act, 1990, (Sixty-seventh Amendment) Act, 1990, (Sixty-eighth Amendment) Act, 1991 and the Violation of personal liberty in the state of Punjab.

T*errorists and Disruptive Activities (Prevention) Act (TADA) of 1985* (amended 1987), another crime of the government in the guise of national security came into being where a suspect could be detained for up to three months without charge, and up to three months more with the permission of a special judge. Under TADA, tens of thousands of politically motivated detentions, acts of torture, and other human rights violations were committed against Muslims, Sikhs, Dalits (so-called untouchables), trade union activists, and political opponents in the late 1980s and early 1990s. In the face of mounting opposition to the act, India's government acknowledged these abuses and consequently let TADA lapse in 1995. In the name of security so many innocent people are rounded up, taking the example of Punjab Mass burial case[129] as to what happened when TADA law was implemented, mass killing of innocent people, security forces having special powers to rape, molest, torture, murder, and what happened at the end when the TADA was repealed, the conviction rate was just 1.8%. With these examples we can understand that security issues cannot be improved by giving special powers to security personnel who violate the personal liberties of the individuals.

Conclusion –

Constitution (Fiftieth Amendment) Act, 1984 or Article 33

By article 33 of the Constitution, Parliament is empowered to enact laws determining to what extent any of the rights conferred by Part III of the Constitution shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

It is proposed to amend article 33 so as to bring within its ambit-

(i) The members of the Forces charged with the protection of property belonging to, or in the charge or possession of, the State; or

(ii) Persons employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence; or

(iii) Persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation.

Experience has revealed that the need for ensuring proper discharge of their duties and the maintenance of discipline among them is of paramount importance in the national interest

CHAPTER – 3

I. INTRODUCTION

".....Ten years ago, women gathered in Beijing and took a giant step forward. As a result, the world recognized explicitly that gender equality is critical to the development and peace of every nation.....I would urge the entire international community to remember that promoting gender equality is not only women's responsibility -- it is the responsibility of all of us."

- Kofi Annan[130]

Human Rights follow a simple logic that is, all are born free and they have some natural, basic and non-derogable rights which form the foundation for human life. But while the logic seems so simple in practice implementation of it is a herculean task. A glaring example of this herculean task is the failure to remove gender based discrimination completely from the society. Fight for the 'Gender Equality' has been carried on since ages but still women remains a group suffering from the gravest form of institutional deprivation.

Since ages scholars and activists raised their voice for Women Empowerment. In 1792 Mary Wollstone Craft published *'A Vindication of the Rights of Women'* arguing that it is not charity that is needed for women in the world, but justice. The struggle for women's empowerment forced England to reform laws governing marriage. France had to recognize women's right to divorce. China had to allow the women to hold office. For a very long time many prominent countries in the world denied women political rights.[131] New Zealand in 1893 became the first country to extend voting rights to women.[132] It's only in the year 1936 USSR Constitution resolved that there would be no discrimination between male and female on the basis of sex. The struggle for her existence was of great concern then and still it is, since; a lot still remains due to her.

Gender justice has become a much talked about phenomena in most of the civil society forums. It has a direct bearing on cultural and religious aspects of a country. It also has a huge impact in setting up social norms and bringing idiosyncrasy in the society. The concept has a variety of meanings. In terms

---

[130] http://www.un.org/News/Press/docs/2005/sgsm9738.doc.htm

[131] In Bradwell v. State of Illinois[131], Justice Bradley of the United States Supreme Court said:
"The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for *"Many of the occupations of civil life.....The paramount destiny and mission women are to fulfil the noble and benign offices of wife and mother. This is the law of the creator."*

[132] Sonia K Das, "Women Empowerment and Law: A Conceptual Overview", Cochin University Law Review, 2004, Jan-Dec, Vol. 28 (1&4), Pg 25-63

of economy it means sharing the proportionate benefit to the contribution made in the economy; whereas, in political science it is concerned with the constitutional practices and processes of democratic values. In the area of law, the concept of Gender Justice advocates for equal rights between men and women. Basically it is a study of ways in which women come in experience with law. Though the law is not the only mode of ensuring gender justice, still the authoritarian nature of it creates a huge impact on the development of the phenomena. Keeping this role of law in mind the visionaries of the UN charter mandated UN to work for equal rights of men and women.[133]

Need for Gender Justice

While deliberating upon Gender issues one very important question arises here i.e. what is the need for Gender Justice? A brief research on the condition of women in the present world would give a fair ground for the dire need of gender justice both at the national and international level. According to a report by New Internationalist 'Women – A World Report'[134], if the services provided free by a housewife had been purchased in the market at the market rate it would have cost $ 145,000 a year that is, the unpaid work done by the female in an industrialized country would have reached nearly 25-40 per cent of the GNP; If this is the situation in USA imagine the situation in a country like India where management of home is mandatory for women irrespective of her other obligations. In 1985 women's wages were consistently lower than men's, ranging from 73 per cent in the countries of northern Europe to less than 50 per cent in Japan and Korea. Precisely, for these reasons only according to one estimate, of the 1.4 billion absolute poor in the world, 70 per cent are women.[135]

Coming to India, situation is as bad as it is elsewhere, in fact in India in certain areas being a woman is a crime and huge burden for parents. In spite of customary and culturally prevailed oppression of women the Constitution of India has proved to be a 'Human Rights Document'. Drafted around the same time as the Universal Declaration of Human Rights (1948), the Indian Constitution was an answer to the consistent violation of civil, political, social and economic rights under the colonial regime. The most important feature of the Indian Constitution is its commitment to protect the oppressed groups in the society and this covered the commitment to ameliorate the battered position of women too.

---

[133] UN charter, Preamble, Para 2

[134] Cited from Dr. Justice Jitendra N. Bhatt, 'Gender Justice: Human Rights Perspective Triumph or Turmoil: Victor of Vanquisher?', SCC (Journal Section) 2006, March, 3-14

[135] Subhash Chandra Singh, "Gender Justice in India: The Myths and Realities", Indian Socio-Legal Journal, Vol. 29 (2003), Pg 99-108

Though the Indian Constitution gave utmost protection to the Indian women but it never thought of having a mechanism which can ensure greater presence of women in the decision making bodies. The inadequate political participation of women jeopardized the position of women in the society for a very long time. The shifting notion of the Human Rights from 'Protection to Empowerment' forced the policy makers to change their stand and take proactive measures to meet gender justice. This portion of the paper is an attempt to find out the protection mechanism under the Constitution of India and its subsequent development through amendments in order to confirm with the shift in the notion of Human Rights.

II. GENDER JUSTICE UNDER THE INDIAN CONSTITUTION

The Indian constitution came into force in the year 1950, much later than many other constitutions of leading democracies. However in terms of gender rights it was far ahead of its times.[136] Numerous provisions of the Indian constitution not only protect the gender equality but also facilitate promotion of comparatively weaker side. The makers of the Indian constitution were very realistic in their vision and that explains the various safeguards built by them in the Constitution for the protection of marginalized and vulnerable groups in the society.

2.1 Gender Equality under the India Constitution

Starting from the Preamble of the Constitution, which gives a fair idea of 'what India aspires to achieve' through its Constitution; it specifically talks about equality as one of the basic virtues of the Constitution.[137] To achieve the ideals included in the Preamble, a number of provisions have been incorporated in the later parts of the Constitution. The most important provisions are under Directive Principles of the State Policy (hereinafter referred as DPSP) and Fundamental Rights. While DPSP is

---

[136] Under American Constitution initially women were not given the voting rights it's only in the year 1920 women were allowed to vote after a lot of struggle and persuasion.

[137] *The Constitution of India, Preamble says, "WE, THE PEOPLE OF INDIA,.....to secure to all its citizens:.....EQUALITY of status and of opportunity.....IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OVERSELVES THIS CONSTITUTION"*

not judicially enforceable, for the violation of Fundamental Rights there is specific redressal mechanism.[138]

Fundamental Rights guaranteed to women under the Indian Constitution

The promotion of gender equality in India's Constitution begins with **Article 14,** which provides that "*[t]he State shall not deny to any person equality before the law and the equal protection of the laws within the territory of India.*"[139] Invoking this provision on many occasions the Supreme Court gave historical judgements which strengthened the Gender Justice Jurisprudence in India. In *Ms C.B. Muthamma v UOI,*[140] the court struck down a sex discriminating rules where it was provided that an IFS woman shall have to obtain written permission for marriage; after marriage, she may at any time be asked to resign if it is felt that her marital obligations are hampering her efficiency professionally. Also no married woman shall be entitled to be appointed to the Indian Foreign Service. Holding these rules as being in defiance of Art 14, 16 and 21 Justice Krishna Iyer said, *that*

> "Our founding faith enshrined in Art 14 and 16 should have been tragically ignored vis-à-vis half of India's humanity, viz; our women, is a sad reflection on the distance between the constitution in the book and the law in action."

In future also such discriminatory rules were struck down by the court on a number of occasions.[141] Even after many judgments the government again resorted to the framing of discriminative rules in the year 2003. *In Air India Cabin Crew Association v. Yeshawinee Merchant and Others,*[142] the Court struck down a rule which provided that women who have joined before 1997 will have retirement age of 50 years with an option of joining ground duty and stay in the service till 58 years. For the same category, who have joined after 1997 they had the advantage of being in the service till 58 years in either of the duties.

---

[138] Refer Art. 32 and 226 of the Indian Constitution, dealing with the jurisdiction of the Supreme Court and the High Court respectively to issue writs for the violation of Fundamental Rights.

[139] Constitution of India, P. M. Bakshi, (2007), Universal Law Publishing Co.

[140] AIR 1979 SC 1868

[141] In the case of *AIR India v. Nergesh Mirza (AIR 1981 SC 1829)*, the Supreme Court held that retirement of air hostesses on first pregnancy is unconstitutional being violative of Article 14 and 16 of the Constitution.
Again in the case of *Madhu Kishwar v. State of Bihar (AIR 1996 SC 1864)*, the Supreme Court held the Chotanagpur Tenancy Act, 1908 was challenged on the ground that the Act denied the right to succession to ST women to the tenancy lands and hence, it violates Article 14, 15 and 21 of the Constitution, similarly in the case of Bombay Labour Union v. International Franchise (AIR 1996 SC 942) Court reacted promptly for the equal rights of women.

[142] (2003) 6 SCC 277

Similarly under **Art 15** which enumerates the principle of non-discrimination on the ground of religion, race, caste, sex, place of birth or any of them; empower the state under **clause (3)** to make special provisions for women which is considered as an exception to the general mandate of 15(1) & (2).[143] Many a times landmark judgements were given to achieve justice for women who stands on an unequal footing with their other female counterparts under the purview of personal laws.[144] The wide interpretations of some of the fundamental rights are available under other Articles. **Art 16** of the Constitution on many occasions the court emphasised on the need for economic development of women.[145] In one such case the Apex Court held that,

> "It is unthinkable to note, in the existing circumstances where a husband can prevent a wife from being independent economically. Such a requirement, therefore, violates the constitutional safeguards and thereby obstructed the efforts to attain women's equality." [146]

Interpreting **Art 21** of the Indian Constitution, which deals with fundamental 'Right to Life' the Court has laid down several norms for the 'protection' and 'empowerment' of women, through cases under the broad ambit of 'Right to Life', under **Art 19** of the Constitution the Court has taken the steps of upholding the dignity of women be it the case of sexual harassment at the work place[147] or protecting the privacy rights of a woman of easy virtue.[148] Under **Art 23** on several occasions the court has adopted a very strict approach to punish those responsible for trafficking and exploitation.[149]

---

[143] In *Thota Sesharathamma v. Thota Manikyamma ((1991) 4 SCC 312)*, Section 14 of the Hindu succession Act, 1956 converting the women's limited ownership of property into full ownership has been found in pursuance of Art. 15(3)

[144] During late 70s in the case of Bai Tahira v. Ali Hassan Fissalli[144] Justice Krishna Iyer held that Art. 15(3) of the Constitution protects Section 125 of the CrPC as an instrument to help women in distress case away by Divorce. The scheme has a social purpose.

[145] Art. 16 deals with employment and it prohibits discrimination on the various grounds but courts while reading this Art with Art 15(3) upheld the special provisions made in favour of women. In *Government of A.P. V. P.B. Vijay Kumar (AIR 1995 SC 1648)*, the legislation made by the state of Andhra Pradesh providing 30% reservation of seats for women in local bodies and in educational institutions was held valid by the Supreme Court and it was states that the power under 15(3) is so wide which would cover the power to make the special legal provisions for women in respect of employment or education

[146] Mayadevi v. State of Maharashtra [1986] (I) SCR 743

[147] Art. 19 talks about 'Right to Life and Liberty', in *Vishakha v. State of Rajasthan (AIR 1997 SC 3011)*, the Court observed, "*Each incident of sexual harassment of women at workplace results in violation of fundamental rights of Gender Equality and the Right to Life and Liberty*"

[148] Expanding the scope of protection in *Maharashtra v. Madhukar Narayan Mandikar (AIR 1991 SC 207)*, the Supreme Court has held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes.

[149] Art 23 protects against exploitation and prohibits trafficking in human being. In pursuant to this Art the AP Government enacted the Devadasis (Prohibition of Dedication) Act, 1988

The biggest advantage of these rights is that they are in application since the time the Constitution of India came into force. The Constitution makers gave complete regard to Mahatma Gandhi's ideology who, while emphasising upon women empowerment said,

> *"I am uncompromising in the matter of women's rights. In my opinion, she should labour under no legal difficulty not suffered by men. They (women) can no longer be treated as dolls or slaves without the social body remaining in a condition of social paralysis...that is why I take every occasion to protest in no uncertain terms that so long as women in India remains ever so little suppressed or do not have the same rights (as men) India will not make real progress.",* which clearly shows that there was adequate sensitivity towards protection of not so equal section of the society.[150]

Directive Principles of State Policy

Directive Principles of State Policy (hereinafter referred as DPSP) under part four of the Constitution, are the guiding principles for the law makers. As far as Gender Justice is concerned DPSP has its own advantages as it emphasizes upon the need to protect the less privileged section of the society. Under DPSP there are certain provisions which are very relevant for the purpose of assessing gender justice as ensured under the Constitution. **Art 39 (a) & (d)** mandates equal right to have adequate means of livelihood and equal wages for the equal work, respectively.[151] To give effect to 39(d), the parliament has enacted *Equal Remuneration Act, 1976* which provides for payment of equal remuneration to men and women workers and prevents discrimination on the ground of sex. Upholding the mandate of these provisions, on many occasions the Apex Court and the High Courts have furthered the claim of women.[152] Courts have maintained that not only the remunerations but while bestowing the benefits there should be no discrimination. Interpreting the nature of this provision Justice Chinnapa Reddy in *Randhir singh v. UOI*[153] observed,

> *"Although the principle of equal pay for equal work is not expressly declared by our Constitution as a fundamental right, it is certainly a Constitutional goal capable of attainment through Constitutional remedies, by enforcement of Constitutional right under Art, 14, 16 and 39(c) of the Constitution."*

---

[150] Cited from, Subhash Chandra Singh, "Gender Justice in India: the Myths and Realities", Indian Socio Legal Journal, Vol. 29 (1&2) (2003) Pg 99-108

[151] Worldwide there is a huge gap between men and women while payment of labour is concerned. They perform two third of the world's work but receive only 10% of the total earning of the world. Refer 'Introduction' to know the economic contribution of women and non recognition of the same.

[152] In 1987 in Mackinnon v. Audrey D'Costa, a lady stenographer was given less salary compared to the male stenographer. The Bombay High court decided in her favour and held the practice unconstitutional.

[153] AIR 1982 SC 879

In a case decided in the year 1996,[154] allowing the appeal of daughter as to her eligibility to obtain regularisation of government quarter of her retiring father as he has no son the Court said,

> *There is no occasion for the railways to be regulating the choice in favour of the son who does not exist or who is not able to maintain his parents. The railway ministry's circular in this regard is wholly unfair, gender biased and unreasonable and liable to be struck down……'*

Further, **Art 42** of the Constitution imposes an obligation on the state to make provisions for securing just and humane conditions of work and for maternity relief. The court has interpreted this provision quite liberally considering the object of gender justice.[155] In one such case upholding the claim of non regular female workers for maternity relief the Court stated,

> *"Since Art 42 specifically speaks of just and humane conditions of work, maternity relief, the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Art 42 which though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of."* [156]

Art 46 also talks about promoting with special care the interest and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation. The most important Article which could have been the spearhead of revolutionary reforms for gender justice is Uniform Civil Code.

Uniform Civil Code

Art 44 deals with Uniform Civil Code. While commenting on the nature of this provision Justice Kuldip Singh in *Sarla Mudgal v. UOI [1995] 3 SCC 635* held that,

---

[154] The Hindustan Times, (New Delhi, February 1, 1996), Cited from I. Sobha, "Judicial Activism for Gender Equality", Indian Socio Legal Journal, Vol. 33, (1&2) (2007)

[155] In the case of Ram Bahadur Thakur (P) Ltd v. chief Inspector of plantations, [2 Lab LJ 20, Ker, 1989] It was held that the actual period of 160 days cannot be insisted upon as a pre-condition for claiming maternity benefit. Court maintained that the half days worked by the female would also be included while the benefit is claimed.

[156] Municipal Corporation of Delhi v. Female Worker's (Muster Roll)

'Art 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Art 25 guarantees religious freedom whereas Art 44 seeks to divest religion from social relations and personal law. Marriage, succession and like matters of a secular character, cannot be brought within the guarantee enshrined under Art. 25, 26 and 27 of the Constitution.'

The issue of uniform civil code had been very controversial since from a very beginning of Constitution formation. Art 35 of the draft constitution which became Art 44 of the Indian constitution faced strong opposition from Muslim community.[157] They considered it as a direct attack on their religious freedom. Even in the history no ruler ever meddled with personal laws. However, amidst huge protest Shri K. M. Munshi said that, *"If the personal law of inheritance, succession, etc. is considered as a part of religion, the equality of women can never be achieved."* 'Art 44 also did not make any difference in the status of women as it remained a dead letter'.[158] Shortly, after Shah Bano Case a number of cases sprung in emphasising the need for Uniform Civil Code[159] But unfortunately despite of judiciary's commendable ruling[160] meagre change has been brought into the system.

A fair analysis of Constitutional provisions makes it very apparent that our constitution makers and interpreters were sensitive enough to include and uphold the protective approach towards women respectively but the most important thing missing in all this was 'Empowerment of Women through direct participation in the policy making'. This created for the way for the demand of Constitutional amendments at the later stage.

---

[157] CAD 2, Vol III, Pg 538-542

[158] Mohd. Ahmed Khan v. Shah Bano Begum, 1985 SCC (Cri) 245, *per*, Justice Y. V. Chandrachud

[159] In Jorden Diengdeh v. S.S. Chopra, AIR 1985 SC 935, the Supreme Court observed emphasized on the totally unsatisfactory state of affairs consequent to the lack of Uniform Civil Code. In the case of sarla Mudgal v UOI, 1995 SCC (Cri) 569, while urging the parliament to make law Justice Kuldip Singh said, "One wonders how long will it take for the government of the day to implement the mandate of the framers of the Constitution under Art. 44 of the Constitution of India.....There is no justification whatsoever in delaying indefinitely the introduction of a uniform personal law in the country."

[160] Refer Shahbano's case (1985 AIR 945) and subsequent enactment of Muslim Women's (Protection of Rights on Divorce) Act, 1986 to exempt Muslim male from the liability under section 125 of CrPC.

III.AMENDMENTS IN THE CONSTITUTION AND GENDER JUSTICE

The Indian Constitution had been very progressive from the very inception. Specifically in the case of women it proved to be the defender of equal rights and in some cases affirmative action have also been taken for the well being of women. Equality, equal right, and equal opportunity everything was provided within the reach of women. Unlike other so called developed countries India had provided for equality in treatment irrespective of gender. In spite of the fact that Indian women was always kept in protection and there were ample attempts to ameliorate her situation there was something lacking in the whole scheme. Women were always protected but never empowered; and this provided a ground for Constitutional amendments and the subsequent political participation by women.

