

## CHAPTER 4.

### SOCIAL JUSTICE AND FUNDAMENTAL RIGHTS.

Social Justice as a concept is based on equal distribution of Justice. Social Justice as a concept in India is related most specifically with equal distribution of rights without discrimination of gender, caste, creed or economic status. The purpose of social justice is to maintain or to restore equilibrium in the society and to envisage equal treatment of equal persons in equal or essentially equal circumstances. The social solidarity was to be brought about by the concept of social justice. In the Indian Constitution it finds place significantly in the Preamble, Fundamental Rights and Directive Principles of State Policy. The leaders of India's freedom movement visualized that in the new dispensation following political freedom, the people should have the fullest opportunity for advancement in the social and economic spheres and that the state should make suitable provisions for ensuring such process.

The fundamentals of the Indian Constitution are contained in the Preamble which secures its citizens, Justice, social, economic and political, Liberty of thought, expression, belief, faith and worship, Equality of status and opportunity, and to promote among them all Fraternity assuring the dignity of the individual and the unity of the nation. The theme of the objectives permeates throughout the entire constitution. It was to give effect to this objective the Fundamental Rights and the Directive Principles of the State policy was enacted in Part III and Part IV of the Constitution, and through them the dignity of the individual was sought to be achieved and maintained. The absolute concept of liberty and equality are very difficult to achieve in modern welfare society. That is why fundamental rights have not been provided in absolute terms. The form in which such rights have been provided is in the form of restrictions which the government is expected to follow in the governance of the country. However, the enjoyment of these rights is subjected to the interest of the people. The State may therefore, encroach on the domain of these rights for the common good or the common interest. The question whether a fundamental right be subjected to restrictions for the common good or public interest will depend upon the conditions and circumstances prevailing at a

particular time. The Constitution of India, instead of formulating fundamental rights in absolute terms, and depending upon the judiciary to come to the rescue of the legislature, permits the State to impose directly to impose limitations on the fundamental rights. It is interesting to note that under the Indian Constitution fundamental rights have been provided in different forms. Only a free society can ensure the all-round progress of its members which ultimately helps the advancement of human welfare. Therefore, every democracy pays special attention to securing this basic objective to the maximum extent without, at the same time, endangering the security of the State itself. The Fundamental Rights envisaged in Part III of the Constitution of India has a tremendous contribution in rendering social justice to the country at large and till date it thrives to maintain its constitutional goal, in guiding legislation aimed at social welfare for the common good and common interest of the people.

The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part III in our Constitution conferring those rights on the people.

'Equality of status and of opportunity' the rubric chiselled in the luminous preamble of our vibrating and pulsating Constitution radiates one of the avowed objectives in our Sovereign, Socialist and Secular Democratic Republic. In every free country which has adopted a system of governance through democratic principles, the people have their fundamental inalienable rights and enjoy the recognition of inherent dignity and of equality analogous to the rights proclaimed in the 'Bill of Rights' in U.S.A., the 'Rights of Man' in the French Constitution of 1791 and 'Declaration of Human Rights' etc. Our Constitution is unquestionably unique in its character and assimilation having its notable aspirations contained in 'Fundamental Rights' in part III through which the illumination of Constitutional rights comes to us not through an artless window glass but refracted with the enhanced intensity and beauty by prismatic interpretation of the Constitutional

provisions dealing with equal distribution of justice in the social, political and economic spheres.<sup>1</sup>

Personal Liberty is one of the major concomitants of Fundamental Rights without which the rights enshrined in the Constitution will be mere illusory.

All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why liberty is called the very quintessence of a civilized existence. Origin of liberty' can be traced in the ancient Greek civilization. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 B.C., an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realize itself as fully as possible through the self-realization of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State.<sup>2</sup>

According to Aristotle, as the state was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his Republic as the best source for the achievement of the self-realization of the people.<sup>3</sup>

Roscoe Pound, an eminent and one of the greatest American Law Professors aptly observed in his book<sup>4</sup> that whatever, 'liberty' may mean today, the liberty is guaranteed by our bills of rights, is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority

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<sup>1</sup> *Indra Sawhney v. Union Of India*, 1992 Supp (3) SCC 212.

<sup>2</sup> *Siddharam Satlingappa Mhetre v. State Of Maharashtra*, AIR 2011 SC 312.

<sup>3</sup> Ibid.

<sup>4</sup> Roscoe Pound , '*The Development of Constitutional Guarantee of Liberty*'.

of those who are designated or chosen in a politically organized society to adjust that society to individuals.

Blackstone in *Commentaries on the Laws of England*<sup>5</sup> aptly observed that personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law.

According to Dicey, a distinguished English author of the *Constitutional Law* in his treatise on *Constitutional Law* observed that, personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification.<sup>6</sup>

According to him, it is the negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual, and personal liberty in this sense is the antithesis of physical restraint or coercion.

Eminent English Judge Lord Alfred Denning observed: By personal freedom I mean freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person.... It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live.

Eminent former Judge of the Supreme Court, Justice H.R. Khanna in a speech<sup>7</sup> observed that liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body. Right to life and personal liberty under the Constitution.

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<sup>5</sup> Blackstone- '*Commentaries on the Laws of England*', Vol. I, p.134.

<sup>6</sup> Dicey on '*Constitutional Law*', 9th Edn., pp.207-08.

<sup>7</sup> published in *IJIL*, Vol.18 (1978), p.133.

The Fundamental Rights represent the basic values enriched by the people of this country. The aim behind having elementary right of the individual such as the Right to Life and Liberty is not fulfilled as desired by the framers of the Constitution. It is to preserve and protect certain basic human rights against interference by the state. The inclusion of a Chapter in Constitution is in accordance with the trends of modern democratic thought. The object is to ensure the inviolability of certain essential rights against political vicissitudes. The framers of the Indian Constitution followed the American model in adopting and incorporating the Fundamental Rights for the people of India.

Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society.

This chapter is a study of various finding of the Supreme Court as to how the fundamental right as envisaged in our Constitution has strengthen the goal in imparting social justice to the citizens.

#### 4.1. EXPRESS DECLARATION OF RIGHTS.

Article 25- Freedom of conscience and free profession, practice and propagation of religion.<sup>8</sup>

Article 26- Freedom to manage religious affairs.<sup>9</sup>

These two article embodied in the fundamental rights chapter professes secular constitutionalism of our constitution. It envisages social justice and expressly declares that no citizen in the country shall be deprived of his legitimate due irrespective of what religion he professes.