Empowerment of women in India

Many a time, development issues and empowerment issues are used interchangeably but this is misleading. While development includes the beneficiaries of a program, empowerment guarantees the direct participation in the policy making. Considering the share in the policy making, it is highly required that women get an opportunity to raise their voice in the political sphere of the country. Politics is a potential avenue for dealing with many Gender Discriminative issues. Women have to be in politics of power both to participate as women and to change the very nature of that power which serves to preclude women.[161] And this precisely is what empowerment refers to *i.e.* opportunity to participate in the decision making and coming up with gender sensitive legislations.

The concept of empowerment has its roots in women's movement. During 1970's it crossed the national boundaries. The International use of 'Empowerment' with respect to Gender Justice probably started with the work of Sen and Grown- *'Development, Crisis and Alternative Visions: Third world Women's Perspective (1985).* ' This work was prepared for the Nairobi Conference at the end of the UN Decade for Women in 1985.[162] In the ordinary sense empowerment means the capability and freedom to develop in a manner one wants. It means creating equal opportunity for those who have been deprived

---

[161] Nelly P. Stromquist, "The Theoretical and Practical Bases for Empowerment" in Digmurti Bhaskar Rao and Digmurti Pushplatha (Eds), International Encyclopedia of Women, Vol. II (1st ed., 1998), p.13; cited from Das, Sonia K., 'Women Empowerment and Law: A Conceptual Overview', Cochin University Law Review, 2004, Jan-Dec, Vol. 28 (1&4), 25-63

[162] Nelly P. Stromquist, "The Theoretical and Practical Bases for Empowerment" in Digmurti Bhaskar Rao and Digmurti Pushplatha (Eds), International Encyclopedia of Women, Vol. II (1st ed., 1998), p.13; cited from Das, Sonia K., 'Women Empowerment and Law: A Conceptual Overview', Cochin University Law Review, 2004, Jan-Dec, Vol. 28 (1&4), 25-63

of it. Empowerment creates decision making power. It teaches lesson to be self reliant by sharing means and resources.

Bystydzienski defines empowerment as

'a process by which oppressed persons gain some control over their lives by taking part with others in development of activities and structures that allow people increased involvement in matters which affect then directly.[163]

In a nutshell 'Empowerment' should have at least three basic things –

- Equality of right between men and women should be followed as fundamental principle.
- Women must be regarded as beneficiaries of change. Investing In women empowerment would ultimately contribute in the growth of the nation.
- Both men and women should be having equal opportunities to develop.

The age old struggle took pace with the constitution of Committee on the Status of Women in India (hereinafter referred as CSWI) in the year 1971. It was established 'to examine the constitutional, legal and administrative provisions that have a bearing on the social status of women, their education and employment' and was constituted and reported on the status of women. This commission deliberated with several women groups to examine the situation of the women. At one place the Committee report said,

> *Every legal measure designed to translate the constitutional norms of equality or special protection into it has had to face tremendous resistance from the legislative and other elites....though women do not lack the three recognized dimensions of inequality: inequality of class (economic situation), status (social position) and political power.....the majority of women are still very far from enjoying the rights and opportunities guaranteed to them by the constitution.*[164]

The Committee found that the lack of participation in politics is a matter of concern and this resulted in recommending 30% reservation for women in the local bodies. Though the recommendation of the CSWI was made after a lot of deliberation, two members of the committee, Vina Mazumdar and

[163] J.M. Bystydzienski (ed.), 'Women Transforming Politics: Worldwide Strategies For Empowerment', (Bloomington, IN: Indiana University Press 1992), Pg 3

[164] Towards Equality, Report of the Committee on the status of Women in India, 1974, pg 303

Lotika Sarkar had certain reservations regarding it as they wanted to extend this to parliament as well.[165]

From the 1980s onwards, issues raised by women in development (WID) and, lately, gender and development (GAD) approaches have acquired greater importance, both for government and civil societies. While WID argues for economic empowerment, GAD is a term used for the development and empowerment of women in all spheres, be it Political, Economic, Social or any other field.[166] Again in the year 1988 the similar demand of reservation (33%) came from the National Perspective Plan for Women chaired by the then Prime Minister Rajiv Gandhi.[167] In spite of all these recommendations at the national level or state level there was no mechanism for the adequate representation of women, though in some states measures were adopted in this regard. But later developments[168] forced the government to come up with a comprehensive policy on women's participation in decision making.

At the International level the later developments include the UN initiatives, which included the three UN Decades for women conferences also held at Mexico (1975), Nairobi (1985) and Beijing (1995); and the CEDAW. All these had great impact on the status of women in India. Following the Nairobi Conference, Government of India announced 'The Perspective Plan for Women' and it outlined policy directions and new administrative structure for the development of women. At Beijing, the government of India announced 33% reservation for women in the local government.

Also before Beijing conference at the International level the UN Commission on the Status of Women in its 24th report recommended for the member states to establish National Commissions or equivalents to look into the matters relating to women and recommend accordingly in various spheres of life.[169] Pursuant to this the National Commission for Women, set up in the year 1991 consistently demanded for the reservation at various levels of the government. At the national level in the year 1991 the state of Karnataka already provided reservation for women in local governance. All these developments in a way created a pressure on the government and paved the way for 73rd and 74th amendment to the Indian Constitution.

---

165 India's Living constitution, Ideas, Practice, Controversies, ed. by Zoya Hasan et al., PERMANENT BLACK (2004), pg 410
166 Karlekar, Malvika, 'A Note on the Empowerment of Women', Indian Journal of Gender Studies, 11:2 (2004) Pg 145-155
167 http://www.allacademic.com//meta/p_mla_apa_research_citation/0/4/1/2/6/pages41263/p41263-3.php
168 In the state of Karnataka 25% and in Maharashtra 30% reservation was provided in the year 1983 and 1990 respectively
169 Mukulita Vijaywargiya, "National Commission for Women: Legal Framework", Journal of Indian Law Institute, Vol 34, (1992)

73rd and 74th Amendment: Reservation for Women in Local Bodies

The legislative origins of the 73rd and 74th amendment can be traced back to the year 1989 when the 64th amendment was presented. The bill was defeated in the Rajya Sabha. The main criticism leveled against the motion was less discretion given to the state in the formation of local governance. The bill was reintroduced in the parliament again in the year 1991. Consequent to this, the Constitution (73rd Amendment) Act, 1992 (commonly referred to as the Panchayati Raj Act) went into effect on April 24, 1993, and the Constitution (74th Amendment) Act, 1992 (the Nagarpalika Act), on June 1, 1993.

The 73rd and 74th Amendments to the Indian Constitution, enacted by the Indian Parliament in 1992, included provisions for the reservation of seats for women in the three-tiered Panchayati Raj system (Local Government Councils in rural areas) and in Urban Municipal Councils. The relevant provisions added by these two amendments read as follows,

Part IX – The Panchayats[170]

243D (2) Not less than one-third of the total number of seats reserved under clause (1)[171] shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Caste and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a panchayat.

(4) The offices of the chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a state may, by law, provide:
Provided further not less than one-third of the total number of offices of Chairpersons in the Panchayat at each level shall be reserved for women.

Part IXA – The Municipalities[172]

---

[170] Inserted by 73rd amendment Act, 1992
[171] Under clause 1 seats are reserved for SC and ST
[172] Inserted by 74th amendment Act, 1992

243T (2) Not less than one-third of the total number of seats reserved under clause (1)[173] shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Caste and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a panchayat.

(4) The offices of the chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a state may, by law, provide.

Going by the provisions as provided under part IX and IXA of the Constitution of India it is quite apparent that the Constitution is committed towards ensuring gender justice and the first step in this regard was 73rd and 74th amendment Acts. Provisions under the Acts not only ensure reservation for women but also provide sub categories for the protection of SCs/STs and this negates the possibility of inclusion of only elite class of women.

The 73rd and 74th amendment to the Indian Constitution, 1992 has served as a major breakthrough towards ensuring women's equal access and increased participation in local governments. The provisions therein, as discussed above provided greater opportunities and challenges to women in India. The only question remains here is how effective these amendments are in ensuring gender justice as a matter of human rights.

Women's Reservation Bill -

81st Amendment Bill

Throughout the 1950s and 1960s especially, talk of reserving seats for women was limited and almost non-existent. During independence Mahatma Gandhi immensely contributed towards participation of

[173] Deals with the reservation of seats for SC and ST

women in politics women was encouraged to take participation in public affairs. Later the struggle for women's right diverted from political rights to social, economic and other rights. Coming to the Panchayati raj, it started in India as early as in the year 1959 following the recommendations of Balwant Rai Mehta Committee which was formed in the year 1957. Even at that stage considering the importance of participation of women in politics the Balwant Rai Mehta Committee suggested the inclusion of 2 women co-opts. With this recommendation in a sense there was a formal declaration of women's acceptance in politics. Following this, the Maharashtra Zilha Parishad (district body) & Panchayat Act of 1961, provided for nomination of one or two women to each of the three bodies, in case no women were elected. After this initial start after a long time in the year 1991 the state of Karnataka for the first time officially provided for the reservation of seats for women.

During 1970s only the struggle for political participation by women took an independent existence. However, when the actual discussion on the reservation of seats was brought to the table by All India Panchayat Parishad's sixth National Conference many women's groups were not very positive about it. While many were of the view that 30% reservation for women at the local level is accepted some felt that the same quota should be maintained at all level of the government.[174] With the 73rd and 74th amendment a whole new era was open for women. Till now there were attempts for economic and social empowerment but the 73rd and 74th amendments introduced a new right in the form of 33% reservation in the local governance, which forms the foundation for other rights.

While the negotiations for the 73rd and 74th amendment bills were in progress some members in civil societies and government committees advocated for extending reservations in the parliament also.[175] After 73rd and 74th amendments extending the reservation benefit for parliament in the form of 81st Constitutional Amendment Bill[176] was the next obvious step. The whole issue relates back to the year 1996 when the United Front Government included the goal to seek Constitutional amendment facilitating reservation for women in parliament in its Common Minimum Program.

The motion for consideration was mooted on May 16, 1997, but it lapsed, following the dissolution of the 11th Lok Sabha. The Bill was again brought before the House during the 12th Lok Sabha on July 14,

---

[174] Kumud Sharma, "Power and Representation: Reservation for Women in India." Pg.4 cited from 'Seat Reservation for Women in Local Panchayats: An Analysis of Power', refer http://www.newpaltz.edu/asianstudies/nycas/2004%20UG%20Ryan%20Prize%20Alexandra%20Geertz.pdf

[175] *Supra* note 16

[176] The bill suggested 1/3rd seats for women in Lok Sabha and in state legislative assembly which shall be applicable in case of seats reserved for SC and ST.

1998, as the Constitution (84th Amendment) Bill, 1998. Again it did not reach to the consideration stage and therefore lapsed, following the dissolution of 12th Lok Sabha. Then, the Constitution (Amendment) Bill, 1999, now popularly known as Women Reservation Bill was introduced on December 23, 1999. On December 22nd, 2000, it was once again shelved. In the budget session of 2003, during NDA government again it was presented but amidst the huge protest house was dissolved and discussion was discontinued.[177]

Strong opposition to the Women Reservation Bill

One interesting question arises here is why the same political parties who came forward for the reservation of seats for women in local governments are opposing extending the same to the parliament. Every party seems to have its own logic for not favouring Women's Reservation Bill. As obvious the most severe critiques of this amendment are male as they would be the immediate affected parties. 33% reservation for women means 33% less seats for male contestants. The parties known for supporting the Dalit rights opposed it on the ground that it would facilitate participation of only elite women as there is no separate quota for backward classes. Interestingly, these parties were ready for the amendment if the proposed percentage of reservation is reduced. This clearly shows the double standards parties have while discussing on a serious issue. Still political parties in India are not gender sensitive. Amidst all these hue and cry there were some alternate models suggested.

Reservation of seats within political parties

A proposal emphasising on fielding at least 30% women candidates instead of reserving the constituencies for women was being advocated by a senior feminist activist scholar Madhu Kishwar.[178] This also was not viable owing to the manipulations within the political parties and there were higher chances that under this model some parties would field only elite candidates.

Duel Constituencies[179]

---

[177] Medha Nanivadekar, 'Feminist Fundamentalism over Women's Reservation Bill: Lessons from the Quota Debate in India', paper presented at "When Women Gain, So Does the World," IWPR's Eighth International Women's Policy Research Conference, June 2005

[178] Madhu Kishwar, 'Women and Politics: Beyond Quotas', Economic and Political Weekly, 26 Oct, 1997

[179] *Supra* note 25

On 15th July 2003, Manohar Joshi, then speaker of the Lok Sabha convened a four-party meeting to discuss a proposal of dual-member constituencies. The proposal suggested the current 543 Lok Sabha Constituencies to be grouped into 181 groups each. In each election, one of these lots would be converted into dual-member constituencies, each electing two members of parliament – a male and a female.

Though the proposal was logically sound as it provided participation of women without affecting the rights of male candidates but again this would have been serving as a dominance of male member over female member had it been adopted. Again the women would have been put under the guidance and surveillance of patriarchal society where women is protected but not empowered. But, in spite of all the efforts and compromises made by the government; the then ruling NDA Government could not succeed in passing the Bill.

All these difficulties eventually only strengthen the struggle for representation.[180] In national policies also, recommendations regarding reservation has been made.[181] Civil societies continuously spoke in favour of Women Reservation Bill.[182] Now coming to the present status of the Bill, recently the Women's Reservation Bill was presented in the parliament[183] as (One Hundred and Eight Amendment) Bill, 2008 and in spite of having strong backing from the eminent parties like BJP, Congress[184] no results in favour of women came out.

Part IVA (Art 51A)

The Constitution (forty-second) Amendment Act, 1976, introduced a complete new concept of duties in the form of Art. 51A. Till now the citizen of India were enjoying protection of fundamental

---

[180] A country wide survey conducted by the Centre for the Study of Developing societies in 1996 showed that 79% women supported active women's participation in politics and 75% supported reservation in legislatures. Likewise an all India survey on the status of Muslim women conducted in 2000 reveals that 78% women endorse reservations. *Refer Supra* note 16

[181] In the National Policy for the Empowerment of Women (2001) it was reiterated that women's equality in power sharing and active participation in decision making including decision making in political process at all levels will be ensured for the achievement of the goals of empowerment. All measures will be taken to guarantee women equal access to and full participation in decision making bodies at every level, including the legislative, executive, judicial, corporate, statutory bodies, as also the advisory commission.....Women friendly personnel policies will also be drawn up to encourage women to participate effectively in the developmental process.

[182] Ten organisations (All India Democratic Women's Association (AIDWA), All India Women's Conference (AIWC), Centre for Women's Development Studies (CWDS), Forum for Child Care and Creche Services (FORCES), Guild of Service, Joint Women's Programme (JWP), Muslim Women's Forum (MWF), National Federation of Indian Women (NFIW), SAMA, and Young Women's Christian Association of India (YWCA)) working on women rights,

[183] http://timesofindia.indiatimes.com/India/Womens_reservation_bill_tabled_in_RS_amid_uproar/articleshow/3014625.cms

[184] http://timesofindia.indiatimes.com/articleshow/2714159.cms

rights but by the virtue of this amendment they are charged with some obligations, though not binding in nature. As far as the gender justice is concerned clause (e) of 51A obligates the citizens of India *to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional diversities; to renounce practices derogatory to the dignity of women.*

Thus with the inclusion of this provision once again it becomes apparent that the Constitution of India is committed towards protecting the rights and dignity of women but again the entire set up becomes dubious when we talk about empowerment.

IV. CONSTITUTIONAL AMENDMENTS: MEANS TO PROVIDE AND PRESERVE HUMAN RIGHTS

Be it human rights per se or the rights of women the object is development and a society cannot develop unless until it provides ample opportunities for its women to develop. There is a very close link between Human Rights Jurisprudence as evolved by various instruments and Gender Justice. Both are interconnected as Gender Justice is part of a wider ambit known as Human rights. When the amendments in the Constitution were brought in the Human Rights mandate was very much present at the back of law making minds. Before we dwell in the relation between Human Rights and Gender Justice, understanding Human Rights is important.

Human Rights at a Glance

If the history of Human Rights[185] is to be traced it would relate back to the ancient civilizations. Throughout much of history, people acquired rights and responsibilities through their membership in a group – a family, indigenous nation, religion, class, community, or state. Most societies have had traditions similar to the "golden rule" of "Do unto others as you would have them do unto you." The Hindu Vedas, the Babylonian Code of Hammurabi, the Bible, the Quran (Koran), and the Analects of Confucius are five of the oldest written sources which address questions of people's duties, rights, and responsibilities.[186]

As far as the modern concept of human rights is concerned, Magna Carta (1215), petition of rights (1628), the English Bill of Rights (1689), Act of Settlement (1700), the French Declaration on the Rights of Man and Citizen (1791), and the US Constitution and Bill of Rights (1789) are some of the early documents which collectively formed the threshold of future human rights jurisprudence. Yet, many of these documents did not consider certain categories of people under its ambit; this included women, people of colour, and members of certain social, economic, religious and political groups. The most recent document serving in the development of human rights jurisprudence is UDHR.

---

[185] The term human rights is addressed with various names for the Romans it was '*jus naturale*' for medieval Christians it was '*lex naturalis*', ancient Hindus termed it as '*rita*' and 'dharma'. *Refer* Bhatt D. K. 'Human Rights and Gender Issues – A Socio Legal Perspective'

[186] http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-history.htm

While appreciating UDHR it would be desirable to throw some light on the Institution which has been responsible for various conventions and declaration towards the promotion of human rights. With the formation of UN which has earned the stature of an international institution and commands a great respect from all parts of the world the entire understanding of human rights took a new direction. The issue which was largely concerned with the regional governments directly came on the international agenda. Since the day UN started working it came up with a number of instruments which ensure gender justice in various forms. Since India is a party to many of them the obligations as set out in these instruments also applies to India.

Gender Justice under International Human Rights Instruments -

UDHR 1948 (Universal Declaration of Human Rights)

UDHR is considered as a common standard of human rights and fundamental source of inspiration for national[187] and international laws for the protection and preservation of rights. This talks about equal protection of law.[188] UDHR revolves around the inherent dignity of human and need to protect the equal rights each human being enjoys.[189] This Human Rights epic prohibits discrimination on the ground of sex *inter alia.* Unlike other human rights documents UDHR talked about person and not men.[190] It specifically mentions that '*everyone has the right to take part in the government of his country, directly or through freely chosen representatives and equal access to public service in his country.*[191]

The Act also talks about '*equal pay for equal work*' and thus clearly prohibits the discriminative practices in determining the wages of male and female for the same work.[192] Thus under UDHR there is a clear mandate for equality in treatment. In Indian Constitution under Art 14 equality means equality among equals and since women has not been given equal opportunity since very long the reservation in local governments as provided by the Amendments, is not only justified but is a mandate of international instruments to which India is a party.

---

[187] In a number of Judgments the Supreme Court of India referred to the principles under UDHR eg. *Mohini Jain v. State of Kamataka* (1992) 3 SCC 666, *Unni Krishnan, J.P. & Ors v. State of A.P. & Ors* 1993 SCC (1)
[188] Refer Art. 2 and 7
[189] Preamble
[190] Art. 2
[191] Art. 21
[192] Art 23

The understanding of equality under UDHR read with Art 14 of the Constitution clearly provides the need and appreciation of reservation for women in local governments.

ICCPR, 1966 (UN Covenant on Civil and Political Rights)

The same mandate of dignity and equality is also included in ICCPR. Art 2 of the ICCPR is very important as it not only talks about the prohibition of discrimination on the ground of sex but also puts an obligation on states to take legislative steps for the protection of rights guaranteed under this Convention. The ICCPR provides right to self determination,[193] ensures equal rights of men and women,[194] and right to be recognised as person.[195] Though India has ratified the main convention it is yet to ratify the two optional protocols.

UN Convention on Economic, Social and Cultural Rights 1966

The convention talks about many rights. It includes the right to self determination which gives freedom to decide political status.[196] This freedom to political status is possible only when there is a fair chance to participate. In part II the convention provides that state parties are required to use their resources to the maximum benefit if its masses and there would be no discrimination between men and women while these benefits are conferred. Also women have equal right to participate in politics and this should be facilitated by legislations.[197] Art 10 of the Convention deals with the provisions of maternity benefits. It provides that mother is responsible for the care and development of child so she deserves special care too. This clearly validates the special protection given to women in India by way of Maternity Benefit Act, 1961.