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<sup>8</sup> V.N. Sukla, *Constitution of India*, Tenth edition, Eastern Book Company.

<sup>9</sup> *ibid.*

Religion is undefined by the constitution, is incapable of precise judicial definition either. In the background of the provisions of the constitution and the light shed by judicial precedent, it can at best be said that religion is a matter of faith. It is a matter of belief and doctrine. It concerns the conscience i.e. the spirit of man. It must be capable of overt expressions in work and deed, such as worship or ritual. So religion is a matter of belief and doctrine concerning the human spirit expressed overtly in the form of ritual and worship. Some religions are easily identifiable as religious, some are easily identifiable as not religious. There are many in the penumbral region which instinctively appear to some as religion and to others as not religions. There is no formula of general application. There is no knife-edge test.

Chinnappa Reddy, J. in *S.P.Mittal v Union of India*<sup>10</sup> attempted on to answer the question as What is Religion ? "Religion: Everyone has a religion, or at least, a view or a window on religion, be he a bigot or simple believer, philosopher or pedestrian, atheist or agnostic. Religion, like 'democracy' and 'equality' is an elusive expression, which everyone understands according to his pre-conceptions. What is religion to some is pure dogma to others and what is religion to others is pure superstition to some others. Karl Marx in his contribution to the Critique of Hegel's Philosophy of Law described religion as the 'Opium of the people'. He said further "Basically religion is a very convenient sanctuary for bourgeois thought to flee to in times of stress. Bertrand Russell, in his essay 'Why I am not Christian', said, "Religion is based, I think, primarily and mainly upon fear." It is partly the terror of the unknown and partly, as I have said, the wish to feel that you have a kind of elder brother, who will stand by you in all your troubles and disputes. Fear is the basis of the whole thing-fear of the mysterious, fear of defeat, fear of death. Fear is the parent of cruelty, and, therefore, it is no wonder if cruelty and religion have gone hand in hand. As a worshipper at the alter of peace, I find it difficult to reconcile myself to religion, which throughout the ages, has justified war calling it a Dharma Uddha, a Jihad or a Crusade. I believe that by getting mixed up with religion, ethics has lost 'much of its point, much of its purpose and a major portion of its spontaneity'. I apprehend I share the views of those who have neither faith nor belief in religion and who consider religion as entirely unscientific and

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<sup>10</sup> (1983)1 SCC 51

irrational. Chanting of prayer appears to me to be mere jingoism and observance of ritual, plain superstition. But my views about religion. My prejudices and my predilections, if they be such, are entirely irrelevant. So are the views of the credulous, the fanatic, the bigot and the zealot.

So also the views of the faithful, the devout, the Acharya, the Moulvi, the Padre and the Bhikshu each of whom may claim his as the only true or revealed religion. For our present purpose, we are concerned with what the people of the Socialist, Secular, Democratic Republic of India, who have given each of its citizens Freedom of conscience and the right to freely profess, practise and propogate religion and who have given every religious denomination the right to freely manage its religious affairs, mean by the expressions 'religion' and 'religious denomination'."

The Supreme Court in *S.R. Bommai v. Union of India*<sup>11</sup> has graciously explained the concept of secularism in our Constitution as follow, "India can rightly be described as the world's most heterogeneous society. It is a country with a rich heritage. Several races have converged in this sub-continent. They brought with them their own cultures, languages, religions and customs. These diversities threw up their own problems but the early leadership showed wisdom and sagacity in tackling them by preaching the philosophy of accommodation and tolerance. This is the message which saints and sufis spread in olden days and which Mahatma Gandhi and other leaders of modem times advocated to maintain national unity and integrity. The British policy of divide and rule, aggravated by separate electorates based on religion, had added a new dimension of mixing religion with politics which had to be countered and which could be countered only if the people realised the need for national unity and integrity. It was with the weapons of secularism and non-violence that Mahatma Gandhi fought the battle for independence against the mighty colonial rulers".

As early as 1908, Gandhiji wrote in Hind Swaraj: 'India cannot cease to be one nation, because people belonging to different religions live in it. In no part of

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<sup>11</sup> (1994) 3 SCC 1.

the world are one nationality and one religion synonymous terms nor has it ever been so in India.<sup>12</sup>

Gandhiji was ably assisted by leaders like Pandit Jawaharlal Nehru, Maulana Abul Kalam Azad and others in the task of fighting a peaceful battle for securing independence by uniting the people of India against separatist forces.

In 1945 Pandit Nehru wrote : 'I am convinced that the future government of free India must be secular in the sense that government will not associate itself directly with any religious faith but will give freedom to all religious functions.' And this was followed up by Gandhiji when in 1946 he wrote in Harijan 'I swear by my religion. I will die for it. But it is my personal affair. The State has nothing to do with it. The State will look after your secular welfare, health, communication, foreign relations, currency and so on, but not my religion. That is everybody's personal concern.'<sup>13</sup>

The great statesman-philosopher Dr Radhakrishnan said 'When India is said to be a secular State, it does not mean that we reject reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the State assumes divine prerogatives. Though faith in the Supreme is the basic principle of the Indian tradition, the Indian State will not identify itself with or be controlled by any particular religion. We hold that no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges in national life or international relations for that would be a violation of the basic principles of democracy and contrary to the best interests of religion and Government. This view of religious impartiality, of comprehension and forbearance, has a prophetic role to play within the national and international life. No group of citizens shall arrogate to itself rights and privileges which it denies to others. No person should suffer any form of disability or discrimination because of his religion but all alike should be free to share to the

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<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

fullest degree in the common life. This is the basic principle involved in the separation of Church and State."<sup>14</sup>

The Supreme Court in *Keshvanand Bharti v. State of Kerala*<sup>15</sup> had held that secularism is already accepted as the basic feature of the Constitution. Notwithstanding the fact that the words 'Socialist' and 'Secular' were added in the Preamble of the Constitution in 1976 by the 42nd Amendment, the concept of Secularism was very much embedded in our constitutional philosophy. The term 'Secular' has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition and perhaps best left undefined. By this amendment what was implicit was made explicit. The Preamble itself spoke of liberty of thought, expression, belief, faith and worship. While granting this liberty the Preamble promised equality of status and opportunity. It also spoke of promoting fraternity, thereby assuring the dignity of the individual and the unity and integrity of the nation. While granting to its citizens liberty of belief, faith and worship, the Constitution abhorred discrimination on grounds of religion, etc., but permitted special treatment for Scheduled Castes and Tribes, vide Articles 15 and 16. Article 25 next provided, subject to public order, morality and health, that all persons shall be entitled to freedom of conscience and the right to profess, practice and propagate religion. Article 26 grants to every religious denomination or any section thereof, the right to establish and maintain institutions for religious purposes and to manage its own affairs in matters of religion. These two articles clearly confer a right to freedom of religion.

We are concerned with what these expressions are designed to mean in Articles 25 and 26 of the Constitution. Any Freedom or Right involving the conscience must naturally receive a wide interpretation and the expression 'religion' and 'religious denomination' must therefore, be interpreted in no narrow, stifling sense but in a liberal, expansive way. Etymology is of no avail. Religion is derived from 'religare' which means "to bind". Etymologically, therefore, every bond between two people is a religion, but that is not true. To say so is only to indulge in etymological deception. Quite obviously, religion is much more than a mere bond uniting people. Quite obviously, again, religion is not to be confined to

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<sup>14</sup> *ibid*

<sup>15</sup> (1973) 4 SCC 225

the traditional, established, well-known or popular religions like Hinduism, Mahomedanism, Buddhism and Christianity. There may be and, indeed, there are, in this vast country, several religions, less known or even unknown except in the remote corners or in the small pockets of the land where they may be practised. A religion may not be wide-spread. It may have little following. It may not have even a name, as indeed most tribal religions do not have. We may only describe them by adding the suffix 'ism' to the name of the founder-teacher, the tribe, the area or the deity. But, all this is unsatisfactory. We are not arriving at any definition of religion. We are only making peripheral journeys and not getting any near.

<sup>16</sup>In ancient times in Gurukuls, emphasis used to be primarily on building the character of a student. Today, right from the schools up to the professional colleges, emphasis is on acquiring techniques and not values. We seem to have forgotten that skills acquired on computers tend to become outdated after sometime but values remain for ever. In other words, present day education is nothing but an information transmission process. Our educational system aims at only information based knowledge and the holistic views turning the student into a perfect human being and a useful member of society has been completely set aside. Swami Vivekananda aptly said, "Education is not the amount of information that is put in your brain and runs riot there, undigested, all your life. We must have life-building. Man making, character-making, assimilation of ideas. If education is identical with information, libraries are the greatest sages of the world and encyclopedias are rishis."

Truth (Satya), Righteous Conduct (Dharma), Peace (Shanti), Love (Prema) and Non-violence (Ahinsa) are the core universal values which can be identified as the foundation stone on which the value-based education programme can be built up. These five are indeed universal values and respectively represent the five domains of human personality, intellectual, physical, emotional, psychological and spiritual. They also are correspondingly co-related with the five major objectives of education, namely, knowledge, skill, balance, vision and identity.<sup>17</sup>

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<sup>16</sup> *Aruna Roy v. Union of India*, AIR 2002 SC 3176.

<sup>17</sup> *supra*.

Religion was an all- pervasive phenomenon in ancient India. It was believed that multitudes of religion were like the beads adorning the necklace of God; all were equally important because God existed in every spirit and force of human welfare. An attitude of objectivity, logic and humanity and an approach of understanding, co-existence and tolerance permeated the secular spirit of ancient Indian thoughts. A distinctive openness is exhibited in Rig Veda which stated, “Truth is one, the learned may describe it variously”. It is also enjoined, “Behave with others as you would with yourself. Look upon all the living beings as yours friends, for all of them resides one soul. All are but a part of universal soul”. The Mauryan Emperor Ashoka, a Buddhist convert, took a very active step for spread of Buddhism without forceful conversion or persecution. The Satvahanas, Kushanas and the Gupta rulers paid equal patronage to all religions. The emphasis on dhyana in Hindu religion during Gupta period brought Hinduism, Jainism and Buddhism closer. In the South, the Chalukyas, Rastrakutas, Cholas and Hoysala rulers liberally patronised all the religions without discrimination<sup>18</sup>.

A clear inference can be drawn from the above evidences that even the ancient text advocated the existence of freedom of religion which is guaranteed right under Article. 25, and Article 26, of the Indian Constitution.

Article 25 and Article 26 should be read together. The right guaranteed by Article 25 is an individual right as distinguished from the rights of an organized body like the religious denomination or any section thereof dealt with by Article 26. Both these Articles protect matters of religious doctrine or belief as well as acts done in pursuance of religion, rituals observances, ceremonies and modes of worship. These Articles embody the principles of religious tolerance that has been the characteristic feature of the Indian Civilization from the start of history, the instance and periods when these features were absent being merely temporary aberrations. Beside they serve to emphasize the secular nature of Indian democracy which the founding fathers considered should be the very basis of the Constitution.<sup>19</sup> Article 25(1) guarantees to every person, and not merely to the citizens of India, the freedom of conscience and the right freely to profess, practice and propagate religion. Freedom of conscience connotes a person’s right to

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<sup>18</sup> Romila Thapar, “A History of India”, vol. 1, 1996 Rep. 1991, Penguin Books

<sup>19</sup> Per Ayyangar, J. in *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*, AIR 1962 SC 853.

entertain beliefs and doctrines concerning matters, which are regarded by him to be conducive to his spiritual well-being.<sup>20</sup>

Clause (2)(b) of Article 25 deals with two exceptions: (i) law providing for social welfare and social reforms, and (ii) the throwing open of all 'Hindu religious institution of a public character' to 'all classes and sections of Hindus'. It has been held by the Bombay High Court that an Act to prevent bigamous marriages was not violative to the religious freedom since it fell under clause 2(b). Likewise the provisions of the Hindu Marriage Act, 1956, are protected under sub-clause (b) of Article 25(2). Prohibition of evil practices such as 'sati' or the system of 'devdasi' could be justified under these clause.