CEDAW 1979 (Convention on the Elimination of All Forms of discrimination against Women)

CEDAW has been proved to be the UDHR of women's rights. To address most comprehensively women's equality with men and non-discrimination in the civil, political, economic, social and cultural fields, the General Assembly adopted, on 18-12-1979, an international human rights treaty,

---

193 Art 1
194 Art 3 and 26
195 Art 16
196 Art 1 of the Convention
197 Refer Art 2-4 of the Convention

Convention on the Elimination of All Forms of Discrimination against Women.[198] The optional protocol to this Convention entered into force in December 2000.

The spirit of this convention is rooted in the goals of the UN to reaffirm faith in fundamental human rights, in the dignity, and worth of the human person, in the equal rights of men and women. In its preamble, the Convention explicitly acknowledges that "extensive discrimination against women continues to exist", and emphasizes that such discrimination "violates the principles of equality of rights and respect for human dignity". The Convention gives positive affirmation to the principle of equality by requiring States parties to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

The conventions defines discrimination as *'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*[199] As far as political participation is concerned Art 7 of the Convention is very important which not only argues for voting rights but also for equal participation in the policy making by way of active participation.[200] Further Art 14 of the Convention urges states to give substantive opportunity to the rural women to participate in development planning at every level. This also to some extent is possible only through political participation as it directly affects policy making. Under Art 18 of the Convention state parties undertake to submit a report on legislative, administrative, judicial and other measures taken to further the mandate of this convention.

India has signed[201] and ratified the convention. The date of ratification is very important as in the same year 73rd and 74th Amendments came into force. India has not accepted the Convention in its entirety it has made reservations with respect to Art 5 (a), 16 (1), 16 (2) and Art 29 of the Convention. While Art 5 (a) of the Convention deals with bringing changes in policies in order to change cultural and

---

198 This Convention came into force in the year 1981

199 Art 1 of the Convention on the Elimination of Discrimination Against Women (hereinafter referred as CEDAW)

200 Art. 7 of the CEDAW reads,

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

201 India signed the Convention on July 30, 1980 and ratified the same on July 9, 1993

customary practices based on the superiority of either of the sexes on the other hand Art 16 (1) deal with marriage and family relations. By making reservation to these provisions India has maintained that while abiding by the mandate of these provisions India will not interfere in the personal matters of any community. This reservation directly hampers the demand of UCC as the customary practices of Muslim community will be challenged. Art 16 (2) deals with child marriage and compulsory registration of the same. India has made reservation to this on the ground of illiteracy, impracticality of this provision in its vast territory.

The argument of vast territory can be taken into consideration but registration of marriage will definitely improve the inheritance rights and also it the prohibition to child marriage is going to help India in policy matters. Since no one is interested in these issues except women no one raises voice and this make representation of women in politics mandatory. Also India became a signatory state to CEDAW in the year 1980 and ratified the same in 1993 there was a pressure, as created by the CEDAW provisions and procedural mechanism,[202] to come up with something substantive for women in India. This pressure resulted in 73rd and 74th Amendment.

In the light of the instruments presented above there are certain rights which can be taken as fundamental rights of either of the sexes, *i.e.* right to self determination, political participation, equal opportunity etc. Though the amendments have been introduced in the constitution but how far they have been successful is still a question to be examined.

[202] At least every four years, the States parties are expected to submit a national report to the Committee, indicating the measures they have adopted to give effect to the provisions of the Convention. During its annual session, the Committee members discuss these reports with the Government representatives and explore with them areas for further action by the specific country. The Committee also makes general recommendations to the States parties on matters concerning the elimination of discrimination against women.

V. EFFECTIVENESS OF CONSTITUTIONAL AMENDMENTS IN THE LIGHT OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

As far as the overall assessment of international obligations as set under various instruments is concerned, it emphasizes mainly upon, equality, right to self determination and participation in the decision making. In case of India since the very early stage when Constitution of India was formulated some of these principles were well recognised and a considerable protection was facilitated to the women in India.[203] Only one guarantee was not there i.e. political empowerment or in other words participation in decision making. Definitely women cannot remain second citizen till infinity and the patriarchal attitude has to stop at some place. Women need special protection.[204] Considering all this the 73rd and 74th amendment was enacted and well implemented but the moot question is whether they have contributed in the empowerment of women as mandated by the International Instruments or in other words whether these amendments have in any manner bettered the condition of India women.

In a recent study it is maintained that there are 27,82,293 elected representatives in Panchayats out of which 10,42,282 are women which constitute to 37.46 %. In states like Kerala, Gujarat, Maharashtra, Karnataka, Tamil Nadu and Madhya Pradesh, the number of women elected in panchayats is quite high.[205] In the year 2000 India had more than 500 district panchayats, around 5,100 block/ taluka panchayats and about 2,25,000 village panchayats, 90 Municipal Corporations, 1,500 Municipal Councils, and 1,800 Nagar Panchayats. All these bodies would jointly elect three million representatives and a considerable number of them would be women.[206] All these numbers show a quite high participation of women in politics but facts on a paper and in practice is not always same the actual test is in the context of a 'continuum of empowerment'.

For some, including women in purdah (veil) and low caste women, just attending the panchayat meetings is a big step forward. Others, including marginalized women, have taken their participation

---

[203] Refer chapter 2 for the Constitutional protection to women

[204] Muller v. Oregon (208 US 412), it was stated:
"The women's physical structure and the performance of maternal functions places her at a disadvantage for subsistence is obvious. History discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength and this control in various forms, with diminishing intensity, has continued to the present. Education was long denied to her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. She will still be where some legislation to protect her seems necessary to secure a real equality or right."

[205] "Women Representation and Empowerment in Panchayats," May 3, 2007; pib.nic.in

[206] R. Sooryamoorthy, and D. Renjini; "Political Participation of Women: The case of women councillors in Kerala, India," Journal of Third World Studies, Spring 2000, refer www.findarticles.com

much further to become women's' activists. The sheer numbers that have been elected (one million each term) provide visibility and participation for women in government.[207]

India's legislative framework is supported by an active and alert judiciary which has infused dynamism into safeguarding and upholding the constitutional and legal provisions, and has issued directives to the State from time to time to further safeguard and strengthen the rights of women. The judiciary in India on many occasions interpreted the constitutional provisions in such a manner as the maximum benefit could be given to the women. In a case including the issue of reserving a single seat under Art. 243D for women, belonging to SC/ST category was challenged before the Bombay High Court. While deciding on the matter the Court ruled,

> *".....after the seventy-third and seventy-fourth Constitutional amendments, the constitution of local bodies has been granted a constitutional protection and Article 243-D mandates that a seat be reserved for the SC and ST in every Panchayat and sub-article (4) of the said Article 243-D also directs that the offices of the chairpersons in the panchayat at the village or any other level shall be reserved for the SCs, the STs and women in such manner as the Legislature of a statute may, by law, provide. Therefore, the reservation in the local bodies like the Village Panchayat is not governed by Article 16(4), which speaks about the reservation in the public employment, but a separate constitutional power directs the reservation in such local bodies."* [208]

Apart from legislature in society also these amendments have given a big relief to the Indian women. There are several individual success stories.[209] But on certain occasions, picture is completely reverse where male members of the local government refused to cooperate with women leader.[210] In overall assessment, the effect of Constitutional Amendments on Gender Justice is mixed.

---

[207] http://action.web.ca/home/sap/india_resources.shtml?x=59207&AA_EX_Session=2099c2383109fedeadf32de96a842a95

[208] Vinayakrao Gangaramji Deshmukh v. P.C. Agrawal (AIR 1999 Bombay 142)

[209] *Rani Sathappan, the President of K.Rayavaram Gram Panchayat in Pudukkottai District, is in her second term. The Panchayat Council decided to bring the two opposing parties to a peaceful solution on a dispute over a temple. Rani took special interest and played a vital role in bringing about a settlement between those groups and, at last the temple 'Kumbabisekam' was performed successfully along with the festival celebrations.*
Jamrud Beevi, President of Devipattinam Village Panchayat of Aamanathapuram district, from a Muslim community has moved towards the public space. Devipattinam is a Hindu pilgrim center but is dominated by Muslim families and both lead a peaceful life in this village. Jamrud's concern was to keep her village protected in the days of communal and caste rivalry. She obtained a grant of As. 13 lakhs from the district administration and constructed a bridge around the deities and provided a sodium vapour light to the Agraharam and a bathroom complex. She also made efforts to keep the entire area neat and clean by removing encroachments. (G.Palanithurai, Pathfinders Series-2: Leadership Matters on Grassroots Governance, Gandhigram: Rajiv Gandhi Chair for Panchayati Raj Studies, 2004) refer http://www.siyanda.org/docs/vanishree_women_in_power.doc

[210] *The stubborn refusal by an elected representative (a caste Hindu -who "purchased" the Vice-President post for Rs.27, 000/-) to cooperate with the dalit woman President of Pottlupatti in Usilampatti taluk in Madurai district, has rendered the village Panchayat inactive. The Vice-President refuses to sign cheques; most of the work remains unfinished, creating widespread disappointment among the villagers against the President, S. Mani. Even the Council has passed a unanimous resolution cancelling cheque signing*

Still the situation has not changed much. In the year 1980 the total representation of women in the world parliament was assessed to be nearly 10%. India is not an exception to this low participation. In the year 1999 The Pioneer Weekly reported that in the 49 years history of Lok Sabha only 3 hour and 45 minutes have been spent on women issues except the time wasted on the discussion of the Women's Reservation Bill.[211] Human Development in South Asia Report 2000 shows Indian women's position in Parliament in South Asia as 8.7 per cent surprisingly Bangladesh is much ahead to India which stands at 12.4 per cent. In the year 1963 there were 7% women in the parliament which increased only by 1% in the year 1984. This means during 2 decades there was a meagre development of only 1%. The representation of women in the Lok Sabha has remained passive as it fluctuates between 2 to 8 per cent.[212] It reached a "high" of 8 % in 1984. This figure went up by a mere 0.2% in 2004; this is there despite the fact that all major national parties in recent years have declared through their manifestos that they would implement a 33% reservation for women in all legislatures.[213]

In a recent world report by World Economic forum as far as gender parity is concerned India ranks as low as 113th among 130 nations chosen for the study and interestingly comparatively a very small country Norway leads the chart.[214] Lately in the year 2008 a global think-tank placed India among the 20 countries, where the gender gap is widest, while the country is sixth in economic inequality between men and women.[215] The report also mentions that probably India has improved its overall ranking by one position from 114th last year, primarily due to improvement in better than average performance in political empowerment space.[216] The country is placed at 25th rank in terms of political empowerment, while it is ranked 116th and 128th in terms of educational attainment and health and survival, respectively.

On the contrary to this China which is considered as a close country and a black sheep when it comes to the protection of human rights, have improved greatly as far as the status of women is concerned. It

---

powers from the Vice-President who is said to have been waging a "proxy-war" against the illiterate Dalit President ever since she refused to obey his instructions and has refused to remain puppet. "He wants to recover the money he paid for the post", she says. The village committee auctioned it and he emerged successful. "But when the village failed to save me from a dalit, I demanded the money back", he says. The committee returned the money. (The Hindu, Nov, 26, 2002).

211 The Pioneer Weekly, 26th Sept. to 2 Oct. 1999, 7 Cited from Mishra, Preeti, 'Gender Justice Some Issues', AIR 2001, May, 149-154

212 Subhash Chandra Singh, "Gender Justice in India: The Myths and Realities", Indian Socio-Legal Journal, Vol. 29 (2003), Pg 99-108

213 "The Road Not Travelled," January 2002; www.indiatogether.org

214 Business standard Wednesday, Jan 21, 2009

215 Press Trust of India / New Delhi November 12, 2008, 17:27 IST

216 *Ibid.*,

has jumped 17 places to 57th rank this year in narrowing gender gaps in educational attainment, economic participation and political participation.[217] The Gender Gap Report of 2008 provided that in the year 2008 the total percent of women in the parliament was merely 0.10% which is definitely lower than the lowest.[218]

In spite of amendments to improve the condition of women still there participation in the politics is meagre. Women in India comprise 48% of the population[219] despite that the participation in the decision making has remained low. In the year 1952 the total percentage of women in the Lok Sabha was 4.4 and in the year it reached up to 9.02. Though it has doubled but still could not cover even the 10% limit. Similarly in the Rajya Sabha the total percentage of women in the year 1952 was 7.3 and by the year 1999 the increase was nearly negligible (8.2%).[220] The number of women in parliament never exceeded 15% of the total seats. Even in the national parties not even 1/4th is occupied by the women.[221] In the course of time instead of decrease there has been an increase in the gender gap. The sex ratio has shown a decrease of 13 points (from 946 in 1951 to 933 in 2001). As per 2001 census at all India level gender gap in the literacy rate is 21.6%. The female employment in central governments is restricted only to 7.53%.[222]

The observation presented above clearly provide that in spite of the 73rd and 74th amendment, which enabled a huge number of women to come out of the closed doors and raise their voice in the policy making, there has been very little progress. In some cases these progress is near to none. In spite of having a judiciary committed to the protection of women still there are some major constraints that prevent women from effective participation at the local level. Due to illiteracy and social constraints women members do not come for group meeting (Jutha charcha) and even if they come they are accompanied by their husbands who speak on their behalf, widely known as Sarpanch Pati. Also many women cast their vote only after receiving counsel. Family members decide whom to vote for.[223]

---

217 *Ibid.*,

218 http://www.weforum.org/pdf/gendergap/report2008.pdf

219 'A Handbook of Statistical Indicators on Indian Women 2007', published by Ministry of Women and Child Development, Government of India

220 http://www.indlaw.com/display.aspx?813975B5-F89C-4388-9B73-1B9959AA3230

221 *Ibid.*, (BJP 12.5%, Congress (I) 11.7%, JD 12.0%, CPI(M) 5.1%, CPI 11.1%)

222 *Supra* note 46

223 Bilkis Vissandjee, Shelly Abdool, Alisha Apale and Sophie Dupere, "Women's Political Participation in Rural India: Discerning Discrepancies Through a Gender Lens", Indian Journal of Gender studies, 13:3 (2006) Pg 425-450

Another major constraint in the women empowerment is attitudinal bias.[224] Women's decision making power is also restricted due to the nature of family eg. If it is a joint family independent decisions cannot be taken. Lack of orientation/ training, no proper knowledge of relevant laws, no prior experience about managing civic issues, proxy women (those who does not have their independent stand and act on instruction from the male members in the family), illiteracy, family responsibilities, restrictive social norms, lack of an enabling environment, violence, including family violence triggered by their new position all these to a large extent still hamper the opportunity of women to come out of doors. A few women have even lost their lives as a consequence of becoming active in local politics.[225]

Amidst negative responses women has received from the society at large, there have been some worthy recognition of these new political power given by the legislature to the women. Some organisations have taken step to recognise the worth of these amendments by way of encouraging women.[226] Certain social initiatives also boost their moral in one such initiative by Institute of social Sciences in Delhi (ISS) every year three women in panchayat are given the 'Outstanding Women Panchayat Leader Award', this is a cash award.[227]

Following the amendments and the performance of women in panchayats many have argued that women should be given more seats as they are less corrupt and they understand sensitive issues better than men. They understand the implication of policy liberalisation in favour of women and issues like health, food, education, hygiene can be dealt by them in a better manner.[228] The awareness created by the Constitutional Amendments has paved a way for international NGOs to come up with suggestion for the better protection of women.[229]

In overall assessment India finds a huge gap in terms of gender equality. In its first ever gender gap study; the World Economic Forum has ranked India a lowly 53 out of 58 countries selected for the

---

[224] In Dimple Singla v. UOI [(2002) 2 AISLJ 161], the Delhi High Court maintained that unless attitudes change, elimination of discrimination against women cannot be a achieved.

[225] *Supra* note 43

[226] Ashish Bose, "Empowerment of Women How and When?", Economic and Political Weekly, August 19, 2000

[227] In the year 1999 this award was given to the Sarpanch of changa village in Gujarat. A graduate in law, in spite of being blind she initiated various development programs in the village including water facility, schools for worker's children, hospital, family planning etc. same is the story of Sarpanch of Pipra (Madhya Pradesh) being a Dalit she was insulted by the community members but she went on fulfilling her duties as Sarpanch. Another award winner in the same year was Sarpanch of Kalva (Andhra Pradesh) who also got the 'UNDP Race Against Poverty' award in 1998.

[228] On the basis of CRRID experience (Centre for Research in Rural and Industrial Development) Rashpal Malhotra, the Director of CRRID says, women are less corrupt than men – they are god fearing and their traditional value system is more intact than that of men.

[229] Refer recommendations of Amnesty International for women as cited in Dr. Justice Jitendra N. Bhatt, 'Gender Justice: Human Rights Perspective Triumph or Turmoil: Victor of Vanquisher?', SCC (Journal Section) 2006, 21st March Pg 3-14

analysis (2007 ranking). The report titled 'The Women's Empowerment: Measuring the Global Gender Gap' measures the gap between women and men in five critical areas like economic participation, economic opportunity, political empowerment, access to education and access to reproductive health care.[230] All the mixed results clearly provide that though Indian constitution provides mechanism for upholding the mandate of human rights still there is a long way to go. A revised report in the year 2008 also did not show any breakthrough. But still, considering the fact that there is huge number of female participants at the local level and there are continuous attempts for the reservation of seats at the centre, there is hope for the Indian women to march forward.

CONCLUSION

With or without paper we will speak out
With or without shoes we will march
Our struggle is without borders,
So, take your sister by the hand
Our song will move hearts.
It's time for a change!"[231]

Women has always been active be it Telangana movement (1948-50), a militant share-croppers movement, Chipko movement (an environment measure), participation in the struggle for freedom women has performed her share of duties. Though she was spearhead to many programs and opposed to many ill ancient practices prevailing against women still she had to go through a lot of struggle in order to ensure adequate political participation. Gender justice in its complete sense still remains a dream. *'Indian women have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are the nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.'*[232] Discussing gender justice in a country like India would be a farce which witnesses 19,000 rapes, 7,500 dowry deaths and 3,65,00 molestation cases in a single year.[233] Participation of women in the decision

---

230 http://www.weforum.org/pdf/gendergap/report2007.pdf

231 Mythili Sivaraman, "The World March of Women – A Struggle Without Borders", 17 (25) Frontline 46 (2001); cited from Das, Sonia K., 'Women Empowerment and Law: A Conceptual Overview', Cochin University Law Review, 2004, Jan-Dec, Vol. 28 (1&4), 25-63

232 Madhu Kishwar V. State of Bihar, AIR 1996 SC 1864

233 Statistics of the year 2006 available on *http://www.indianofficer.com/forums/current-issues/5958-crime-against-women-india.html*

making be at home, workplace or community has never reached even 25% of the total women population in India.

The oppression of women in pre-independence era prompted the constitution makers to come up with revolutionary provisions in the form of fundamental rights and DPSP. Still these provisions were patriarchal as they strengthened the conservative thinking of protecting the women and keeping them out of the decision making process. But the situation changed with the enactment of 73rd and 74th Amendment Act. Both are no doubt a win-win situation for staunch advocates of gender justice as they provoked women to come out of inhibitions and stand for her rights, but the age long struggle does not stop here. In spite of the fact the statistics show that the position of women has not changed much.

If powers under local government are taken into consideration it is more in the nature of implementing the policies of the government and not taking complete independent decisions. The failure to extend the benefit of 73rd and 74th amendment at the central level proved to be fatal for the status of women in India. Though on paper amendments have been made but failure to educate masses and change in the attitudinal bias has to some extent defeated the whole purpose of Constitutional Amendments and vis-à-vis the mandate of International Human Rights Jurisprudence. The political participation as mandated by the CEDAW and various other international treaties and conventions is still a dream as in the national legislature the representation of women is near to non-existent.