In the case of *Adithayan v. The Travancore Devaswom Board*<sup>21</sup> the question that came for consideration before the Supreme Court was whether the appointment of a person, who is not a Malayala Brahmin, as "Santhikaran" or Poojari (Priest) of the Temple in question Kongorpilly Neerikode Siva Temple at Alangad Village in Ernakulam District, Kerala State, is violative of the constitutional and statutory rights of the appellant. A proper and effective answer to the same would involve several vital issues of great constitutional, social and public importance, having, to certain extent, religious overtones also. The Hon'ble Court held "there is no justification to insist that a Brahman or Malayala Brahman in this case, alone can perform the rites and rituals in the Temple, as part of the rights and freedom guaranteed under Article 25 of the Constitution and further claim that any deviation would tantamount to violation of any such guarantee under the Constitution. There can be no claim based upon Article 26 so far as the Temple under our consideration is concerned. Apart from this principle enunciated above, as long any one well versed and properly trained and qualified to perform the puja in a manner conducive and appropriate to the worship of the particular deity, is appointed as Santhikaran de hors his pedigree based on caste, no valid or legally justifiable grievance can be made in a Court of Law". Reflecting its idea on social justice it further went on to opine, "Any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights,

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<sup>20</sup> *Ratilal Panachand Gandhi v. State of Bombay*, AIR 1954 SC 388.

<sup>21</sup> (2002)8 SCC 106.

dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by Courts in the country”.<sup>22</sup>

In *A.S. Narayana Deekshitulu v. State of A.P.*<sup>23</sup> explaining the concept of religion in context of secularism the Apex Court held “that the word ‘religion’ used in Articles 25 and 26 of the Constitution is personal to the person having faith and belief in the religion. The religion is that which binds a man with his Cosmos, his Creator or super force. Essentially, religion is a matter of personal faith and belief or personal relations of an individual with what he regards as Cosmos, his Maker or his Creator which, he believes, regulates the existence of insentient beings and the forces of the universe. Religion is not necessarily theistic. A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. Right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right but is subject to legislation by the State limiting or regulating any activity - economic, financial, political or secular which are associated with the religious belief, faith, practice or custom. They are subject to reform as social welfare by appropriate legislation by the State. Though religious practices and performances of acts in pursuance of religious belief are, as much as, a part of religion, as faith or belief in a particular doctrine, that by itself is not conclusive or decisive. What are essential parts of religion or religious belief or matters of religion and religious practice is essentially a question of fact to be considered in the context in which the question has arisen and the evidence - factual or legislative presented in that context is required to be examined and a decision reached. In secularising the matters of religion which are not essentially and integrally parts of religion, secularism, therefore consciously denounces all forms of supernaturalism or superstitious beliefs or actions and acts which are not essentially or integrally matters of religion or religious belief or faith or religious practice. Non-religious or anti-religious practices are anti-thesis to secularism which seeks to contribute in some degree to the process of secularisation of the matters of religion or religious practices. A

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<sup>22</sup> Ibid.

<sup>23</sup> (1996) 9 SCC 548.

balance, therefore, has to be struck between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs or religious practices guaranteed under the Constitution”.

In a country like ours where discrimination on the ground of caste or religion is a taboo, taking lives of persons belonging to another caste or religion is bound to have a dangerous and reactive effect on the society at large. It strikes at the very root of the orderly society which the founding fathers of our Constitution dreamt of. Our concept of secularism is that the State will have no religion. The State shall treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual right of religion, faith and worship.<sup>24</sup>

The right to freedom of religion assured by Article 25 and Article 26 is expressly made subject to public order, morality and health. Therefore, it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order. These two Articles in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order.

In *Ramji Lal Modi v. State of U.P.*<sup>25</sup> the Apex Court opined that it was absurd to suggest that insult to religion as an offence could have no bearing on public order so as to attract cl. (2) Of Art. 19 in view of the provisions of Arts.25 and 26 of the Constitution which, while guaranteeing freedom of religion, expressly made it subject to public order.

We have no doubt that it is in this sense. that the word 'propagate' has been used in Article 25 (1), for what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25 (1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no

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<sup>24</sup> *Dara Singh v. Republic Of India*, (2011) 2 SCC 490.

<sup>25</sup> AIR 1957 SC 620

fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike<sup>26</sup>.

In *The Commissioner, Hindu Religions Endowments Madras v. Sri Lakshmindra Thirtha Swamiar*<sup>27</sup> dealing with various aspects of Article 26 of the Constitution the Apex Court observed as follows: "The other thing that remains to be considered in regard to Article 26 is, what is the scope of clause (b) of the article which speaks of management of its own affairs in matters of religion? "The language undoubtedly suggests that there could be other affairs of a religious denomination or a section thereof which are not matters of religion and to which the guarantee given by this clause would not apply.

It will be seen that besides the right to manage its own affairs in matters of religion, which is given by clause (b), the next two clauses of article 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of a religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which clause (b) of the article applies freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down. Under Article 26(b), therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. Of course, the scale of expenses to be incurred in connection with these religious observations would be a

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<sup>26</sup> *Stainislaus v. State of M.P.*, (1977)1 SCC 677

<sup>27</sup> AIR 1954 SC 282

matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature; or it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under article 26(b) it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under clause (d) of Article 26." <sup>28</sup>

The Supreme Court in *Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Assn*<sup>29</sup>, held that the Court may issue directions in respect of controlling noise pollution even if such noise was a direct result of and was connected with religious activities. It was further held:- "Undisputedly, no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice amplifiers or beating of drums. In our view, in a civilized society in the name of religion, activities which disturb old or infirm persons, students or children having their sleep in the early hours or during daytime or other persons carrying on other activities cannot be permitted. It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without there being any unnecessary disturbance by the neighbours. Similarly, the old and the infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick, people afflicted with psychic disturbances as well as children up to 6 years of age are considered to be very sensible (sic sensitive) to noise. Their rights are also required to be honoured.

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<sup>28</sup> supra.

<sup>29</sup> AIR 2000 SC 2773.

In *Re. Noise Pollution*<sup>30</sup> entertaining a writ petition raising issues of wide ranging dimensions relating to noise pollution and the implications thereof, the Supreme Court on taking cognizance of the matters as public interest litigation, vide its order directed the implementation of the Laws for Restricting Voice of Loudspeakers and High Volume Producing Sound Systems".

Article 29- Protection of interest of minorities.

Article 30- Rights of minorities to establish and administer educational institutions.

Clause (1) of Article 29 gives protection of every section of the citizens having a distinct language, script or culture by guaranteeing a right to conserve the same. The right under this article is absolute. Clause (2) of Article 29 relates to admission into educational institutions which are maintained or aided by the State funds.

In *State of Bombay v. Bombay Education Society*,<sup>31</sup> the Hon'ble Supreme Court observes as follows: "No citizen shall be denied admission in such institutions on the ground only of religion, race, caste, language or any of them. It will be recalled that Article 15 also prohibits discrimination against citizen on ground of religion etc. But the scope of the two article is different. Firstly Article 15(1) protects all citizens against the state whereas the protection under Article 29(2) extends to the State or any body who denies the right conferred by it. Secondly Article 15 protects all citizens against discrimination generally, but Article 29(2) is a protection against a particular species of wrong, namely denial of admission into educational institutions maintained or aided by the State".

In *State of Madras v. Champakam Dorairajan*,<sup>32</sup> the Hon'ble Supreme Court has held that the right to admission into a educational institution is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens.

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<sup>30</sup> (2005) 5 SCC 733.

<sup>31</sup> AIR 1954 SC 561.

<sup>32</sup> AIR 1951 SC 226.

In *re The Kerala Education Bill*,<sup>33</sup> Article 30(1) of the Constitution which deals with the right of minorities to establish and administer education institutions, came for consideration. The Kerala Educational Bill, 1957, which had been passed by the Kerala Legislative Assembly was reserved by the Governor for consideration by the President. The contention of the State of Kerala was that the minority communities may exercise their fundamental right under Article 30(1) by establishing educational institutions of their choice wherever they like and administer the same in their own way and need not seek recognition from the Government, but that if the minority communities desire to have state recognition they must submit to the terms imposed, as conditions precedent to recognition, on every educational institution. The claim of the educational institutions of the minority communities, on the other hand was that their fundamental right under Art. 30(1) is absolute and could not be subjected to any restriction whatever. This Court, however, did not accept the extreme views propounded by the parties on either side but tried to reconcile the two.

It observed<sup>34</sup>: Article 29(1) gives protection to any section of citizens residing in the territory of India having a distinct language, script or culture of its own right to conserve the same the distinct languages, script or culture of a minority community can best be conserved by and through educational institutions, for it is by education that their culture can be inculcated into the impressionable mind of the children of their community. It is through educational institutions that the language and script of the minority community can be preserved, improved and strengthened. It is, therefore, that Article 30(1) confers on all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. The minorities, quite understandably, regard it as essential that the education of their children should be in accordance with the teachings of their religion, and they hold, quite honestly, that such an education cannot be obtained in ordinary schools designed for all the members of the public but can only be secured in schools conducted under the influence and guidance of people well versed in the tenets of their religion and in the traditions of their culture.

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<sup>33</sup> AIR 1958 SC 956.

<sup>34</sup> *supra*.

The minorities evidently desire that education should be imparted to the children of their community in an atmosphere congenial to the growth of their culture. Our Constitution makers recognised the validity of their claim and to allay their fears conferred on them the fundamental rights referred to above. But the conservation of the distinct languages, script or culture is not the only object of choice of the minority communities. They also desire that scholars of their educational institutions should go out in the world well and sufficiently equipped with the qualifications necessary for a useful career in life. But according to the Education Code now in operation to which it is permissible to refer for ascertaining the effect of the impugned provisions on existing state of affairs, the scholars of recognised schools are not permitted to avail themselves of the opportunities for higher education in the University and are not eligible for entering the public services. Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfill the real objects of their choice and the rights under Article 30(1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to their educational institutions."

In *Sidhaibhai Sabhai v. State of Bombay*<sup>35</sup> dealing with Article 30(1) of the Constitution, the Apex Court held: "The right established by Article 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedom guaranteed by Article 19, it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institutions, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Article 30(1) will be but a "teasing illusion", a promise of unreality. Regulations which may lawfully be imposed

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<sup>35</sup> AIR 1963 SC 540.

either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective an educational institution. Such regulation must satisfy a dual test-the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it."

In *State of Bombay v. Bombay Education Society*<sup>36</sup> the Apex Court has held that the right to establish an educational institution under Art. 30(1) is not confined to the purposes specified in Art. 29(1). In *D.A.V. College, v. State of Punjab*,<sup>37</sup> Reddy, J., speaking on behalf of the Court, observed that Article 29(1) is wider than article 30(1), in that, while any section of the citizens including the minorities can invoke the rights guaranteed under article 29(1), the right guaranteed under article 30(1) is only available to the minorities based on religion or language. He then went on to say that a reading of these two articles together would lead to the conclusion that a religious or linguistic minority has the right to establish and administer educational institutions; of its choice for effectively conserving its distinctive language, scriptor culture, which right, however, is subject to the regulatory power of the State for maintaining and facilitating the excellence of its standards and that while this is so, these two articles are not inter-linked nor do they permit of their being always read together.

In a land mark judgment<sup>38</sup> the Supreme Court has held that there, is no fundamental right to affiliation. But recognition or affiliation is necessary for a meaningful exercise of the right to establish and administer educational institutions. The Court opined that "Affiliation of minority institutions is intended to ensure the growth and excellence of their children and other students in the academic field. Affiliation mainly pertains to the academic and educational character of the institution. Therefore, measures which will regulate the courses of study, the qualifications and appointment of teachers, the conditions of

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<sup>36</sup> AIR 1954 SC 561.

<sup>37</sup> (1971)2 SCC 269.

<sup>38</sup> *Ahmedabad St. Xavier's College Society v. State of Gujarat*, (1974)1 SCC 717.

employment of teachers, the health and hygiene of students, facilities for libraries and laboratories are all comprised in matters germane to affiliation of minority institutions. These regulatory measures for affiliation are for uniformity, efficiency and excellence in educational courses and do not violate any fundamental right of the minority institutions under Article 30." The Court further opined<sup>39</sup>, that it will be wrong to read Art. 30 (1) as restricting the right of minorities to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities. If the scope of Article 30(1) is to establish and administer educational institutions to conserve language, script or culture of minorities, it will render Article 30 redundant. If the rights under Articles 29(1) and 30(1) are the same then the consequences will be that any section of citizens, not necessarily linguistic or religious minorities, will have the right to establish and administer educational institutions of their choice. The scope of Article 30 rests on linguistic or religious minorities and no other section of citizens of India has such a right. If the scope of Article 30(1) is made an extension of the right under Article 29(1) as the right to establish and administer educational institutions for giving religious instruction or for imparting education in their religious teachings or tenets, the fundamental right of minorities to establish and administer educational institutions of their choice will be taken away.