Thus the Constitutional amendments recognised the right but did not equip the society and the masses with the tools to achieve the same. Considering the vision of Constitution the only thing which policy makers need is a strong political will to bring further reforms by bringing into existence Women's Reservation Bill and Civil Uniform Code. As far as the Civil Uniform Code is concerned none of the political parties would dare to venture into an area which has a direct relation with religion so change in the personal laws in the near future seems to be next to impossible but in case of Women's Reservation Bill forming a consensus would be comparatively easy. Once this Bill is brought into force a lot would change as the women would have a direct hand in the policy making at the highest order. This Bill would be nothing but an extension of the affirmative action as facilitated under 73rd and 74th amendment. Thus with the present amendments the journey towards gender justice as enumerated

under the international instruments and developed by the ever expanding concept of human rights has been initiated still a lot more is due to her.

CHAPTER-4

POLICY OF RESERVATION, CONSTITUTIONALS AMENDMENT AND HUMAN RIGHTS.

I. INTRODUCTION.

The caste system is a unique feature of the Indian society. Discrimination based on caste is also distinct in those terms.[234]. In India in ancient time there were four *Varnas* based on the division of labour but the time passed *Varnas* were divided into caste, sub-caste and even further sub-caste were further divided.[235] So from time immemorial the weaker sections have faced inequalities leasing to denial of social status and opportunities for their betterment. Therefore they lagged behind in every sphere-economic, social, political, cultural and educational.

Even the Constitutional framers had a vision and had analyzed the prevailing law, politics and social philosophy and accordingly drafted the Constitution. The provisions were made in the Constitution for the upliftment of the weaker sections of the society so that they may be brought at par with other members of the society. The provisions are aimed at upliftment of the weaker section of the society in order to resume equality of status and of opportunity. Reservation is one such method of affirmative action[236] (compensatory discrimination).[237]The benefits of compensatory discrimination extend to the Scheduled Castes, Scheduled Tribes and the Other Backward Classes. Preferences are extended mostly on a communal basis.[238]

The Constitution of India guarantees various safeguards for the protection of the interest of the weaker section of the society so as to give them a sense of security and to protect them against discrimination. The preamble of Constitution assures justice, social, political as well as equality of opportunity and status to every citizen of India. In pursuance of this assurance Articles 14, 15 and 16 have been enacted which embody certain fundamental rights guaranteed by the constitution.[239] Although injustice, discrimination and

---

[234] The word caste is not a word that is indigenous to India. It originates in the Portuguese word *casta* which means race, breed, race or lineage. However, during the 19th century, the term caste increasingly took on the connotations of the word race.

[235] Basically the caste system is composed of four main castes,or *varnas*: *Brahamans* (priests),*Kshatriyas* (warriors),*Vaishyas*(farmers)and *Shrudras*(labour and servants).This Four fold division has its origin in the Vedas, the ancient Hindu scriptures .Historically ,the *Dalits* were considered to out side this system.

[236] In United states ,Affirmative action is defined as a system of preferential treatment for minorities and woman which attempts to compensate them for being denied opportunities of advancement due to past and present discrimination .(Here compensatory discrimination is used in place of affirmative action).

[237] The compensatory discrimination in India may be through reservation ,access to valued resources such as seats in legislative bodies ,higher education and employment .Secondly, policies extending services such as scholarships ,healthcare ,legal aid etc

[238] Marc Galanter , "Law and Society in Modern India" (1989), at 186.

[239] Justice S.M.Raina, "Reservation with Justice" *Central India Quarterly*, Vol. 3 (1), at 1.

inequality are social phenomenon, their nature and extent differ from society to society. At the same time there have been constant efforts to fight these problems.

Equality is a basic feature of Constitution of India and any treatment of equals unequally or unequals as equals will be violation of basic structure of Constitution of India. Art 14 read along with Art 15 and 16 embody facets of magnified grandeur of equality and it is one of the magnificent corner stones of Indian democracy.[240]The three articles together form part of the same Constitutional code of guarantee of equality and supplement each other.[241]The court has a duty to uphold the equality clause in the Constitution and if that is not done, the whole edifice of the Constitution system shall collapse. The above articles empower to make positive discrimination in favour of disadvantaged, particularly in the case of Scheduled Castes and Scheduled tribes.[242] Protective Discrimination is a contour to bring about equality for SC/STs.

Across the span of different historical junctures, the parliament has passed constitutional amends to respond to the different social issues that have been of concern of people. The amendment to the preamble, the fundamental rights and the directive principle ever the past 60 years indicate the changing conveyors between Constitutional amendments and Human Rights (with reference to reservation).[243] Even recently in 2005, the 93rd constitutional amendment was passed which added clause (5) to Article 15 thus enabling the state to provide reservation in a new grab for other backward classes. The Supreme Court agreed with the parliament by upholding the validity of the amendment in *Ashoka Kumar Thankur v. Union of India.* [244]

The utility of this portion of the project is to understand, the Concept and Purpose of Reservation and to examine the viability of Constitutional Amendments from the touchstone of Human Rights and to see whether they have been in tune with the aspiration of the people

---

[240] *Indra Sawhey v. Union of India* ,1992 supp(3) SCC 217.

[241] *Govt Branch Press v.D.R.Bellapa*,(1979) 1 SCC 477

[242] *State of U.P v. Dina Nabi Sukhla* AIR 1997 SC 1095.

[243] The Central Government has developed an administrative mechanism for regulating, monitoring and implementing the reservation policy. The main institutions involved are the Department of Personal and Training (DoPT), the National Commission for SCs and STs, the Committee of Parliament on Welfare of SCs and STs, the Ministry of Social Justice and Empowerment, and the Ministry of Tribal Affairs.

[244] MANU/SC/1397/2008.

II. AN OVERVIEW OF RESERVATIONS

Estimated to be over 2500 years old, the caste system has undergone many transformations, from the ancient *varna* system to the contemporary *jati* system.[245] The *varna* system divided the population initially into four and later into five mutually exclusive, endogamous, hereditary and occupation specific groups: the *Brahmins, Kshatriyas, Vaisyas, Sudras* and *Ati- Sudras.* The last two comprised all castes doing menial jobs with the latter being considered "untouchables", in that even their presence was considered polluting and thus was to be avoided.[246]The three higher varnas are often referred to as "caste Hindus" (upper caste Hindus) or as "twice born", since (the men of) these castes enter an initiation ceremony (the second birth) and are allowed to wear the sacred thread.[247] Together, the upper castes constitute 17-18 percent of the population. The Ati-Sudras are roughly 16 percent of the population. Numerically, the largest varna is Sudra, constituting nearly half of the population. [248]

In the Indian context, reservations were introduced during the last decades of the 19th century at a time when the subcontinent could be broadly divided according to two main forms of governance – British India and the 600 princely states Some of these princely states were progressive and eager to modernise through the promotion of education and industry; and by maintaining unity among their own people. Mysore in south India[249] and Baroda and Kolhapur in western India took considerable interest in the awakening and advancement of the minorities and deprived sections of society. [250]And for the British the caste system had been a fascination since their arrival in India.[251] Earlier the object of British government was to divide and rule and it was adopted to redress the communal in-equalities in representation in public service[252]. The

---

245 Unfortunately, these are translated into a single English term, the caste system, which does not enable us to distinguish between these manifestations

246 The Ati-Sudras were considered untouchables because almost the entire range of social interaction with them was to be avoided by other castes. However, the manner in which jatis interact with each other used to be according to rather complex rules of social interaction, wherein certain interactions were permitted with some castes and others weren't.

247 The framers of constitution were determined to eradicate the scourge of untouchability. With this in view, Art, 17 abolishes untouchability and Art 25(2) (b) provides for opening of Hindu temples to Harijans .To promote their educational and economic interest ,Art 15 (4) and 16 provide for reservation of seats for them in educational institution and in government services.

248 Ashwini Deshpande, "Affirmative Action in India and the United States" *World Development Report 2006* ,at 1

249 In the princely state of Mysore the Tamil Brahmins monopolised all the jobs. Kannadiga brahmins had a very small share in public services. The maharaja of Mysore was well advised by his ministers and the resident and some reforms were introduced with a view to giving a larger share to the Kannadiga brahmins, vokkalligas and lingayats beside the untouchable castes and the Muslims. Reservations were thus introduced in 1918 in favour of a number of castes and communities that had little share in the administration.

250 Bhagwan Das , "Moments in a History of Reservations " ,*Economic and Political Weekly* (October 28, 2000) at 3831.

251 British Coming from a society that was divided by class, the British attempted to equate the caste system to the class system. The general classification is by classes, the detailed one by castes. The former represents the external, the latter the internal view of the social organization. The difficulty with definitions such as this is that class is based on political and economic factors, caste is not.

252 The untouchables – or the depressed classes as they were then called – had joined the presidency armies and fought battles under the command of British officers. They had contributed a great deal towards the creation of the British empire. In the army, untouchable soldiers got their first opportunity to learn to read and write and were also exposed to new ideas.

British government never adopted the policy of reservation as a measure of upliftment of the oppressed or to help the socially and educationally backward classes but simply to divide the nation and weaken it. [253] The victims of entrenched discrimination and backwardness comprise the present Scheduled Caste (SC), Scheduled Tribes (ST) and Other Backward Classes (OBC). These groups are eligible for benefits and protection as provided under Constitution, which enable them to be on par with the rest of the society.[254]

A) SCHEDULED CASTES.

The Schedule Caste are not, strictly specking, a racial, linguistic or religious minority. They are part and parcel of the Hindu society. Being at the bottom of the caste hierarchy, the former untouchables not only are poorer, they continue to be targets of discrimination, oppression, violence and exclusion. Thus, the affirmative action program in India is targeted at these jatis, designed both to bring these groups into the mainstream and also to compensate them for centuries of discrimination. The names of these jatis are listed in a government schedule and thus in official literature these castes are referred to as Scheduled Castes, or simply as SCs. Mahatma Gandhi referred to them as Harijans, literally, as people of (close to) God, but some view this as a patronizing term. Most prefer to use the original Sanskrit, but now Marathi term Dalit, meaning the oppressed, which is seen as a term of pride.[255] They constitute nearly 15 per cent of the Indian Population. They usually engage themselves in the so-called dirty jobs like tanning and skinning of hides, manufacture of leather goods, sweeping of streets ,scavenging,etc. Even amongst the Harijans, there are high and low at the lowest rung of the ladder being the bhangi.[256]

B) SCHEDULED TRIBES.

The Scheduled Tribes, also known as aborigines, are those backward sections of the Indian population who still observe their tribal ways, their own peculiar cultural norms. These communities are often distinct from the Hindu religious fold. They are the *Adivasis*, (literally, original inhabitants) who have origins that precede the Aryans and even the Dravidians of the South. Many have lifestyles and

---

[253] Sukhdev Khanna ,*Reservation and its implication* , (Jain Law Agency Chandigarh -1994) at 1.

[254] The Constitution of India nowhere defines SC/ST nor lays down any criteria for it. However ,under articles 341 and 342 the President of India from time to time has provided by Constitutional (Scheduled Castes) and (Scheduled Tribes)Order ,lists of such caste and tribes .In these orders there are lists of SC/ST of different states and union territories .Later on Parliament ,by law, include more groups in the schedule.

[255] Since the early 20th century, several terms have been used to describe the same group of people. The earliest and still most widely known terms are "untouchables" and "outcastes." Gandhi, because of the unfavorable connotation of "untouchable," dubbed them "harijans" (children of God). From the 1930s, they have also been known collectively as "scheduled castes," after the schedules appended to laws affecting their status. In the 1970s, they came to call themselves "Dalits" (the oppressed) .

[256] M P Jain, *Indian Constitutional Law.* (Wadhwa and Company Nagapur New Delhi. -2007) at 1399.

religious practices that are distinct from any of the known religions in India and languages distinct from the official languages of India and their dialects. Most live on the margins of existence, excluded from the mainstream development process. These tribes are also targets of affirmative action, similarly notified in a government schedule and hence referred to as Scheduled Tribes or STs. [257] These people are divided into three distinct zones – North, Eastern, Central and Southern. The three main characteristics of these people are their primitive way of living, nomadic habits, love for drink and dance and habitation in remote and inaccessible areas.[258]They constitute nearly 7.5 per cent of the country's population.[259]

C) OTHER BACKWARD CLASSES.

The term' Other Backward Classes' has not been defined in the Constitution. [260]Previous to the enactment of the Constitution, the backward classes were know as 'Depressed Classes'.[261] This term had its origin in the princely state of Mysore in 1885 where all communities to the exclusion of Brahmins were defined as backward communities. But the vexatious issue of which groups are OBCs has persisted in India since the Constitution came into force of and has perplexed the Indian judicial system since 1950.Historically, the term was evolved in South India . The task of identifying the Other Backward Classes is a complex issue due to the fact the Constitution has neither defined them nor identified any method of identifying them unlike the Scheduled Caste and scheduled Tribes.[262]

The first Backward Class Commission headed by Kaka Kalelkar ,which came to be know as the Kaka Kalelkar Commission was appointed in January ,1953 by President, to assess the situation of the socially and educationally backward class. The report was accepted as far as Scheduled Castes and Scheduled Tribes were concerned. The recommendations for OBC's were rejected. Later The Mandal Commission, as the Second Backward Classes Commission headed by B.P.Mandal was established to assess the situation of socially and educationally backward. On the basis of their survey, the population of Other Backward Class was estimated to be 52% of the total population of India. This estimate has been deemed to be faulty.

---

[257] *Supra note* (13) Ashwini Deshpande, at 3.

[258] FIRST REPORT OF THE COMMISSIONER FOR SCHEDULED CASTES AND SCHEDULED TRIBES, 3, 11(1952).

[259] *Supra note* (20) M P Jain at 1399.

[260] Dr B R Ambedkar felt that there was no ambiguity and stated that the Draft Constitution clearly give rise to the interpretation that backward community was a community which was backward in the eyes of the local government .(VII Constitutional Assembly Debates 669-692 (1950)).

[261] The term 'Other Backward Classes ' was perhaps first used in 1928 when the Govemment of Bombay established a Committee to identify backward classes and recommended special provisions for their advancement. The report of the committee, headed by Mr .O.H.B Starte classified backward classes into three categories-depressed classes, aboriginal and hill tribes and other backward classes.

[262] The National Commission for Backward Classes Act ,1993 defines "backward classes" to mean such backward classes of citizen other than the Scheduled Caste and Scheduled Tribes as may be specified by Central Government in the list.

In addition, accepting the recommendations of the Commission would have meant that over 70% of the population would be entitled to benefits –this is not economically feasible for any government to carry out. This finding of the Commission was not translated as it violated the law laid down by Supreme Court in *Balaji* that no more than 50% of the seats could be reserved .Hence, the Commission evolved the figure of 27% as a recommended reservation for Other Backward Classes in addition to the reservation already in place for Scheduled Caste and Scheduled Tribes.[263]Further in *Indra Sawnhey v.Union of India*[264],popularly know as the 'Mandal case' examined the finding s of the Mandal Commission and the Constitutional validity of the same .[265]

[263] The reservation for Scheduled Caste is 15% and the Scheduled Tribes is 7.5 %
[264] 1992 Supp.(3) S.C.C .217
[265] Nirupama Pillai , "Who are the Other Backward Classes ?" ,*Student Bar Review* ,(Vol,19(1) 2007) at 39-40.

III. RECENT DEVELOPMENTS

The Constitution (Ninety- Third) Amendment Act, 2005 and the enactment of Act 5 of 2007 giving reservation to Other Backward Classes (OBCs), Scheduled Castes (SCs) and Scheduled Tribes (STs) created mixed reactions in the society.[266] This effectively reversed the 2005 August Supreme Court judgment. [267] Though the reservation in favour of SC and ST is not opposed by many, but the reservation of 27% in favour of Other Backward Classes/Socially and educationally backward classes was strongly opposed.[268]

In *Ashoka Kumar Thakur* v. *Union of India*[269] the Petitioners contended that the Ninety-Third Amendment is against the basic structure of the Constitution. It was argued that the Doctrine of Equality is adversely affected by giving a wide and untrammeled enabling power to the Union Legislature that may affect the rights of the non-OBCs, SCs and STs. Another contention raised by the petitioners' Counsel is that the Golden Triangle of Articles 14, 19 and 21 is not to be altered and the balance and structure of these constitutional provisions has been ousted by the Constitution (Ninety-Third Amendment) Act, 2005. Finally the Supreme Court of India on April 10 2008, on going through all the contention upheld the constitutional validity of 93rd amendment.

---

[266] The 93rd constitutional amendment added clause (5) to Article 15 -Nothing in this article or in Sub-clause (g) of Clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to the educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in Clause (1) of Article 30

[267] In *Inamdar vs. State of Maharashtra* on August 12, 2005, gave a clear verdict against reservation of seats for the Scheduled Castes, Scheduled Tribes and Other Backward Classes (SCs, STs, and OBCs) in the un-aided private and minority higher education institutions.

[268] Till 2005, there was no provision for reservation for the OBC in central government run educational institution, but different government has implemented reservations for OBC's to different degrees.

[269] MANU/SC/1397/2008.

IV. THE CONCEPT OF RESERVATION.

Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the Constitution. [270]

In other words reservation is one of the many kinds of affirmative actions.[271] Reservation in India Law is a term used describe policies whereby a portion of employment opportunities, or educational opportunities are set aside or reserved for a under represented group[272]. The claim that reservation in jobs and positions are justified because these communities have been excluded for centuries. It invokes the principle of compensatory justice and suggests that communities previously harmed must now be suitably recompensed.

Founders of modern India, who gave the policy of affirmative action decisive shape, had two approaches to social justice. One was the principle of "equality in law" whereby the State should not deny any person equality before the law. The second was the principle of "equality in fact" which gives the State an affirmative duty to remedy existing inequalities.[273] Opponents of affirmative action see a contradiction in the two whereas proponents of affirmative action argue that the two constitutional doctrines supplement rather than contradict each other. True equality can be achieved only if the state maintains an integrated society but adopts unequally beneficial measures to help those previously disadvantaged.

India's current affirmation action policy, otherwise known as the 'reservation policy', is operative in three main spheres, namely appointment and promotion in government services, admissions to public educational institutions, and seats in Central, State and local legislatures .[274]

---

[270] In *Ashoka Kumar Thakur* v. *Union of India* [MANU/SC/1397/2008].

[271] In the USA, affirmative action originated as a response to the civil rights movement against discrimination in educational and job opportunities for the non-whites in general and African Americans and women, in particular (Riccuci and Rosenbloom, 1989). The earliest use of the term"affirmative action" appeared in an Executive Order 100925 in the USA in 1961.

[272] "Reservation" normally implies a separate quota which is reserved for a special category of person and with a category ,a appointments to the reserved posts may be made in the order of merit.(*Govt of A.P.* v *P.B. Vijaykumar* ,AIR 1995 SC 1648).

[273] This latter principle gave shape to some directive principles of state policy, such as Article 46: "... the state shall promote with special care the educational and economic interests of the people, and in particular SC and STs and shall protect them from social injustice"....

[274] Gurpreet Mahajan , "The Problem (Reservation)" *Seminar* (May 2005)at -15.

i) RESERVATION OF SEATS IN EDUCATIONAL INSTITUTION.

The most important aspect of reservation policy relates to education. Article 15 (4) of the constitution empowers the State to make special provision for the educational advancement of SCs and STs.[275] In pursuing this provision, the State reserves places for SC and ST students in educational institutions, including all colleges run by the Central or State governments and all government-aided educational institutions. This is supported by a number of financial schemes, including scholarships, special hostels for SC and ST students, fee concessions, grants for books, and additional coaching.[276]

A) Article – 15(4): Clause 4 of article 15 in the foundation head of all provisions regarding compensatory discrimination for SCs / STs. This clause was added in the first amendment to the Constitution in 1951[277] after the SC judgment in the case of *Champakam Dorairajan. V. State of Madras*.[278]

B) Article 15(5): This clause was added in 93rd amendment in 2005 and allows the state to make special provisions for backward clauses or SC's or ST's or OBC's for admission in private educational institutions, aided or unaided.

C) Article 46: Enjoins the states to promote with care the educational and economic interests of the weaker sections, specially SC and STs.

D) Article – 335: Allows relaxation in qualifying marks for admission in educational institutes or promotions for SCs / STs.

ii) RESERVATION IN GOVERNMENT SERVICES.