The Apex Court in the case of *Frank Anthony Public School Employees' Association v. Union of India*<sup>40</sup> took the view that from the decided cases, it is clear, that there is a general and broad consensus about the content and dimension of the Fundamental Right guaranteed by Article 30(1) of the Constitution. The right guaranteed to religious and linguistic minorities by Article 30(1) is two fold, to establish and to administer educational institutions of their choice. The key to the Article lies in the words "of their own choice". These words indicate that the extent of the right is to be determined, not with reference to any concept of State necessity and general societal interest but with reference to the educational institutions themselves, that is, with reference to the goal of making the institutions "effective vehicles of education for the minority community or

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<sup>39</sup> supra

<sup>40</sup> (1986)4 SCC 707.

other persons who resort to them". It follows that regulatory measures which are designed towards the achievement of the goal of making the minority educational institutions effective instruments for imparting education cannot be considered to impinge upon the right guaranteed by Article 30(1) of the Constitution. The question in each case is whether the particular measure, in the ultimate analysis, designed to achieve such goal, without of course nullifying any part of the right of management in substantial measure. It further held that it cannot for a moment be suggested that surrender of the right under Article 30(1) is the price which the aided minority institutions have to pay to obtain aid from the Government.

In *St. Stephen's College v. University of Delhi*<sup>41</sup> that Supreme Court held that the minorities whether based on religion or language have the right to establish and administer educational institutions of their choice. The administration of educational institutions of their choice under Article 30(1) means 'management of the affairs of the institutions. This management must be free from control so that the founder or their nominees can mould the institution as they think fit, and in accordance with their ideas of

how the interests of the community in general and the institution in particular will be best served. But the standard of education are not a part of the management as such. The standard concerns the body politic and is governed by considerations of the advancement of the country and its people. Such regulations do not bear directly upon management although they may indirectly affect it. The state, therefore has the right to regulate the standard of education and allied matters. Minority institutions cannot be permitted to fall below the standards of excellence expected of educational institutions. They cannot decline to follow the general pattern of education under the guise of exclusive right of management. While the management must be left to them, they may be compelled to keep in step with others. There is a wealth of authority on these principles.

A Coram of 11 Judges, not a common feature in the Supreme Court of India, sat to hear and decide *T.M.A.Pai Foundation v. State of Karnataka*<sup>42</sup> (hereinafter 'Pai Foundation', for short). It was expected that the authoritative

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<sup>41</sup> (1992)1 SCC 558.

<sup>42</sup> (2002) 8 SCC 481

pronouncement by a Bench of such strength on the issues arising before it would draw a final curtain on those controversies. The subsequent events tell a different story. A learned academician observes that the 11-Judge Bench decision in *Pai Foundation* is a partial response to some of the challenges posed by the impact of Liberalisation, Privatisation and Globalisation (LPG); but the question whether that is a satisfactory response, is indeed debatable. It was further pointed out that 'the decision raises more questions than it has answered'. The principles laid down by the majority in *Pai Foundation* are so broadly formulated that they provide sufficient leeway to subsequent courts in applying those principles while the lack of clarity in the judgment allows judicial creativity ".

The prophecy had come true and while the ink on the opinions in *Pai Foundation* was yet to dry, the High Courts were flooded with writ petitions, calling for settlements of several issues which were not yet resolved or which propped on floor, post *Pai Foundation*. A number of Special Leave Petitions against interim orders passed by High Courts and a few writ petitions came to be filed directly in this Court. A Constitution Bench sat to interpret the 11-Judge Bench decision in *Pai Foundation* which it did vide its judgment dated 14.8.2003 in the case of *Islamic Academy of Education v. State of Karnataka*,<sup>43</sup> "Islamic Academy" for short). The 11 learned Judges constituting the Bench in *Pai Foundation* delivered five opinions. The majority opinion on behalf of 6 Judges was delivered by B.N. Kirpal, CJ. Khare, J (as His Lordship then was) delivered a separate but concurring opinion, supporting the majority. Quadri, J, Ruma Pal, J and Variava, J (for himself and Bhan, J) delivered three separate opinions partly dissenting from the majority. Islamic Academy too handed over two opinions. The majority opinion for 4 learned Judges has been delivered by V.N. Khare, CJ. S.B. Sinha, J, has delivered a separate opinion. The events following *Islamic Academy* judgment show that some of the main questions have remained unsettled even after the exercise undertaken by the Constitution Bench in *Islamic Academy* in clarification of the 11-Judge Bench decision in *Pai Foundation*.

A few of those unsettled questions as also some aspects of clarification were called for settlement by the Bench of 7 Judges in *P.A. Inamdar v. State of*

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<sup>43</sup> (2003) 6 SCC 697.

*Maharashtra*<sup>44</sup> wherein amongst other the Court sought to find the inter-relationship between Articles 19(1)(g), 29(2) and 30(1). It opined that the right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1) (g). Notwithstanding the fact that the right of a minority to establish and administer an educational institution would be protected by Article 19(1)(g) yet the Founding Fathers of the Constitution felt the need of enacting Article 30. The reasons are too obvious to require elaboration. Article 30(1) is intended to instill confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institution of their choice. Article 30(1) though styled as a right, is more in the nature of protection for minorities. But for Article 30, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under Clause (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious or linguistic minorities are concerned, educational institutions of their choice will enjoy protection from such legislation. However, such institutions cannot be discriminated against by the State solely on account of their being minority institutions. The minorities being numerically less qua non-minorities, may not be able to protect their religion or language and such cultural values and their educational institutions will be protected under Article 30, at the stage of law making. However, merely because Article 30(1) has been enacted, minority educational institutions do not become immune from the operation of regulatory measure because the right to administer does not include the right to mal-administer. To what extent the State regulation can go, is the issue. The real purpose sought to be achieved by Article 30 is to give minorities some additional protection. Once aided, the autonomy conferred by the protection of Article 30(1) on the minority educational institution is diluted as provisions of Article 29(2) will be attracted. Certain conditions in the nature of regulations can legitimately accompany the State aid.

It is for the first time in *Pai Foundation's case*<sup>45</sup> that the question of application of Article 30 to minority professional colleges arose. All earlier judgments of this court were only concerning education in schools and colleges

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<sup>44</sup> (2004) 8 SCC 139.

<sup>45</sup> *ibid*

other than those imparting professional education. For the first time in *Pai Foundation*, the court held that running an educational institution is an 'occupation' and Article 19(1) (g) guarantees it as a fundamental right.

With regard to the ambit of the constitutional guarantee of protection of educational rights of minorities under Article 30, it can be understood that both religious and linguistic minority, as held in *Pai Foundation*, are to be determined at the State level. On this understanding of the concept of 'minority', Article 30 has to be harmoniously construed with Article 19(1)(g) and in the light of the Directive Principles of the State Policy contained in the Articles 38, 41 and 46. Rights of minorities cannot be placed higher than the general welfare of the students and their right to take up professional education on the basis of their merit. The real purpose of Article 30 is to prevent discrimination against members of the minority community and to place them on an equal footing with non-minority. Reverse discrimination was not the intention of Article 30. If running of educational institutions cannot be said to be at a higher plane than the right to carry on any other business, reasonable restriction similar to those placed on the right to carry on business can be placed on educational institutions conducting professional courses. For the purpose of these restrictions both minorities and non-minorities can be treated at par and there would not be any violation of Article 30(1), which guarantees only protection against oppression and discrimination of the minority from the majority. Activities of education being essentially charitable in nature, the educational institutions both of non-minority and minority character can be regulated and controlled so that they do not indulge in selling seats of learning to make money. They can be allowed to generate such funds as would be reasonably required to run the institute and for its further growth.

In the case of *P.A. Inamdar*<sup>46</sup>, this Court held that there shall be no reservations in private unaided colleges and that in that regard there shall be no difference between the minority and non-minority institutions. However, by the Constitution (Ninety- third Amendment) Act, 2005, Article 15 is amended. It is given Article 15(5). The result is that *P.A. Inamdar*<sup>47</sup> has been overruled on two

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<sup>46</sup> *ibid*

<sup>47</sup> *ibid*

counts: (a) whereas this Court in *P.A. Inamdar*<sup>48</sup> had stated that there shall be no reservation in private unaided colleges, the Amendment decreed that there shall be reservations; (b) whereas this Court in *P.A. Inamdar*<sup>49</sup> had said that there shall be no difference between the unaided minority and non-minority institutions, the Amendment decreed that there shall be a difference.

In *Ashok Kumar Thakur v. Union of India*<sup>50</sup> the question arose before the Supreme Court was that does the 93rd Amendment violate the Basic Structure of the Constitution by imposing reservation on unaided institutions? Answering in the affirmative the Court opined, Yes, it does. Imposing reservation on unaided institutions violates the Basic Structure by stripping citizens of their fundamental right under Article 19(1)(g) to carry on an occupation. *T.M.A. Pai*<sup>51</sup> and *Inamdar*<sup>52</sup> affirmed that the establishment and running of an educational institution falls under the right to an occupation. The right to select students on the basis of merit is an essential feature of the right to establish and run an unaided institution. Reservation is an unreasonable restriction that infringes this right by destroying the autonomy and essence of an unaided institution. The effect of the 93rd Amendment is such that Article 19 is abrogated, leaving the Basic Structure altered. To restore the Basic Structure, the Court opined that I sever the 93rd Amendment's reference to "unaided" institutions.

The Supreme Court *Sindhi Education Society v. Govt. (NCT Of Delhi)*<sup>53</sup>, in deciding the question as to whether Rule 64(1)(b) of the Delhi School Education Rules 1973 and the orders/instructions issued thereunder would, if made applicable to an aided minority educational institution, violate the fundamental right guaranteed under Article 30(1) of the Constitution and are the respondents herein entitled to a declaration and consequential directions to that effect held that “State actions should be actio quaelibet it sua via and every discharge of its duties, functions and governance should also be within the constitutional framework. This principle equally applies to the Government while acting in the field of reservation

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<sup>48</sup> ibid

<sup>49</sup> ibid

<sup>50</sup> (2008) 6 SCC 1.

<sup>51</sup> ibid

<sup>52</sup> ibid

<sup>53</sup> (2010) 8 SCC 49.

as well. It would not be possible for the Courts to permit the State to impinge upon or violate directly or indirectly the constitutional rights and protections granted to various classes including the minorities. Thus, the State may not be well within its constitutional duty to compel the linguistic minority institution to accept a policy decision, enforcement of which will infringe their fundamental right and/or protection. On the contrary, the minority can validly question such a decision of the State in law. The service in an aided linguistic minority school cannot be construed as 'a service under the State' even with the aid of Article 12 of the Constitution. Resultantly, we have no hesitation in coming to the conclusion that Rule 64(1)(b) cannot be enforced against the linguistic minority school.”

The Supreme Court referring to its earlier judgment in *T. Varghese George v. Kora K. George*<sup>54</sup> held that the right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-à-vis the majority. The right to establish and administer educational institution does not include the right to mal-administer.

Article 32 provides every citizen the right to constitutional remedies.

A right without a remedy does not have much substance. The Fundamental Rights guaranteed by the constitution would have been worth nothing had the Constitution not provided an effective mechanism for their enforcement. The significance of jurisdiction conferred by Article 32 is described by Dr. B.R. Ambedkar in the Constituent Assembly<sup>55</sup> as follows: “If you ask me to name one Article in the Constitution that is most important, I would definitely say Article 32. “This is the most important article without which this Constitution would be a nullity”. Further he has described it as “the very soul of the Constitution and the very heart of it”.

Thus, it can be said that Art. 32 mainly preserves the principle of constitutionalism by limiting the government against any arbitrary act. This right arms the citizen to bring into the notice of the Apex Court social inequalities and hence serves a vehicle to impart social justice by restricting the government of any

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<sup>54</sup> (2012) 1 SCC 369.

<sup>55</sup> ‘*Constituent Assembly Debates*’, Vol. IX, p.953

arbitrary act. Instance are numerous when the Apex Court has taken note of the rampant injustice and ill treatment of poor and downtrodden citizen and have called upon the States to undo the wrong and impart social justice to its people. Where a person or class of persons to whom legal injury is caused or legal wrong is done is by reason of poverty, disability or socially or economically disadvantaged position not able to approach the Court for judicial redress, any member of the public acting bonafide and not out of any extraneous motivation may move the Court for judicial redress of the legal injury or wrong suffered by such person or class of persons and the judicial process may be set in motion by any public spirited individual or institution even by addressing a letter to the court. Where judicial redress is sought of a legal injury or legal wrong suffered by a person or class of persons who by reason of poverty, disability or socially or economically disadvantaged position are unable to approach the court and the court is moved for this purpose by a member of a public by addressing a letter drawing the attention of the court to such legal injury or legal wrong, court would cast aside all technical rules of procedure and entertain the letter as a writ Petition on the judicial side and take action upon it.