The most important aspect of the reservation policy is that relating to government services.
In pursuing this provision, the Government made reservation for SCs and STs in proportion to their share of population.[279] There are also reservations in the promotion of employed persons. The government

---

[275] The evidence indicates that there has been a large increase in enrolment of SCs and STs in education institutions. In 1981, the proportions of SCs and STs among total graduates were estimated to be 3.3% and 0.8% respectively, far below their shares in total population. By the late 1990s however, these figures had risen to 7.8% and 2.7%. Nevertheless, these figures are still low, compared with the groups' shares of total population.

[276] Sukhadeo Thorat, "Affirmative Action –India", *Policy Brief Inter –Regional Inequality Facility*, (February 14) 2006 at 3-5.

[277] It says thus, "Nothing in this article or in article 29(2) shall prevent the state from making any provisions for the advancement of any socially and economically backward classes of citizens or for scheduled caste and scheduled tribes." This clause started the era of reservation in India.

[278] AIR 1951 SC 226

services included are the Government civil service, public sector undertakings, statutory and semi-Government bodies, and voluntary agencies which are under the control of the government or receiving grant-in-aid. At the central level, some services are however excluded from the reservation policy; these include, most prominently, defense and the judiciary. Reservation is accompanied by other provisions designed to increase the ability of SCs and STs to compete for government jobs. These include the relaxation of minimum age for entry into the service, relaxation in the minimum standard of suitability (subject to a required minimum qualification), the provision of pre-examination training, separate interviews for SCs and STs, and representation of people with SC or ST backgrounds on selection committees.[280]

A) **Article 16(4):** This clause allows the state to reserve vacancies in public service for any backward clauses of the state that are not adequately represented in the public services.

B) **Article 16(4A):** This allows the state to implement reservation in the matter of promotion in the public services.

C) **Article 16(4B) :** This allows the state to consider unfilled vacancies reserved for backward clauses as a separate clauses of vacancies not subject to a limit of 50% reservation.

iii) RESERVATION OF SEATS IN THE LEGISLATURE AND OTHERS.

The third most important sphere of the reservation policy relates to representation in Central and State legislatures. Under Articles 330, 332 and 334 of the Constitution, seats are reserved for SCs and STs in the Central legislature and State legislatures.[281] Similar reservations are provided in local level bodies at district, Taluk and village level. The reservation of seats is complemented by statutory provisions to enhance political participation by SCs and STs.[282]

A) **Article 330/332:** Allows reservation of seats for SC/ST in the parliament as well as in state legislatures.

---

[279] There has been a striking increase in the number of SC and ST government employees. The absolute number of SC employees increased from 218,000 in 1950 to 641,000 in 1991. The number of SC and ST employees has also increased significantly in public sector undertakings, nationalised banks, and public insurance companies. There are, however, variations between different type of jobs, and quotas are much closer to being met in lower categories of jobs.

[280] *Supra note* (41) Sukhadeo Thorat, at 3-5.

[281] As described in the previous section, seats are reserved for SCs and STs in Central and State legislatures in proportion to their shares of population, and these are mandatory in nature. Thus in 2004- 75 (13.8%) of the 543 seats in the *Lok Sabha* were reserved for SCs and 41 (7.6%) were reserved for STs. Of the total number of seats in the *Vidhan Sabha* (State legislative assembly), more than 2000 seats were reserved for SCs and STs.

[282] *Supra note* (41) Sukhadeo Thorat, at 3-5.

B) **Article 334:** Reservation of seats and special representation to cease after [sixty years][283]

C) **Article 40:** Provides reservation in 1/3 seats in Panchayats to SC/ST.

Reservation for admission in educational institutions or for public employment has been a matter of challenge in various litigations in Supreme Court as well as in the High Courts. Diverse opinions have been expressed in regard to the need for reservation. Though several grounds have been raised to oppose any form of reservation, few in independent India have voiced disagreement with the proposition that the disadvantaged sections of the population deserve and need "special help". But there has been considerable disagreement as to which category of disadvantaged sections deserve such help, about the form this help ought to take and about the efficacy and propriety of what the government has done in this regard. [284]

[283] Article 334 which initially provided reservation of seats in (House of People) and the Legislative Assemblies for ten years was amended after every ten years. The last amendment made to Article 334 of the Constitution was the Seventy –ninth Amendment Act, of 1999 and extended the reservation till 2010A.D.

[284] In *Ashoka Kumar Thakur v. Union of India* [MANU/SC/1397/2008].

V. PURPOSE OF RESERVATIONS

To provide social justice to the most marginalized and underprivileged is our duty of every state and their human right. Reservation will really help these marginalized people to lead successful lives, thus eliminating caste-based discrimination which is still widely prevalent in India especially in the rural areas .It should be noted that the reservation is intended to protect and promote interest of such sections to stabilize and strengthen the society. As already mention reservation is one form of affirmative action of different forms and may include a wide range of actions from formulation of anti-discrimination laws and access to social and public goods to special consideration in various spheres of social and institutional life.[285]

The constitution of India guarantees various safeguards for the protection of the interest of the weaker section of the society so as to give them a sense of security, to protect them against discrimination. So the constitution has laid down preferential treatment to backward classes. The Right to Equality enshrined in our Constitution is not merely a formal right or a vacuous declaration. The necessary ingredients of equality essentially involve equalization of unequals. Affirmative action though apparently discriminatory is calculated to produce equality on a broader basis. By eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and more powerful sections so that each member of the community whatever is his birth, occupation or social position may be, enjoys equal opportunity of using to the full, his natural endowments of physique, of character and of intelligence.

Reservation of seats in educational institution, employment and legislature is a continuation from colonial rule, and is intended to protect and promote the interest of groups which though that their interests would suffer under conditions of open competition. In the context of education, any measure that promotes the sharing of knowledge, information and ideas, and encourages and improves learning, among India's vastly diverse classes deserves encouragement. To cope with the modern world and its complexities and turbulent problems, education is a must and it cannot remain cloistered for the benefit of a privileged few. Reservations provide that extra advantage to those persons who, without such support, can forever only dream of university, education, without ever being able to realize it. Secondly, the fact that representative of scheduled castes and tribes Reservation in legislature is designed to empower scheduled castes and tribes by which they can work for their communities and constituencies and also open the doors which had remained shut historically.[286]

---

[285] *Supra note* (9) Gurpreet Mahajan , at 14.
[286] M .N.Srivinsa , "The Pangs of Change", *Frontline* Vol 14 No 16 Aug 9-12(1997).

The logic for continuing affirmative action for SC and STs is based on the following set of arguments:[287]

1. Historically they were denied the right to property, business (except some occupations considered as impure and polluting), education, and all civil, cultural and religious rights, except manual labour and service to castes above them.

2. This group has suffered from isolation, exclusion, neglect and underdevelopment due to their geographical and cultural isolation. In their case, exclusion can take several forms, including the denial of right to resources around which they live, and displacement induced by economic development. This is reflected in a lack of access to income earning assets, higher-quality employment and public services. They also experience resistance, violence and even atrocities in their attempts to secure human rights and lawful entitlements. The discrimination and exclusion experienced by these groups has resulted in severe deprivation and poverty.

3. Dalits continue to suffer from a "stigmatized ethnic identity" due to their untouchable past and there is corresponding social backwardness. Human RightsWatch (1999) amply demonstrates the various aspects of violence, exclusion and rejection that Dalits continue to face in contemporary India. There is evidence to suggest that this stigma can affect economic performance adversely, thus perpetuating caste based inequalities.

4. If equality of opportunity between castes is the objective, then affirmative action is needed to provide a level playing field to members of SC/ST communities.

5. Finally (arguably) social policy ought to compensate for the historical wrongs of a system that generated systematic disparity between caste groups and actively discriminated against certain groups.

6. Caste based discrimination in labor, land, capital and consumer goods markets (preventing SCs from entering, say, milk production and distribution) continue both in urban and rural areas. In labour markets this is manifested both as wage discrimination and job discrimination.

VI. ATTITUDE OF CONSTITUTIONA DRAFTERS TOWARDS RESERVATION.

[287] *Supra note* (5) Ashwini Deshpande, at -12.

On May 16, 1946, the British government released the Cabinet Mission Statement, a set of proposals to guide the framing of a new Indian constitution. By this time, the wheels for India's independence had already been set in motion. The Constituent Assembly was opposed to the policy of reservation of posts for the minorities with the exception of Anglo Indian Community .Congress party was committed to oppose the idea of providing any reservation for any community or group in public services .Congress was opposed to any attempt to continue the British policy of reservation on communal lines. Jawaharlal Nehru (1889-1964), India's first Prime Minister and dominant political figure sought to build a secular India free from caste discrimination. He was among the "many educated Hindus" opposed to the caste system as noted by Gandhi in his 1933 Harijan exchange with Ambedkar.[288]

In the constituent assembly, Dr, B.R.Ambedkar had underlined the need to promote social and economic equality in order to make democracy meaningful and workable .He said that the principles of liberty, equality, and fraternity from a union of trinity and one could not be divorced from the other, as that would defeat the very purpose of democracy .He observed: "Fraternity means of common brotherhood of all Indians – if Indians being one people. It is the principle which gives unity and solidarity to social life .It is a difficult thing to achieve". He cautioned: "In India there are castes .The castes are anti-national .In the first place because they bring about separation in social life. They are anti-national also because they generate jealousy and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation. Without fraternity can be a fact only when there is a nation .Without fraternity, equality and liberty will be no depper than coats of paint". [289]

From the outset, the Constituent Assembly laid out clearly its objectives and philosophy for the new constitution. Several of the framers' main goals, articulated in the "Objectives Resolution," included guarantees of equality, basic freedoms of expression, as well as "adequate safeguards...for minorities, backward and tribal areas, and depressed and other backward classes." These principles guided the delegates throughout the Constitution-making process.

The Assembly set up a special Advisory Committee to tackle minority rights issues. This committee was further divided into several subcommittees. The Subcommittee on Minorities focused on representation in

---

[288] Pt .Jawahar Lal Nehru moved a resolution in the Constituent Assembly on 13th December ,1946 in the form of policy ,a pledge ,a statement of policy ,and an introduction to the under lying Philosophy of the Indian Constitution clause 5 of the resolution reads as under: *"Wherein shall be guaranteed and secured to all the people of India Justice ,social, economic and political ,equality of status ,of opportunity ,and before the law, freedom of thought and expression ,belief, faith, worship ,vocation ,association and action subject to law and public morality." "Wherein adequate safe guards shall be provide for minorities backward and tribal areas and depressed and Other Backward Classes."*

[289] Constituent Assembly Debates ,Voll 979-980.

legislatures (joint versus separate electorates and weightings), reservation of seats for minorities in cabinets, reservation for minorities in the public services, and administrative machinery to ensure the protection of minority rights. After extensive research and debate, the Subcommittee on Minorities drafted a report of its findings for submission to the Advisory Committee. The latter supported most of the Subcommittee's recommendations.[290]

Sardar Patel who was the chairman of the sub-committees on minorities expressed strong opposition to any proposal for reservation in services for any community.[291]Patel was of the firm view that recruitment be made in services on the basis of merit alone any departure from merit would necessarily impair the Administrative efficiency. [292] Framers of the Constitution reversed the British Policy of communal representation in services which had weakened the unity of the country and impaired the efficiency of administration.[293] The drafting committee after taking into consideration the views of all the members decided to continue the policy of reservation only for the Backward Classes and not for any religion or caste. The word *'Backward'* before the word *"Classes"* was added by the drafting committee in the draft Constitution. (Article 10(3) of the draft Constitution which is Article 16(4)of the Constitution).

Shri B.R. Ambedkar while discussing the inter-relation of Article 16(1) with Article 16(4) explained that the purpose of Article 16(4) i.e. to provide adequate representation to the underrepresented Backward Classes and that reservation should be of a minority of posts. Ambedkar was clear and he visualised and stated that while making reservation it is to be kept in mind that a whole sale reservation does not completely destroy the guarantee of equality of opportunity contained in Article 16(1) of the Constitution of India. [294] Aart from Article 16, Article 330 to 342 were incorporated as special provisions for the benefit of SCs and STs .

The Constituent Assembly on 26th of November 1949 enacted and adopted the Constitution of India with a solemn resolve to constitute India in to Sovereign ,Socialist, Democratic ,Republic.

VII. CONSTITUTIONAL AMENDMENTS AND HUMAN RUGHTS.

---

290 Kamlesh Kumar Wadwha, *Minority Safeguards in India: Constitutional Provisions and Their Implementation* (New Delhi: Thomson Press (India) Limited, 1975)at 47-68.

291 Patel said , *"We are not aware of any other Constitution in which such a guarantee exists and on merits ,we consider as a genereal prorposition that any such guarantee would be a dangerous innovation.*

292 Patel happily declared, "The *Constitution of India, of free India, of a secular state will not hereafter be disfigured on communal basis.*

293 *Supra note* (18) Sukhdev Khanna ,at 2-6.

294 *Ibid*,.at 2-6

The Preamble of the Constitution ,the Fundamental Rights and the Directive Principles of State Policy contain the essence of human rights as has been enshrined in the Constitution .Human Rights are a creation of the will of the people as has clearly been embodied in the first line of the Preamble, " We ,the People of India...."Concerns keep changing which lead to different amendments .Across the span of different historical junctures, the parliament has passed constitutional amendments to respond to the different social issues that have been to the people. Human Rights are the Rights which are possessed by every being, irrespective of his or her nationality; race, religion, sex, and etc .Meanwhile they are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection.

A) FIRST CONSTITUTIONAL AMENDEMENT.

India obtained independence in 1947 and when Constitution came into force in 1950, the Constitution provided special clauses "for advancement of any socially and educationally backward classes of citizens or for the Scheduled castes and the Scheduled tribes". Across the span of different historical junctures, the parliament has passed constitutional amendments to respond to the different social issues that have been of concern to the people.

In 1951 Article 15(4) *which empowers the state to make special provisions for any socially and economically back ward class* was passed by the 1st amendment.[295] This clause was added after the SC judgment in the case of *Champakam Dorairajan* v. *State of Madras*[296].In this case the Supreme Court had struck down the Madras State communal order that had proportionality disturbed seats in education institution according to communities, on the ground of violating A.15(1).[297] Later based on the Article 15 (4), the reservation of seats for any backward class of citizen or for Scheduled Castes and Scheduled Tribes in Medical, Engineering and other Technological colleges has been upheld in innumerable cases .This provision is fountain head of all provisions regarding compensatory discrimination for SCs/STs.

The major difficulty raised by Article 15(4) is regarding the determination of who are 'socially and educationally backward classes.' It lays down no criteria to designate 'backward classes'; it leaves the matter to the state to specify backward classes, but the courts can go into the question whether the criteria used by

---

[295] Due to the difficulties created by *Champakam Dorairajan* decision in the way of helping backward classes by making discriminatory provisions in their favour, Art.15 (4) was added to the Constitution in 1951.

[296] AIR 1951 SC 226.

[297] Madras government issued an order by which all seats in Medical and Engineering Colleges were distributed among six communities in a fixed ratio and the candidates of various communities could compete only among themselves for admission and with candidates of other communities .This G.O , was Declared invalid because it classified students merely on the basis of 'caste' and 'religion' irrespective of their merit.

the state for the purpose are relevant or not. As regards the identification of "Scheduled Caste" and "Scheduled Tribes", reference is to be made to Articles 341 and 342. However under Article 340 contemplates appointment of a commission to investigate the condition of 'socially and educationally backward classes' and such others matters as may be referred to the commission by the President .The President has, in fact ,exercised his power under this provision twice in, 1953[298] and 1978.[299]

In the case of *Balaji* v *State of Mysore*[300], the validity of the Mysore Government order was challenged by the candidates who had secured more marks than those admitted under the order.[301]The court held that the sub-classification made by order between 'backward classes' and 'more back ward classes' was not justified under Article 15(4) . "Backwardness" as envisaged by Article 15 (4) must be both social and educational and nor either social or educational. Though caste may be a relevant factor but it cannot be the sole test for ascertaining whether a particular class is a backward or not. Poverty, occupation, place of habitation may all be relevant factors to be taken into consideration. Further, held that reservation cannot be more than 50%.

Indra Sawhney v.*Union of India*,[302] know as the Mandal Commission case ,is a very significant pronouncement of the Supreme Court on the question of Reservation of post for Backward classes .The Court has dealt with the question in a very exhaustive manner .On Aug, 13 ,1990, the V.P. Singh Government at the center issued an office memorandum accepting the Mandal Commission recommendation and announcing 27% reservation for the socially and educationally backward classes in vacancies in civil posts and services under the Government of India . Ultimately, the constitutional validity of the memorandum came to be questioned in the Supreme Court through several writ petitions. After referring to the previous decisions of the

---

298 In 1953, under the Chairmanship of shri Kakasaheb Kalkar then M.P. The First Backward classes Commission, 1955 (Kalekar Commission) was appointed to assess the situation of the socially and educationally backward class. The Commission came with some recommendation in 1955. The recommendation relating to SCs and STs were considered by Government and it did not find any merit in drawing a national list of OBC's and said that it would be left to the state government to drawn up their own OBC lists.

299 The Second Backward class Commission 1978 was headed by Bindeshwari Prasad Mandal, then M.P, to examine the desirability or other wise of making provision for the reservation of posts in favour of such backward classes of citizen that are no adequately represented in public services and posts concerned in connection with the affairs of the Union or of any state and to make such recommendation as they think proper. It used eleven indicators to ascertain economic and social backwardness and came to the conclusion that about 52% of the total population of India, belonging to 3,743 different castes and communities, was backward. Therefore, in its report submitted in 1980, it recommended 27% reservation for the OBCs in all government jobs and higher education institutions (except in those states where a higher percentage of reservation already prevailed) in addition to the prevailing 22.5% reservation for the SCs and STs, bringing the total to 49.5%. (Asha Gupta, "Affirmative action in higher education in India and the U.S.",*CSHE Research and occasional papers*, (University of California Berkerley). June 2006 at 10.)

300 AIR 1963 SC 649.

301 The Mysore Government issued an order under Article 15 (4) reserving seats in the Medical and Engineering Colleges in the State (Backward classes 20%, more Backward classes 20%,Scheduled caste and Tribes 18%.) Thus 68% of the seats of the seats were reserved and only 32% was made available to the merit pool.

302 AIR 1993 SC 447.

Supreme Court on Article 15 and 16, the Supreme Court of India upheld a 27% reservation for the OBCs, but subject to the exclusion of the "creamy layer" or "socially advanced persons/sections of the OBCs".

The majority held that that the maximum limit of reservation can not exceed 50 percent .Further held that reservation is confined to initial appointments and not to promotions. Meanwhile the court overruled the *Balaji case* in which it was held that the sub-classification between backward and more backward classes was unconstitutional .The court held the classification is necessary to help the more backward classes ,otherwise the advanced sections of backward classes might take all the benefits of reservation.

B) SIXTY -FIFTH CONSTITUTIONAL AMENDEMENT.

In the 1990s, the 65th amendment created the National Commission for Scheduled Castes and Scheduled Tribes which was later bifurcated into separate commissions for SCs and STs. During this period, the protection of Human Rights Act was enacted which provided for creation of National Human Rights Commission. This sixty-fifth Amendment enlarges the scope of Art 338 which deals with the constitutional safe guards of Schedule Caste and scheduled Tribes. Prior to this Amendment, Art, 338 provided for the appointment of a Special Officer for the Scheduled Caste and Scheduled Tribes to investigate all matters in relation to the safeguards provided for these section of population.

The Commission shall investigate all matters relating to the safeguards provided for the Scheduled Caste and Scheduled Tribes, and also inquire into specific complaints with respect to deprivation of any rights and safeguard to people. The Commission also makes recommendation as to measure to be taken by the various Governments for the effective implementation of these safeguards and other measures for the protection, welfare and socio economic development of the Scheduled Caste and Scheduled Tribes.

The Commission consists of a chairperson, vice-chairperson and five other members .The Commission makes report to the President and Governor of the concerned state and these report are placed before Parliament and State Legislature as to the action taken or proposed to be taken on the recommendations made by the Commission.

C) SEVENTY-SEVENTH CONSTITUTIONAL AMENDEMENT.

In *Gen, Manager, Southern Rly,* v,*Rangachari* [303] the Supreme Court by majority had held that Art 16(4) permitted reservation of post not only at the initial stage but also included promotion to selection post .Thus the Supreme Court has interpreted the term 'appointment' in 16 liberally as including initial appointments as well as promotions .This positions continued till the *Indra Sawhney* pronouncement.

In *Indra Sawhney* the Supreme Court interpreting Art 16 ruled that the word 'employment' would not include 'promotion'. The Court however permitted the existing rules in that behalf to operate for the period of five years from the date of the judgment and made the suggestion to enact suitable law. Thus the *Rangachari* and subsequent decisions were overruled.

Accordingly, in 1995 the 77th Amendment inserting Article 16(4A) to provide for reservation in promotions in any class or classes of post in services under the state in favour of the S.Cs and the S.Ts was added to Constitution. It may however be noted that Art 16 (4A) permits reservation in promotion post only for the members of Scheduled Caste and Scheduled Tribes but not for Other Backward Classes . This means that the position taken by the Supreme Court in *Indra Sawhney* still prevails as regards OBCs in respect of promotions of posts.

D) EIGHTY-FIRST CONSTITUTIONAL AMENDEMENT.

In 2000 the 81st Amendment inserting Article 16(4B) enabling the government to carry forward unfilled reserved vacancies in public services to the following year, and these vacancies are to be treated as distinct and separate from the current vacancies during any year and keep them beyond the 50 per cent ceiling on reserved posts fixed by the Supreme Court in *Indra Sawhney.* This means that the unfilled reserved vacancies are to be carried forward from year to year without any limit, and are to be filled separately from normal vacancies. The amendment does increase the employment opportunities for the SC, ST and OBC candidates.

E) EIGHTY-SECOND CONSTITUTIONAL AMENDEMENT.

In 2000, the 82nd Amendment which added a proviso to Article 335, as per, it becomes possible for the government to make any provisions in favour of SCs and STs for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services of post in connection with the affairs of the Union or of a State.

---

[303] AIR 1962 S C 36.

This amendment is intended to restore the relation in qualifying marks and standard of evaluation in job reservation and promotion to SCs and STs which had been set aside by the Supreme Courts judgment in 1996 that the relaxation in matters of the reservation was not permissible under Art, 16 (4) of the Constitution in view of the command contained in Art.335 of the Constitution. [304]

F) EIGHTY-FIFTH CONSTITUTIONAL AMENDEMENT.

The 85th Amendment Act was the amendment of Article 16(4A), this Amendment has substituted, in clause 4-A, for the words "in matters of promotion to any class" the words "in matters of promotion, with *consequential seniority*, to any class". This amendment aims at extending the benefit of reservation in favour of the SC ST .in matters of promotion with consequential seniority. In the case of Ajit Singh vs St*ate of Punjab II* [305] the Supreme Court, however, held that accelerated promotion did not imply accelerated seniority. The amendment, therefore, inserted the words, "in matters of promotion with consequential seniority" in the clause to provide that reservation is not ruled out in such cases. [306]

G) NINTY-THIRD CONSTITUTIONAL AMENDEMENT.

In 2005, the 93rd constitutional amendment was passed which added clause (5) to Article 15 thus enabling the state to provide reservation for OBC SCs and STs to their admission to the educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions . Later in 2008 the SC upheld the constitutional validity of 93rd amendment in *Ashoka Kumar Thakur v. Union of India.*[307]

---

[304] *S.Vinod Kumar* v *Union of India*, (AIR 1996).

[305] (1999)7SCC 209.

[306] Later petitioner challenged the constitutional validity of the 77th, 81st, and 85th amendments, in *M.Nagraj & Ors* v. *Union of India and Ors*(AIR 2007 SC 71.). The Constitutional bench in this case upheld the constitutional validity of Art 16(4A), 16(4B) and proviso to Art 335 and held that ,these amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained.

[307] In *Ashoka Kumar Thenkur v. Union of India.* The Supreme Court of India on April 10 2008, upheld the Government's move for initiating 27% OBC quotas in Government funded institutions. The Court has categorically reiterated its prior stand that "Creamy Layer" should be excluded from the ambit of reservation policy. The Supreme Court avoided answering the question whether reservations can be made in private institutions, stating that the question will be decided only as and when a law is made making reservations in private institutions. The verdict produced mixed reactions from supporting and opposing quarters.

Finally by the above Constitutional Amendments it is clear that, these Amendments are of major significance to give greater safeguards to the Scheduled Caste, Scheduled Tribes and Other Backward Classes. Further, these Amendments have strengthened the Human Rights of them, and are given new dimension.

VIII. CONCLUSION.

In the light of above discussion, we can come to the conclusion that there is integral relationship between what Parliament thinks and how Human Rights are interpreted. The object of vesting the Parliament with the constituent power of amending the Constitution was to enable it to meet the changing needs of society. Over a span of time due to Constitutional Amendments there has been a considerable increase in the share of SCs and STs in government employment and educational institutions. Reservations in the legislature have also provided a space for SCs and STs in the executive and the decision-making process. The formal reservation policy in the government sector and the informal affirmative action policy in the private sector have also contributed to an improvement in the human development of SCs and STs.

But during the course of the implementation of India's reservation policy, some problems have become apparent. First, its success has been uneven across sectors and departments. Generally speaking, participation of SCs and STs is close to their population shares in lower categories of jobs, but much lower than their shares in high-grade positions. Due to indirect resistance, the extension and spread of reservation policy to several government sectors has also been slow.Another issue is the demand by SCs and STs to extend formal affirmative action policy to private sector employment .It is estimated that more than 90 percent of SC and ST workers are employed in the private sector, and there is a danger that such workers lack protection against discrimination. However, this is currently under active consideration by the government. Finally, the fact that disparities in attainment persist to this day indicates that addressing social exclusion is often a far more difficult challenge than anti-poverty policy. Social and cultural sources of exclusion, including low self-esteem, stigma, discrimination and denial of citizenship, are rooted in the social structure and the institutions of caste and untouchability.

On the other hand it is clear that the Constitution do not permit the weaker section to remain weaker forever. The distinction between the Backward Classes (including SCs and STs) and non –backward classes must disappear sonner than later To continue the Reservation indefinitely ,neglecting implementation of the directive principles of the state policy is the surest way to keep the backward classes permanently

backward.. Reservation are like first aid, not a permanent cure to the massive problem of backwardness. The vested interest developed by politicians in perpetuating the caste system needs to be wiped out.

CHAPTER V

I. AN INTRODUCTION TO LAND REFORMS

Human rights are those minimal rights which every individual enjoys against the State or other public authority by virtue of his being a human[308]. These rights are superior to those created by human authorities and apply to all irrespective of any consideration whatsoever. One such human right is the right to property[309]. In India to begin with right to property was considered a fundamental right of every citizen. However within a few years of the functioning of the constitution the dichotomy between individual rights and that of the society was starkly exposed. Of the long list of dichotomies, one of the most controversial was and has been the outcome of attempts at land reforms initiated by Independent India, resulting in far reaching changes in the fundamental law of the land.

The paper shall first look at the social milieu that evolved over time to understand the context within which the calls for land reform crystallized. It shall attempt to draw an understanding as to why, given the social and economic context, there was a felt need for land reforms. In the second section it appraises various provisions of the constitution of India for the normative justification for viewing land reforms as a tool for social transformation. It finally moves on to evaluate the various constitutional amendments pertaining to land reforms and their impact on human rights of different sections of the society.

Jurisprudence of Right to Property

The reason why men enter into society is the preservation of their Property.

-John Locke

The notion of property is as instinctive in man as it is in animals. The seminal importance accorded to property including land in the annals of human history is well catalogued. So high has been its importance that it can be to a certain extent stated that human civilization has its roots in the recognition of the property rights; be communal property rights or individual property rights.

Property could be understood as right to possession, use or disposal of anything[310]. To Austin property denoted a right, which was indefinite in point of use, unrestricted in point of disposition and unlimited

---

[308] Basu, DD, *Human Rights in Constitutional Law*, II ed, Wadhwa and Company, 2005, at 8.

[309] Art 17 of the Universal Declaration of Human Rights and Art 1 of the Protocol 11 to the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[310] Hidayatullah, M, *Right to Property and The Indian Constitution*, Tagore Law Lectures, Calcutta University and Arnold Heinmann, 1983, at 11.

CHAPTER V

I. AN INTRODUCTION TO LAND REFORMS

Human rights are those minimal rights which every individual enjoys against the State or other public authority by virtue of his being a human[308]. These rights are superior to those created by human authorities and apply to all irrespective of any consideration whatsoever. One such human right is the right to property[309]. In India to begin with right to property was considered a fundamental right of every citizen. However within a few years of the functioning of the constitution the dichotomy between individual rights and that of the society was starkly exposed. Of the long list of dichotomies, one of the most controversial was and has been the outcome of attempts at land reforms initiated by Independent India, resulting in far reaching changes in the fundamental law of the land.

The paper shall first look at the social milieu that evolved over time to understand the context within which the calls for land reform crystallized. It shall attempt to draw an understanding as to why, given the social and economic context, there was a felt need for land reforms. In the second section it appraises various provisions of the constitution of India for the normative justification for viewing land reforms as a tool for social transformation. It finally moves on to evaluate the various constitutional amendments pertaining to land reforms and their impact on human rights of different sections of the society.

Jurisprudence of Right to Property

The reason why men enter into society is the preservation of their Property.

-John Locke

The notion of property is as instinctive in man as it is in animals. The seminal importance accorded to property including land in the annals of human history is well catalogued. So high has been its importance that it can be to a certain extent stated that human civilization has its roots in the recognition of the property rights; be communal property rights or individual property rights.

Property could be understood as right to possession, use or disposal of anything[310]. To Austin property denoted a right, which was indefinite in point of use, unrestricted in point of disposition and unlimited

---

308 Basu, DD, *Human Rights in Constitutional Law*, II ed, Wadhwa and Company, 2005, at 8.

309 Art 17 of the Universal Declaration of Human Rights and Art 1 of the Protocol 11 to the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

310 Hidayatullah, M, *Right to Property and The Indian Constitution*, Tagore Law Lectures, Calcutta University and Arnold Heinmann, 1983, at 11.

in point of duration over a determinate thing. For him it was of high value leading him to argue that the general happiness or good demanded the institution of property - that exclusive enjoyment which was conferred upon the owner by law[311]. A society's claim for protection or security of property was legitimate since without it there was no inducement to save. Without saving there could be no capital accumulation which was necessary to multiply the enjoyments of every individual in the community[312].

Chief proponent of importance of right to property was John Locke who argued that *the reason why men enter into society is the preservation of their property*[313]. Locke argued that property was one of the essential components of high significance to man, completing the trio with life and liberty. To protect these and prevent any hindrance in their peaceful enjoyment people entered into a social contract. Hence his conception was that in a civilized society property rights would always be upheld and a society where the property rights were unprotected was a society in anarchy.

Man was held to naturally understand the concept of property and brook no interference in its enjoyment. Its importance grew further when man made the transition from being a food-gatherer to a food cultivator. With the advance of civilisation and use of implements for agriculture, man literally 'settled down' and started a life of settlement. Land was now used not only for residence but also agriculture, the main source of food. This led to land slowly and steadily becoming the nucleus of property proper[314]. Land became the means to generate surplus which could be traded bringing in better conditions of living. Such was the importance of land that it became foundation of the supreme law[315].

Accordingly the proposition that there was a natural right of property came to be well accepted[316]. Society recognised and acknowledged a right to property, supported the claims of the owner, delineated the extent and mode of enjoyment of this right and debarred the rest from infringing the right. With the passage of time and establishment of legal orders, law recognised the right to property as constituting ownership, possession and enjoyment of property and protected the same.

---

311 Rumble, Wilfred E, (ed) Austin, John, *The Province of Jurisprudence Determined*, Cambridge University Press, 1995, at 85.
312 *Ibid*, at 42.
313 John Locke in "Second Treatise on Civil Government", <http://books.google.co.uk/books?hl=en&id=mGQ2C_Pl_4cC&dq=Second+Treatise+in+Civil+Government&printsec=frontcover&source=web&ots=SVVoiVcEMM&sig=_qACJMu52AaDT7fcgft3KHzBRX4&sa=X&oi=book_result&resnum=2&ct=result>
314 *Supra* note 3, at 18.
315 *Ibid*, at 21.
316 Jain, MP, *Indian Constitutional Law*, V ed, Wadhwa and Company, 2003, at 1465.

Ancient Indian philosophy also recognised right to property as an inherent right which the King was required to protect. During the Vedic period, land was considered to be the common property of the village as a whole. Manu placed the right of ownership over land with the first clearer of the forest[317]. However, with the progress of time the character of ownership evolved and changed. The King or village headman claimed to himself the ownership of all the soil and recognised the landholders as only tenants. Thus even though the King had his own private lands, but as ruler of the whole country, his right was represented not by a claim to general soil-ownership, but by the ruler's right to revenue, taxes, cess and the power of making grants of the waste[318].

Therefore land belonged to the cultivator. The village head, usually appointed as the representative of the King was only interested in the collection of land revenue. Revenue was usually part of the produce of the land; it was fixed on the basis of quality of the land and the quantity of the production. It was predetermined and usually collected first in kind, and later in cash, and had to be paid[319].

This led to Kautaliya arguing that if the king felt that the land was not being used to its full potential, he could confiscate the land from the hands of one and give them to another. There was a right to enjoy the fruits of the land to the fullest as long as the land was used efficiently and not left idle[320]. However the property could be acquired only with the consent of the person and after having adequately compensated him for his loss. The reason given for the recognition of this right was that *'Human beings reside on land and they have that natural right to own land'*[321].

With the advent of Mughals, the Zamindari system gained prominence. The zamindars (powerful landlords and official revenue collectors) were to collect the land revenue and pass it on to the officers of the empire. Soon they collaborated in the economic exploitation of the cultivators. There were two categories of zamindars:

a. Primary Zamindars – who held proprietary rights and habitational land, and

---

317 Baden-Powell, B.H, *The Land Systems of British India*, Vol I, Low Price Publication, Reprint1990, at 127.
318 *Ibid*, at 129.
319 P.K. Agarwal, *Land Reforms in India: Constitutional and Legal Approach*, M D Publications Pvt. Ltd., New Delhi, 1993, at 3.
320 Dr. S. Sankaran, *Agricultural Economy of India*, VI ed, 1982, at 75.
321 Katyana Smriti, 17th verse, Jois, M Rama, *Legal and Constitutional History of India, Ancient Legal, Judicial and Constitutional System*, Universal Law Publishing Co. Pvt Ltd, 2001, at 333.

b. Intermediary Zamindars – who collected the revenue from primary zamindars and paid it to the imperial treasury or to the jagirdars or to the chieftains or in certain cases appropriated it[322].

Till the Mughals were strong, the system was kept under strict control, however with the weakening of central imperial authority; the feudal and semi-feudal landlords became a law in themselves.

The English introduced tenants of English feudalistic society in parts of India under its control ensuring that India remained more or less uninfluenced by the European system of land ownership and enjoyment. Under the English system the ultimate ownership of land rested with the King, who gave land to a few selected vassals in exchange of service, military or otherwise. Thus the land was held *of* the King and the vassal administered it. The services attached with the grant of land ran with the land and failure to render service resulted in the distrait of land. There were co-relative rights and duties attached with the land and ran with it. Accordingly the doctrine of tenure became the foundation of all land laws. The land tiller occupied the lowest position and held only those rights which were granted by the custom of the particular manor[323].

In India the consolidation of the colonial power only ensured the skyrocketing of the rate of exploitation of the land tiller. The imperial power had only one motive and that was profit maximization. All policies and programmes related to land initiated by the British had one sole aim - streamlining the existing modes of revenue collection so as to collect maximum possible revenue with the least possible cost. This state of affairs continued over two centuries.

Developments in Europe however hastened the demise of feudalism in England[324]. Yet shades of feudalism continued and thrived in India. However with greater refinement in political thought in Europe, right to property came to be regarded in two distinct manners[325]. On the one hand it was argued there were those who argued that Government only existed for according protection to private property and that right to protection of private property was a social right. As against this there were others who argued that exclusive property was a theft against nature.

---

322 *Supra* note 12, at 4. The usual terminology used to identify them – chaudhuries, desh-mukhs, desais, despandes, muqaddams, kanungos, ijeradars or talukdars.
323 *Supra* note 3, at 84.
324 *Ibid*, at 86.
325 *Ibid*, at 12.

With independence dawned the understanding that an important function of a modern state is to formulate policies for facilitating and ensuring capital accumulation, allocating resources for development and distributing the surplus for the common good. Also realized was that in attempts geared for social transformation, land occupied a pivotal place. Thus land policies were required to not only deal with production but also with distribution of produced goods and the productive assets to provide meaningful employment. Such policies were bound to affect assorted interests involved in land. Those who possessed large chunks of land had managed to accumulate large amounts of surplus and accordingly made all efforts to maintain their control over land and thereby preserve their power and status in a caste based and hierarchical society. On the other hand those who have been deprived of productive resources and production struggled to regain control over land and other resources[326]. However on the whole land tenure system in India saw reforms aimed at:

(i) Abolition of intermediaries
(ii) Eradicating Tenancy, and;
(iii) Ceiling of Land holdings

pursued with the following objectives[327]:

(i) To bring about an increase in productivity by improving the economic conditions of the farmers and tenants so that they may have interest and incentive to invest and improve agriculture output.
(ii) To ensure distributive justice and to create an egalitarian pattern of society.
(iii) To transfer the income of a few to many in order to stimulate the demand for consumer goods ultimately leading to an increased production of agricultural and consumer goods.

Land reforms were initiated in three different phases after independence. In the first phase, the main objective was to abolish the intermediaries. The Congress committee of 1948 was of the opinion that, *'there was no place for intermediaries and the land must belong to the tiller'*. With the abolition of Zamindari, nearly 20 million tenants became land owners and the exploitation by the landlords was put to an end. The land in the hands of the tiller helped in increasing agricultural efficiency. This system however had

---

[326] Shah, Ghanshyam and Shah, D.C (ed), *Land Reforms in India: Performance and Challenges in Gujarat and Maharashtra*, Vol 8. Sage Publications, New Delhi, 2002, p 19.
[327] *Supra* note 13, at 82.

certain adverse effects, for instance the payment of compensation to the erstwhile Zamindars was a substantial drain on government funds. Further big landlords conducting agriculture on modern lines had to abandon their projects[328].

The second phase aimed at eradicating tenancy, especially sharecropping. In the third phase, which started from the second five year plan onwards, the priorities were to regulate the size of holdings that an individual could possess through land ceiling legislation, and then distribute among landless labourers and marginal farmers surplus land generated[329]. The underlying rationale was that a wider and more equitable distribution of land based on a proper fixation of ceilings would effectively reduce the wide disparities in income of the rural population. With a more equitable distribution of land the efficiency of agricultural production would also increase[330].

On the whole the aim was to break the concentration of land resources in the hands of a few intermediaries and to provide security to the tiller by recognising his rights on the land. It was expected that once the structural constraints with respect to land-man relations in agriculture was relaxed, agricultural production would respond positively. It was also envisaged that reforming the colonial agrarian relations would result in bringing about social justice and much needed efficiency in Indian agriculture[331].

[328] *Ibid*, at 86.
[329] *Supra* note 19, at 22.
[330] *Supra* note 13, at 96.
[331] *Supra* note 19, at 22.

II. HISTORY AND EVOLUTION OF LAND REFORM IN INDIA

Land system under the British

For long, rulers had been interested in lands for the sole purpose of its produce, including the revenue it generated. Post the arrival of British the demand for revenue only increased. There were several contributing factors, such as[332]:

a. growth of stronger regional states
b. cost of warfare
c. investment in production and trade
d. tributes paid to other such as East India Company, Marathas, etc, and
e. loss of income to intermediaries

With the defeat of Sirajuddola in the battle of Plassey in 1758, the East India Company became the most dominant power in Bengal and effectively in India. By 1760 the districts of Bardwan, Midnapore, and Chittagong were granted revenue free. In 1765 the grant of Diwani or right of civil and revenue administration of Bengal, Bihar and Orissa was made to the Emperor for a fixed sum of twenty six lakhs annually and of providing for the expense of the Nizamat i.e. the criminal and militarily administration[333].

The East India Company had come to India with only one motive and that was of profit. Slowly and steadily India moved up from its low standing in the empire to become the largest source of raw materials (cotton, jute and indigo) and foods and drugs (opium, tea, coffee, wheat), and also a market for British manufactured goods. India became a vital site for British employment, services and investment[334]. Funding its ambitious plans were its land policies which were devised to achieve primarily economic ends. The laws were formulated to assist in identifying[335]:

a. how much would be paid to the state for land,

---

[332] Robb, Peter, *Empire Identity and India: Peasants, Political Economy, and Law*, Oxford University Press, New Delhi, 2007, at 8.
[333] *Supra* note 10, at 390.
[334] *Supra* note 25, at 8.
[335] *Supra* note 10, at 216.

b. who would pay it, and
c. on what terms and conditions.

The land policy thus adopted by the imperial British had two clear guiding policies[336]:

a. Control - land policy was devised to ensure that there was order in the countryside and that revenue was readily relinquished to the state. The idea was creations of a section of society that would collaborate with them. For such collaboration the right incentive had to be provided. This stratum would see its benefit in ensuring that those who rebelled, resisted or tried to avoid the state's authority were curbed. The intention was ensure maximum protection to the flow of revenue.

b. Trade – in the eighteenth century British trade in India centered on exchanging cotton good manufactured in India for gold and silver. This was partly because there was little market in India for British produce and partly because silver and gold were required commodities in India which Europe could provide relatively cheap. Further the East India Company bought Indian goods with Indian money and sold it for hefty profits in other parts of the empire, and ploughed it back into those areas where it had a monopoly such as salt and opium, to make even greater profits.

The British recognised the need for greater control but realized the impossibility of direct control. Thus it actively sought the involvement of local intermediaries. This led to agreements between local rulers and zamindars or ijaradars (revenue farmers) who were chosen by auction of rights to the highest bidder. The trade off was increase in revenue with reduced central control. The system remained geared primarily for short term revenue farming[337].

A change was made in 1789 and a 10 year settlement was brought in place of the yearly collection of rent. In 1793 Lord Cornwallis introduced permanent settlement, a system where the tax was fixed forever[338]. The settlement was to be made by local arrangements using the existing records. The reasons for bringing in this system were following[339]:

---

336 *Supra* note 25, at 7.
337 *Ibid*, at 9.
338 The Permanent settlement system was an agreement between the East India Company and the Zamindars of Bengal and was hinged on the idea of providing the zamindars with adequate incentive to invest and ensure growth of the land. What was proposed

a. it provided a means of running India through general rules set out in a long list of regulations enforceable by the courts.

b. a settlement with zamindars would ensure a sort of rural aristocracy that would always collaborate with the establishment in their own interest. This soon came to being as the zamindars gave up political roles and ambitions and became loyal subjects of the company.

c. Such an arrangement brought in predictability allowing for clear and fixed limit to the government's share in production, and thus encouraged investment, higher productivity, and trade, which substantially albeit indirectly contributed to the increase in government's income.

Since permanent settlement attached possession of land to possession of it, non payers were at risk of being dispossessed of their property in addition to being tortured and imprisoned. The zamindars were given absolute targets and near absolute powers over their tenants and over their tenants' property, including standing crops. In some instances other agrarian classes were also recognised and their rights preserved. In some areas intermediary landholders (jotedars) gained most from the permanent settlement through directly managing production. This allowed them to ensure increasing revenues, and with a fixed contribution to be remitted to the company, their share increased considerably overtime[340].

While the worst of the tax-farming excesses were countered by the introduction of the settlement, the use of land was not part of the subject of the agreement; hence the tendency of Company officials and Indian landlords was to force their tenants into plantation-style farming of cash crops like indigo and cotton rather than rice and wheat. This was a cause of many of the worst famines of the nineteenth century. In addition, zamindars eventually became absentee landlords, leading to a further neglect of investment on the land[341].

---

was security of tenure of landlords who were granted proprietorial rights and land tax was fixed in perpetuity. Incentivisation of zamindars in this case was intended to encourage improvements of the land, such as drainage, irrigation and the construction of roads and bridges; such infrastructure had been insufficient through much of Bengal. With a fixed land tax, zamindars could securely invest in increasing their income without any fear of having the increase taxed away by the Company. Cornwallis made this motivation quite clear, declaring that "when the demand of government is fixed, an opportunity is afforded to the landholder of increasing his profits, by the improvement of his lands.

[339] *Supra* note 25, at 9.

[340] *Ibid*, at 10.

[341] *Supra* note 19, at 20.

The British related ownership to use and they favoured settled agriculture over all other modes of land utilization though they also created reserved forests. They deliberately set land revenue rates and designed the systems and chose the revenue payers in order to maximize commercial production. A land not in use was considered waste and was taken away from those who exercised control over it and given and allocated to private owners. Earlier regimes had left vast amounts of land and its produce in the hands of others to pay for public services and goods (officials, armies, temples, mosques, schools) and had drawn much government income from their own state lands. This trend was reversed under the British. They were not eager to manage lands directly or to look to state land as a major source of income. They preferred to encourage market production and to collect cash into the treasuries, and then to govern through employees who were paid in money[342].

What it all implied was the purpose of land. Above all, it was to be cultivated to produce crops that could be sold. The land had to pay, to its owner and then to the state. This was the traditional idea on how revenue from land had to be distributed. But under the British, commercial exploitation became the only idea of land superceding all other views of land[343].

With some minor adjustments, the system remained more or less unchanged between 1770s and 1850s and beyond, even after the territories of the East India Company had been officially taken over by the British Crown in 1858 and the Crown had assumed sovereignty over India. A radical change insofar as the right to property was concerned came through the Government of India Act, 1935 which guaranteed the rights in private property. Before 1935 the requisition and the acquisition of property even for public purposes was not governed by any constitutional guarantee, but by law.

The first law in this field was an Act of the Indian Legislature of the year 1870 which stated that the collector would settle the price to be paid by the government for the acquisition of land. By the Government of India Act of 1858 (s 20(4)) it was reaffirmed that all property vested in his majesty under the Act of 1858 shall be applied in aid of the revenues of India. With the passing of the Government of India Act, 1935, the Joint Parliamentary Committee was moved to create a constitutional guarantee against the expropriation of private property.

Consistent efforts were also made by the colonial masters in ensuring lesser fragmentation of land and where possible to prevent it altogether. On larger estates the British actively promoted the rule of

---

342 *Supra* note 25, at 18.
343 *Ibid.*

primogeniture. Reforms were made in the legal setup to protect landholdings. Post the sepoy mutiny, in 1875 a plethora of reforms were introduced to protect landholders against moneylenders who were grabbing land rights and disturbing social and political equilibrium of the countryside. Various laws were enacted to provide increased security of landed property. For instance the Punjab Alienation of Land Act of 1900 tried to restrict land transfer (and hence mortgages on rural land) to recognised agriculturalists, members of the 'tribes and castes' listed in a schedule of the Act[344].

Various tenancy Acts had been enacted to protect superior landowning interests and to provide a measure of security to the cultivators. Over time these enactments began to give some rights to those who held land from landlords rather than directly or indirectly from the State. In Bengal, the Rent Act of 1859, while purporting to help zamindars collect rents, also recorded as settled or occupancy tenants those who had held land for 12 years. It placed restrictions on the enhancements of rents. It also sought improvement in landlord-tenant relations and the more effective resolution of agrarian disputes. Clearly the focus in the first half of the nineteenth century was agricultural development. Bengal Tenancy Act 1885 enacted in the aftermath of the famine, significantly added to the existing structure by:

a. classifying tenants and introducing further gradations of rights. This was based on the presumption of occupancy status in a village for all those holdings any land in that village. In many areas this status now applied to large majorities of first tier tenants in other words excluding those who were the tenants of other tenants.

b. introducing the provision for survey and settlement to establish and record rights, holdings and rents by analogy with the procedures in temporary settled areas. These had the effect of establishing tenant rights and familiarising people with them.

Post 1885 principles of Bengal Tenancy Act were extended elsewhere. But it was in due time sidelined by other measures designed to regulate all aspects of agrarian relations[345].

Land reform was thus a key example of the way that the role of government was being extended. The British were no longer content merely to frame the agrarian structure (that is establish and define

[344] *Supra* note 19, at 12.
[345] *Ibid*, at 13.

landed property) in the hope of promoting commercial expansion and securing its revenue. Colonial policies introduced new ideas about land use and types of land control[346].

What colonial laws and policies had done to land rights was that they reduced the number of different types of rights to only those which the law specified. They made each type's benefits and obligations more definite – by legal definitions, by more precise measurements and by the decisions of a hierarchy of courts. The owner could be anyone, an individual, family, village, corporation, or the state. But for all, only one kind 'ownership' was to be recognised, the kind established in the state's law. Within British territories all landowning became identical – as a complete collection of rights to land, unless some legal provision said otherwise. Landlords were given exclusive titles to specified areas, with qualifications made by law reserving certain other rights for the state, for sub-proprietors or for privileged tenants[347]. All these rights derived from the state and its laws. Thus there were only the landlord and tenant. No other traditional category survived.

Pre-independence

The permanent settlement had a devastating effect on the cultivator. The Zamindars exploited the cultivators and the cultivators lost all incentive to work their lands efficiently. Under this system, neither the State, nor the Zamindars nor the tillers were interested in improving the efficiency of the holdings. The whole system symbolized tyranny and oppression[348].

The other systems like the Ryotwari and the Mahalwari systems of land tenure were also in existence around the same time as the Zamindari system. Under the Ryotwari system the holder of the land was recognized as its proprietor and had to pay the revenue directly to the government. There was no fear of eviction under this system unless ejected for the failure to pay to the government the fixed assessment. Though less harsh than the Zamindari system this system also had its faults, in as much that the amount of assessment was done on the basis of mere guesswork by the settlement officers. This lead to non-uniformity of taxation in a single village and destroyed the collective basis of village life and community. Under the Mahalwari system, the land was held jointly by landlords who are jointly and severally responsible for the land revenue. The object of this system was to recognize the

---

[346] *Ibid*, at 15.
[347] *Ibid*, at 17.
[348] *Supra* note 13, at 76.

joint character of the village communities and common rights in land. The whole estate of these villages known as the 'mahal' was to be assessed to one sum of land revenue[349].

These three systems slowly evolved and took the characteristics of each other slowly tending towards the Zamindari system. This was a harsh and inhumane structure, which lead to increased incidences of atrocities against the poor landless tillers and other evils like corruption of officials at various levels of the system[350].

This called for drastic changes in the existing defective systems of land tenure by introducing a rationalized structure in order to increase efficiency in agricultural productivity in the form of 'Land Reforms'[351]. The cause of exploited tenants was taken up the Indian National Congress. In 1906-07 kisan movements were organised in Punjab under the leadership of Sardar Ajeet Singh. In Champaran, Bihar, a Satyagrah was organised to protest the forcing of cultivators to grow indigo even at the cost of their land and livelihood. The 1916 Lucknow Conference of the Indian National Congress, exploitation of tenants under the Zamindari system was passionately discussed and vehemently opposed. In Gujarat, the Khera Satyagrah was launched by Mahatma Gandhi.

However it was Uttar Pradesh which saw a stupefying upheaval in the form of Eka Movement in 1921. Social boycott was adopted as a method to ensure that people joined the movement. Soon the gatherings grew as more and more people joined to protest, which by no means was non-violent. An infamous example of such protest was the Chauri Chaura movement[352].

Around 1926 there were a number of peasant struggles, some spontaneous and some well organised, in different parts of the country. Organisations like Kisan Sabha and Indian National Congress provided leadership to some of the struggles. In view of many such happenings the Indian National Congress at its Lucknow Conference in 1935 came out with the Lucknow Resolution wherein in it resolved that there was only one fundamental method of improving the village life namely[353],

a. land reforms - the introduction of a system of peasant proprietorship under which the tiller of the soil will himself be the owner of it, and

---

349 Baden Powell, *Land Revenue of British India*, 1st ed., 1928, at 199.
350 Venkatasubbiah, H, *Indian Economy since Independence*, Asia Publishing House, 1961, at 51.
351 *Supra* note 13, at 80.
352 < http://pib.nic.in/feature/feyr98/fe0898/f180898b.html > accessed on 28.11.2008
353 *Supra* note 19, at 21.

b. payment of revenue directly to the government without the intervention of any intermediary such as the zamindar or taluqdar.

The aim, therefore, was to increase the rent-share of the cultivators, abolish zamindari system and eliminate all intermediaries between the state and the cultivators.

The Kisan Conference of Allahabad (1935) also urged for abolition of zamindari system. Mahatma Gandhi spearheaded the movement of tenant empowerment in India, calling upon the landlords to release lands for fellow men. On 11 April 1936, a conference of farmers was held in Lucknow following which the 'Bhartiya Kisan Sabha' was formed and a 'Kisan Declaration' was published in Bombay containing the following demands[354]:

a. No land revenue should be imposed on unproductive land
b. The lands unfit for cultivation by the zamindar should be distributed among the poor peasant
c. Zamindars and moneylenders should pay income tax, estate duty and heir tax
d. Land revenue and irrigation rates should be reduced by 50 per cent. No arrest for realization of debts and revenue should be made.
e. Moneylenders should realize at the most 6 per cent interest.
f. Indirect taxes on salt, Kerosene, oil, sugar and tobacco should be abolished
g. Minimum wages should be applied to farmers and societies
h. The management of all lands and pastures should be handed over to the Panchayat bodies
i. The farmers should be given arms licenses for protection of their animals
j. Kisan should be given loan from State Government and banks at the rate of 5 percent
k. State and Central Government should realize 75 percent tax from the rich class and should spend 75 per cent in the interests of farmers and labourers.
l. the middle man should be done away with by creating state trading and cooperative societies
m. the Kisan Sabha should be authorised to check corruption in government departments such as PWD, Police, Revenue and Excise.

[354] *Supra* note 12, at 13.

In the meantime West Bengal witnessed the 'Tebhaga movement' in 1946, which focused on ensuring that a sharecropper or bataidar would get two-thirds of the gross produce and the remaining one-third would go to the landowner i.e. the Raiyat instead of customary one-half. The movement itself spurred greater intensity towards land reform, so much so that in the 1946 congress election manifesto gave special emphasis on abolition of zamindari and land reforms[355].

Meanwhile there were several struggles aimed at abolishing the zamindari system and returning the ownership of land to the tillers in Andhra Pradesh, Kerala, West Bengal, the United Provinces, Bihar and the Bombay Presidency. Independence raised high hopes and expectations among the toiling masses. In such a situation, land reforms became the main agenda of the Congress Party soon after independence[356]. On the eve of independence in 1946, the Congress appointed the Congress Agrarian Reforms Committee under the chairmanship of JC Kumarappa to look into agrarian problems and measures to protect the rights of the tenants[357].

[355] *Supra* note 12, at 15.
[356] *Supra* note 19, at 22.
[357] *Ibid*, at 21.

III. INDEPENDENT INDIA

State has the last right of ownership of land

-Marx

The struggle for Independence had been fought on the shoulders of farmers and land tillers. Their need was perhaps best recognised and articulated. It was recognised that a radical change had to be ushered in without which no nation building could be possible. Nation building required food security, which required agricultural efficiency, which was not possible without ensuring that zamindari system was done away with. Accumulation of land had to be prevented to ensure that there was never a re-emergence of landlord tenant system.

At the start of independence, intermediary tenures like Zamindars, jagirs and imams held more than 40 percent of the total land area. There were large disparities in the ownership of land held under ryotwari tenure which covered the other 60 percent area and a substantial portion of the land was cultivated through tenants at will and sharecroppers who paid about one half the produce as rent. Most holdings were small and fragmented add to which there was a large population of landless agricultural labourers. In these conditions the principal measure recommended for securing the objectives of the land policy were the abolition of intermediary tenures, reform of the tenancy system, including fixation of fair rent at one fifth to one fourth of the gross produce, security of tenure for the tenant, bringing tenant into direct relationships with the State and investing in them ownership of land. A ceiling on land holding was also recommended so that some surplus land may be made available for distribution to the landless agricultural workers. Another important part of the programme was consolidation of agricultural holding and increase in the size of the operational unit to an economic scale through operative methods[358].

In 1947 the Conference of Chief Ministers and Provincial Congress Committee chiefs held to discuss programmes of land reforms adopted the 'Agriculture and Agrarian Reforms'. This coupled with other initiatives of the government for establishing a just and egalitarian society heralded the evolution of comprehensive land policy. Its main aims were[359]:

---

[358] *Supra* note 19, at 14.
[359] *Supra* note 12, at 16.

a. abolition of intermediaries and bringing tenants in direct contact with the government
b. tenancy reforms with a view to providing security to actual cultivators of land against eviction,
c. redistribution of land by imposition of ceiling on agricultural holdings,
d. consolidation of holdings, and
e. updation of land records.

Overall the land reform efforts in Independent India could be bifurcated under the following heads[360]:

a. ushering of agrarian economy – the aim was reconstructing the agrarian economy to be achieved through granting of ownership rights to the tiller, abolition of zamindari system, giving security of tenure to tenants, fixing a ceiling on personal holding of agricultural land and redistributing the surplus land among the landless,

b. urban property –provide housing to the people, clearance of the slums, town planning, rent control, acquisition of property and imposing ceiling on urban land ownership, etc, and

c. regulation of private enterprises and nationalization of commercial undertakings.

Constitutional norms relating to egalitarian social order

... personal freedom and political right
had become so much bound up with relations created by land,
as to be actually sub-servient to it

– Stubbs in Constitutional History of England, Vol I

After two hundred years of servitude, masses of India cried out for justice; a call which found voice in the supreme law of the land, the Constitution of India. The term justice could be understood as the harmonious reconcilement of individual conduct with the general welfare of society[361]. The

[360] *Supra* note 9, at 1253.
[361] Basu, DD, *Commentary on the Constitution of India*, VIII ed, Wadhwa and Company, 2007, at 416.

Constitution attempts to secure to all its citizens social, economic and political justice[362]. The term 'justice' noted in the Preamble of the constitution means equality consistent with competing demands between distributive justice with those of cumulative justice. Justice dispensed had to ensure general well being of the nation as well as individual's excellence[363].

Thus, justice is the unwritten yet overriding object of every law. This justice in our circumstances has to be understood in the context and circumstances particular to our country. Emerging from devastation wrecked by the colonial rule, the goal of justice as envisaged in the constitution was to build a welfare state, in which economic and social justice prevailed[364]. The dichotomy that the world was to face in drafting and accepting the covenants on political and civil rights and economic, social and cultural rights was resolved and internalized by the Constitution of India. The focus therefore was not only on ensuring political justice but also socio-economic justice to improve the quality of life of the poor, disadvantaged and the disabled.

Art 38 of the constitution enjoins the state to promote the welfare of people by working towards building a social order that delivers to them social, economic and political justice. Such an injunction is to ensure equitable sharing of benefits and burdens by all in the society. Furthermore justice of the kind mentioned above has to fashion and mould various social institutions such as property systems, public organisations, etc. The avowed aim here is to minimize and eliminate inequalities in status, facilities and opportunities amongst individuals.

Therefore what is envisaged is 'egalitarian equality' and not 'formal equality', whereby the state is required to take affirmative action to ensure upliftment of disadvantaged sections of the society. Seen in this manner social justice and equality are complementary since social justice aims to attain substantial degree of social, economic and political equality by mitigating the sufferings of poor, weak and deprived sections of the society and to secure to them the dignity of a person[365]. In *JK Cotton Spinning and Weaving Co. Limited v. Labour Appellate Tribunal of India*[366] the Hon'ble Supreme Court observed that the concept of social justice was not narrow or pedantic. It was founded on the basic

---

[362] The Preamble and provisions of the Constitution of India enumerate various forms of justice that the state is duty bound to ensure to its people.
[363] *Dalmia Cement (Bharat) Ltd. v. UOI* (1996) 10 SCC 104.
[364] *Supra* note 54, at 417 and *Supra* note 9, at 16.
[365] *Ibid*, at 421.
[366] AIR 1964 SC 737.

ideal of socio-economic equality and its aim was to assist the removal of socio-economic disparities and inequalities.

Social justice also aims at distribution of material resources of the community in such a way so as to subserve the common good[367]. In *State of Karnataka v. Reganatha Reddy*[368] it was held that Art 39(b) embraces the entire material resources of the community. Its task was to distribute such resources in such a manner so as to best subserve the common good and through such reorganization what was achieved was the distribution of the ownership and control of the resources.

It is clear from the above that the constitution also envisages economic justice. Directive Principles of State Policy in particular various clauses of Art 39 and 43 of the constitution are instructive in this regard. Economic justice has been understood to mean abolition of economic conditions which ultimately results in inequality of economic values between men. One finds a dictum for social and economic justice under Art 14 of the constitution. Art 14 mandates equality and equal protection of law and therefore strives to remove inequalities in status and to provide equal opportunities to all.

To allow for redistribution of resources through land reforms it was held imperative that every citizen of India be vested with the right to hold property. The right to property was extensively discussed in the Constituent Assembly, and the provision was finally settled after much discussion and debate. It was recognised to be intimately connected with the right to freedom[369] and accordingly included as a fundamental right in Art 19(1)(f) with incursions permitted only by law and in the interest of general public or any of the Scheduled Tribes. Additionally the conditions of its enjoyment were listed in Art 31 which provided that deprivation of property would only be by authority of law and that compensation would be paid for the loss of property. In other words the constitution originally

a. guaranteed the right of property,
b. stated the consequences of breach of guarantee, and
c. guaranteed the remedy to be resorted to in the event of breach of guarantee

Constitutional amendments furthering land reforms

[367] Art 39 (b) of the Constitution of India.
[368] AIR 1978 SC 215
[369] Seervai, HM, *Constitutional Law of India*, Vol 2, VI ed, Universal Publications, 1993, at 1358.

Social equity demanded an end of the parasitic class of intermediaries' in all its incarnations, while economic justice required reduction in size of land holdings through land ceilings and the redistribution of excess lands to tenants and the landless. Both these measures were intended to produce equality among members of the society[370].

Independent India accordingly witnessed many states passing legislations aimed at abolition of zamindari class and introduction of land ceilings. Since such regulations led to deracinating of entrenched interests on a massive scale, their introduction saw opening of litigation floodgate challenging various legislations aimed at regulating property rights. Since many decisions that were given, were seen to be impeding the social revolution on the promise of which struggle for independence had been structured, the Constitution was amended many times to avoid inconvenient rulings[371].

Amendments with far reaching implications were introduced to the following provisions of the constitution:

a. **Art 19(1)(f) and 31**

Before 1978 the Constitution contained two important articles to protect private property. These two articles together guaranteed to the people of India the fundamental right to property. Art 31 read - *'no one shall be deprived of his property save by authority of law'*. Permitted was acquisition of private property by the state for public purpose by paying compensation to the owner. It also exempted zamindari abolition and agrarian reform laws from the requirements of compensation and public purpose[372].

Art 31 saw its first challenge in *Kameshwar Singh v. State of Bihar*[373], wherein the Bihar Land Reforms Act 1950 which provided for transference to the State of the interests of proprietors and tenure holders in land, and other things appurtenant to in lieu of compensation to be provided in certain multiples. The Act was invalidated on grounds of infringing Art 14. It was further ruled that Art 31(4) did not prevent

---

370 Austin, Granville, *Working of a Democratic Constitution: A History of the Indian Experience*, Oxford University Press, 1999, at 118.

371 *Supra* note 9, at 1253. The author argues nothing has generated more bitterness that property rights courtroom battles. The two entrenched sides were always at loggerheads, with one calling for abolishing of Fundamental right to property and the other that property rights were essential for the survival of a democratic society, and that its dilution had defaced and defiled the Constitution.

372 Kumar, Narender, *Constitutional Law of India*, Allahabad Law Agency, 2006, at 775.

373 AIR 1951 Pat 91.

the Zamindari abolition laws from being challenged in a court on grounds other than those mentioned in clause (2) of Art 31.

In addition to this though it was recognised that under the eminent domain[374], the state could acquire private property for public use; however such acquisition could not be done without compensating the owner of the private property. A further problem was created when In *Chiranjit Lal Chowdhry v. Union of India*[375] it was held that such compensation ought to be *'just'*, in other words the issue of compensation was held to be justiciable.

These interpretations posed immense difficulties and posed a grave threat to the very viability of zamindari abolition programmes[376]. To overcome this difficulty the Constitution First Amendment Act was passed. The object was to insert provisions fully securing the constitutional validity of Zamindari Abolition Laws and certain specified state Acts. The Constitution (First Amendment) Act 1950 introduced Art 31 A.

Art 31 A

Art 31A was introduced by the first Constitution amendment act 1950 to remove difficulties posed by some of the apex court judgments concerning land reforms. At different times, varying efforts of government was challenged prompting amendments to Art 31 to overcome difficulties posed by judgments. Art 31A was amended in 1955 by the Constitution (Fourth Amendment) Act, in 1964 by Constitution (Seventeenth Amendment) Act, and in 1978 by the Constitution (Forty Fourth Amendment) Act. Each introduced a crucial factor within the existing law.

The First Amendment Act in its statement of objects and reasons noted[377]:

'During the last fifteen months of the working of the Constitution... Another article in regard to which unanticipated difficulties have arisen is article 31. The validity of agrarian reform measures passed by the State Legislatures in the last three years has, in spite of the provisions of clauses (4) and (6) of article 31, formed the subject-matter of dilatory

---

374 Art 246 read with Entry 42, List III substituted by the Constitution (Seventh Amendment) Act 1956. In *State of Bihar v. Kameshwar Singh* AIR 1952 SC 458, the apex court defined eminent domain as *'the power of the sovereign to take property for public use without the owner's consent upon making just compensation'*.

375 AIR 1951 SC 41.

376 *Supra* note 65, at 780. Though right to property was no longer a fundamental right post the Constitution (Forty Fourth Amendment) Act 1978, however operation of this Act was made prospective and not retrospective.

377 <http://indiacode.nic.in/coiweb/amend/amend1.htm> accessed on 21.10.2008.

litigation, as a result of which the implementation of these important measures, affecting large numbers of people, has been held up... The main objects of this Bill are, accordingly ... to insert provisions fully securing the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular. The opportunity has been taken to propose a few minor amendments to other articles in order to remove difficulties that may arise.'

Dichotomous relation existed between the two rights namely individual human rights and collective/societal rights. The need to ensure that to each individual his common law right to property was accorded and protected was shadowed by an equally compelling need to ensure protection of the interest of the society as a whole, and therefore the need of redistribution of resources.

The aim and purpose which propelled introduction of the above noted articles was to shield acquisitions of zamindaris from any interference by the judiciary. The aim was that of equality, to bridge the gap between the haves and the have-nots. Independent India had inherited massive and widespread social and economic disparities as a colonial legacy, stark in the agricultural sector[378].

The very purpose of introducing Art 31A was to bring about a change in the agricultural economy and facilitate agrarian reforms. This was to be achieved through utilizing law to curtail rights of landlords and expand those of tenants[379]. The question of what was meant by agrarian reform was explained in *State of Kerala v. Gwalior Rayon Silk Mfg. (Wvg) Co. Ltd*[380]:

The objectives of increasing the agricultural production and the promotion of the welfare of the agricultural population are clearly a predominant element in agrarian reform' (para 35)

It is thus clear to those who understand developmental dialectic and rural planning that agrarian reform is more humanist than mere land reform and, scientifically viewed, covers not merely abolition of intermediary tenures, zamindaris and the like but restructuring of village life itself taking in its broad embrace the socio-economic regeneration of the rural population. The Indian Constitution is a social instrument with an economic mission and the sense and sweep of its provisions must be gathered by judicial statesmen on that seminal footing. (para 51)

---

[378] *Ramanlal Gulabchand Shah v. The State of Gujarat* AIR 1969 SC 168. The apex court in *Union of India v Elphinstone S&W Co. Ltd.*, AIR 2001 SC 724 observed that Art 31A was introduced by the Constitution (First Amendment) Act, 1951 to validate the acquisition of Zamindari and the abolition of Permanent Settlement without interference from the judiciary. In *State of Kerala v. Gwalior Rayon Silk Mfg. (Wvg) Co. Ltd* (1973) 2 SCC 713 it was observed that the State wields the shield of Article 31A to ward off the private owners' sword thrust of Art 13 read with Articles 14, 19 and 31.

[379] *Kavalappara K Kochunni v. State of Madras* AIR 1960 SC 1080.

[380] (1973) 2 SCC 713.

The balance was attempted to be stuck between the rights of an individual to amass property and the right of collective to live in dignity. The Supreme Court noted that that the very purpose of Art 31A was to prevent concentration of agricultural land[381] in the hands of few. It sought to remove economic imbalance by taking surplus land from the holders in excess of the ceiling and distributing the same to the landless persons[382].

b. Art 31 B and the Ninth Schedule

Art 31B was added by the Constitution (First Amendment) Act 1950, and consequently the context and need which prompted the introduction of Art 31A squarely applied to the introduction of this article. Art 31B is however to be read with the Ninth Schedule of the Constitution, also introduced by the same amendment. The object as would be very clear from the text of the article was to protect certain legislations from judicial scrutiny since they infringed on certain fundamental rights.

Art 31B and Ninth schedule put in place a protective shell within which legislations, of any kind, character or category, promoting collective human rights could be shielded from challenge on grounds of infringing individual human rights. Time and again this article has been challenged but has been upheld my numerous apex court judgments.

Art 31B plugged a lacuna that had existed in the original constitution. The original constitution had, perhaps under the influence of western individualistic philosophies, placed at the apex individual human rights. However as was evident and something that was realized in due of course of time was that individual human rights had to in many instances give way to collective human rights[383]. The core of the philosophy was that an individual ought not to enjoy his right in such a manner so to completely negate the rights of another. If he had the right to amass wealth and property, and that led to widespread starvation, then human right protection for those affected became illusory. Human rights become meaningful only when such a right was balanced with the right of others to live a life of dignity. This was precisely what the amendment aimed at in shielding those legislations that attempted a redistribution of land and ensured that enrichment of few wasn't at the cost of many.

---

381 Post *Kavalappara K Kochunni v. State of Madras* AIR 1960 SC 1080 Art 31A was seen dealing only with agrarian reforms and therefore only those legislations facilitating agrarian reforms were facilitated.

382 *Godavari Sugar Mills v. SB Kamble* AIR 1975 SC 1193.

383 Though this argument has a Benthamite ring to it, *greatest good for greatest number*, however it is far from it especially since it argues for a balance and not an extreme.

c. Art 31 C

Article 31C[384] was inserted by the Constitution (Twenty Fifth Amendment) Act 1971 and further amended by the Constitution (Forty Second Amendment) Act 1976 with an intention to give primacy to the directive principles of state policy. Art 31C is of drastic nature, and attempts to usher in a socialist pattern of society. The Constitution of India is a human rights document of which Directive Principles of State Policy is an integral part. The Directive Principles includes a catalogue of economic and social rights often termed as second generation rights, albeit of no less importance than civil and political rights enumerated in the Constitution as Fundamental Rights. Both these rights go hand in hand since without one the other is meaningless as being unattainable or unsustainable. Without education one would not be aware of his right, without a culture lack the identity of being, without health would fail to meaningfully fructify the right to life and what good would be the freedom to speak one's mind if one had nothing to fill ones belly with.

Each right was interconnected; however since the directive principles were non-justiciable they were often ignored in policy making, leading to a lopsided protection being accorded to the basket of rights guaranteed under the Constitution. It was rightly understood that civil and political right could not be protected without ensuring adequate protection for economic and social rights. Art 31C was meant to restore the equilibrium that the constitution had intended, which however had been lost in its implementation.

Agrarian and land reforms were crucial for the fructification of many rights enumerated in the constitution especially those contained in Part IV of the Constitution. Art 31C was sought to be justified on grounds that rights of community/ collective rights should prevail over the rights of the individual.

d. Art 300A

Art 31 had yet another role to play in ushering in an important amendment. Art 31(2) provided that a person who was deprived of his property would be paid compensation. In *West Bengal v. Bela Banerjee*[385], the apex court held the following:

---

[384] The article was held to be constitutional in *Kesavananda Bharti v. UOI* AIR 1973 SC 1461, though held to be always subject to judicial review.
[385] AIR 1954 SC 170.

a. compensation under Art 31 must be just equivalent of what the owner has been deprived of,
b. the principles are only for ascertaining compensation ,and
c. if the compensation fixed is not a just equivalent of what the owner has been deprived of or if the principle has not taken into account all the relevant elements or takes into account irrelevant principle for arriving at a just equivalent, the question in regard thereto was a justiciable issue.

This led to the Constitution (Fourth Amendment) Act 1955, which amended Art 31(2) to the effect that the questions of adequacy of compensation would not be justiciable. However the apex court delivered further judgments wherein it held that compensation paid cannot be illusory compensation or the legislature cannot adopt policies resulting in non-payment of compensation[386]. This prompted another amendment and Constitution (Twenty Fifth Amendment) Act 1971 was enacted whereby the word 'amount' replaced the word 'compensation' in Art 31(2). The validity of the amendment was upheld in *Kesavananda Bharati v. State of Kerala*[387].

However Constitution (Forty Fourth Amendment) Act 1978 abrogated the right to property as a fundamental right i.e. a right to acquire, hold and dispose of property under Art 19(1)(f) and right to property under Art 31 and replaced it with right to property as a constitutional right codified under Art 300A of the constitution. Such a reduction now protects the right to property against executive interference but not legislative interference[388]. The right to property cannot be deprived merely by an executive order. The rights in property can be curtailed, abridged or modified by the state only by exercising legislative power. A law depriving a person of his property should fulfill three conditions:

a. the authority that has enacted the law must be competent authority,
b. the law must not violate any provision of the constitution, and
c. it must not infringe any fundamental right.

In other words no law, no deprivation of property is what is enunciated by Art 300A.

---

[386] *P.Vajravelu v. Special Deputy Collector* AIR 1965 SC 1017 and *R.C. Cooper v. UOI* AIR 1970SC 564.
[387] AIR 1973 SC 1461.
[388] *Bishamber Dayal Chandra Mohan v. State of UP* AIR 1982 SC 32.

Right to property, which includes land, is a human right[389], and the term property used in Art 300A ought to be understood as including within its fold the right to use, enjoy, manage, consume and alienate the said property. This is an important expansion of the right, since a right is not a right in the true sense of the word if its enjoyment is heavily truncated instead of adequately moderated. Acquisition of property was necessary to achieve redistribution of resources to effectively counter need and destituteness. In a country where resources are in acute shortage and where oppression runs riot, the upliftment of any individual requires enabling him to come out of the crushing grip of poverty. Redistribution of land post acquisition, seeks to address just that. Further by ensuring that an executive act cannot deprive an individual of his property, an individual has been granted adequate protection against the arbitrary action of the state[390], which constitutes the very essence of human rights.

Impact of these Constitutional Amendments on Human Rights

That land plays an important role in realization of human rights is uncontested. Hegel observed that if his needs were looked at then possession of property was the means of satisfying his needs. However he further argued that *'from the standpoint of freedom, property is the first embodiment of freedom, and so is in itself a substantive end'*[391]. In other words it could be argued that self preservation makes right to property appropriate. Land reforms aiming at radical changes in ownership of land have had potent effect on the human rights of various sections of the society. These can be broadly classified as following:

a. Survival with human dignity[392] – existence being depended on what land produced, land has since time immemorial been of seminal importance to mankind. It was only after the basic needs of subsistence were met could a man thing towards other comforts. The freedom of choice and action would not have been possible without the ability to maintain one's life. By ensuring that land was more or less equally distributed among members of the society, the important promise of equality and equal opportunity was fulfilled. The individual was given the means of sustenance, a means of emerging from poverty and thereby live a dignified life.

b. Enjoyment of other basic freedoms – use of property (in terms of land) in the exercise of freedom of assembly, association, movement and residence can hardly be denied[393]. The very

---

389 *Indian Handicrafts Emporium v. UOI* AIR 2003 SC 3240.
390 *Bishan Das v. State of Punjab* AIR 1961 SC 1570.
391 Bhat, P Ishwara, *Fundamental Rights: A Study of Their Interrelationships*, Eastern Law House, Kolkata, 2004, at 30.
392 Juss, Satvinder S, *Judicial Discretion and The Right to Property*, Pinter, 1998, at 2.
393 Supra note 84, at 33.

existence of trade and commerce depends on generation of economic goods. Agricultural outputs provide vital raw material for such goods and products. With the growth of commerce and trade, the prospects of a better life through trickling down of benefits become a reality.

c. Protection against unjust treatment and exploitation – that without the resource of land, an individual is open to exploitation is writ large in the history of India. There exist even today those who are exploited since they have no resources of their own to sustain themselves. Property provides a sense of autonomy vesting in an individual freedom from oppression and security of self. Further distribution of land among the have nots guards against monopolies and exploitative arrangements.

d. Distribution of means of production – by ensuring an equitable distribution of resources the state ensured greater efficiency, lesser waste contributing to enhanced production, and prevention of monopolization of resources, in turn contributing to furtherance of economic justice.

In *Jilubhai Nanbhai Khachar v. State of Gujarat*[394] it was observed that since there was a strong linkage between ownership of land and the person's status in the social system, those without land suffered not only from an economic disadvantage, but also a concomitant social disadvantage. It was to counter this dual disadvantage that the proffered amendments were brought forth. They have played a crucial role in furthering the cause of human rights of various deprived sections of the society, and have gone a long way in realizing the dreams of our founding fathers, that of equality, dignity and justice for all.

[394] AIR 1995 SC 142.

IV. CONCLUSION

Land has a social significance which transcends the purely economic advantage it offers; it is a source of prestige and social identity. India has had a long and chequered history of land based exploitation. Throughout its history barring sporadic instances, peasants have borne the brunt, with recorded instances of large scale violation of human rights. Independence did flicker the hope that change might be in the offing. However land reforms since independence has lost its way in the political and judicial meanderings and become virtually meaningless for those it was intended for.

Constitution is the guiding document, yet it remains a mere document if it is not worked in the manner it is supposed to be worked. Several hundred legislations by various state governments in many instances required to be saved by thirteen constitutional amendments, necessitating abolitions of the fundamental right to property and payment of Rs 6,000 million as compensation to landlords, the ultimate vesting of agricultural land to tillers was quite insignificant[395]. Sukumar Das in his study *A Critical Evaluation of Land Reforms in India (1950-1955)*, in Sinha, BK and Pushpendra (ed), *Land Reforms in India: An Unfinished Agenda,* Vol 5 notes that by end of March 1995 only 2.06 million hectares of ceiling surplus land and 5.54 million hectares of government wasteland had been acquired from ex-landlords and officially transferred. This constituted less than 4.6 per cent of the total arable land of India. Further only 2.4 per cent of the 4.9 million beneficiaries were below poverty line.

Thus the author concludes that the legislative efforts at land reform failed to generate economic holdings. Further redistributed land being of poor quality failed to provide even adequate subsistence thereby failing to bring most above the poverty line. Thus, amendments to constitution have only added to the tools available to the representatives of people to ameliorate their situation. However it is ironic that the reforms that would have ameliorated the conditions of millions of peasants were impeded by the same representative institution whose manifest purpose was to reflect constituent's interest. The shortcoming was not on the part of the law, but on the part of those who implemented that law.

---

[395] Das, Sukumar, *A Critical Evaluation of Land Reforms in India (1950-1955)*, in Sinha, BK and Pushpendra (ed), *Land Reforms in India: An Unfinished Agenda*, Vol 5, Sage Publications India Private Ltd, 2000, at 39.

In India it is widely recognised that the implementation of land reforms has not been satisfactory. Lack of clear direction from the state government has been one of the factors responsible for this situation. Though it has been time and again 'realized' that the enactment of progressive measures and their efficient implementation called for hard political decision and effective political support, the same has been found to be starkly lacking. No tangible progress can be expected in the field of land reform in the absence of the requisite political will and without a mending of ways by the intransigent bureaucracy.

****