In *Romesh Thappar v. State of Madras*<sup>56</sup>, the Apex Court held that under the Constitution the Supreme Court is constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights, although such applications are made to the Court in the first instance without resort to a High Court having concurrent jurisdiction in the matter. The fundamental right to move this Court can therefore be appropriately be described as the cornerstone of democracy edifice raised by the Constitution. In the words of Dr. Ambedkar<sup>57</sup> “If I was asked to name any particular article in the Constitution as the most important, an article without which this Constitution would be a nullity-I would refer not to any article except this one. It is the very soul of the Constitution and the very heart of it.”

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<sup>56</sup> 1950 SCR 594.

<sup>57</sup> ‘*Constituent Assembly Debates*’, Vol.VII, pg.953.

The Apex Court in *State of Madras v. V.G. Rao*<sup>58</sup> opined as follows “Our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights ", as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set up are out to seek clashes with the legislatures in the country.

In *Bandhua Mukti Morcha v. Union of India*<sup>59</sup> a writ petition under Article 32 of the Constitution has been filed by way of public interest litigation seeking issue of a writ of mandamus directing the Government to take steps to stop employment of children in Carpet Industry in the State of Uttar Pradesh; to appoint a Committee to investigate into their conditions of employment; and to issue such welfare directives as are appropriate for total prohibition on employment of children below 14 years and directing the respondent to give them facilities like education, health, sanitation, nutritious food, etc. The Hon'ble Supreme Court has held “Child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to the humanity. Mankind has best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the

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<sup>58</sup> 1952 SCR 597.

<sup>59</sup> AIR 1984 SC 802.

innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood - socially, economically, physically and mentally - the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and goods citizenry.

The founding fathers of the Constitution, therefore, have bestowed the importance of the role of the child in its best for development. Dr. Bhim Rao Ambedkar, was for a head of his time in his wisdom projected these rights in the Directive Principles including the children as beneficiaries. Their deprivation has deleterious effect on the efficacy of the democracy and the rule of law. The Apex Court while issuing directives expressed “We are of the view that a direction needs to be given that the Government of India would convene a meeting of the concerned Ministers of the respective State Governments and their Principal Secretaries holding concerned Department, to evolve the principles of policies for progressive elimination of employment of the children below the age of 14 years in all employments governed by the respective enactments mentioned in M.C. Mehta's case<sup>60</sup> to evolve such steps consistent with the scheme laid down in M.C. Mehta's case, to provide (1) compulsory education to all children either by the industries itself or in co-ordination with it by the State Government to the children employed in the factories, mine or any other industry, organised or unorganised labour with such timings as is convenient to impart compulsory educations, facilities for secondary, vocational profession and higher education; (2) apart from education, periodical health check-up; (3) nutrient food etc.; (4) entrust the responsibilities for implementation of the principles. Periodical reports of the progress made in that behalf be submitted to the Registry of this Court. The Central Government is directed to convene the meeting within two months from the date of receipt of the order. After evolving the principles, a copy thereof is directed to be forwarded to the Registry of this Court.

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<sup>60</sup> *M.C. Mehta v. State of Tamil Nadu*, (1996) 6 SCC 756.

In *Sheela Barse v. Union of India*<sup>61</sup> the petitioner filed an application before the Supreme Court praying that the respondents-States be directed: (a) to release all children detained in the jails in the respondent-States ; (b) to furnish 'complete information respecting all children detained in the States and the circumstances and the legal facts of such detention and the number of available juvenile courts and children homes; (c) to appoint district judges of the districts to visit jails, sub-jails and lock-ups to identify and release children in such illegal detention; (d) to requisition immediately necessary buildings and provide infrastructure and make immediate interim arrangements for 'places of housing' of children sought directions to the respective States, Legal Aid Boards, District Legal Aid Committees through the appointment of 'duty counsel' to ensure protection of the right of the children etc.

The Hon'ble Court held<sup>62</sup> ". It is absolutely essential, and this is something which we wish to impress upon the State Governments with all the earnestness at our command, that they must set up Juvenile Courts, one in each districts and there must be a special cadre of Magistrates who must be suitably trained for dealing with cases against children".

There is no doubt that the right to move this Court conferred on the citizens of this country by Article 32 is itself a guaranteed right-and it holds the same place of pride in the Constitution as do the other provisions in respect of the citizens' fundamental rights. The fundamental rights guaranteed by Part III which have been made justiciable, form the most outstanding and distinguishing feature of the Indian Constitution. It is true that the said rights are not absolute and they have to be adjusted in relation to the interests of the general public. But as the scheme of Article 19 illustrates the difficult task of determining the propriety or the validity of adjustments made either legislatively or by executive action between the fundamental rights and the demands of socioeconomic welfare has been ultimately left in charge of the High Courts and the Supreme Court by the Constitution. It is in the light of this position that the Constitution makers thought it advisable to treat the citizens' right to move this Court for the enforcement of their fundamental rights as being a fundamental

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<sup>61</sup> (1988)4 SCC 226.

<sup>62</sup> *supra*

right by itself. The fundamental right to move this Court can, therefore be appropriately described as the corner-stone of the democratic edifice raised by the Constitution.

In *M.C. Mehta v. Union of India*<sup>63</sup> by way of public interest litigation a spirited citizen raised some seminal questions concerning the true scope and ambit of Article. 21 and 32 of the Constitution, the principles and norms for determining the liability of large enterprises engaged in manufacture and sale of hazardous products, the basis on which damages in case of such liability should be quantified and whether such large enterprises should be allowed to continue to function in thickly populated areas and if they are permitted so to function, what measures must be taken for the purpose of reducing to a minimum the hazard to the workmen and the community living in the neighbourhood.

<sup>64</sup>The Constitution makers thought it advisable to treat the citizens' right to move this Court for the enforcement of their fundamental rights as being a fundamental right by itself. The fundamental right to move this Court can, therefore be appropriately described as the corner-stone of the democratic edifice raised by the Constitution. A truly democratic Constitution recognizes not only certain important natural rights which are the attributes of a free citizen, but also sets up adequate machinery for protection against invasion of those rights. Our Constitution has in Chapter III enumerated certain fundamental rights such as equality before the law, with the concomitant guarantee against discrimination, right of freedom of speech, assembly, association, movement and residence, and to practice any profession or to carry on occupation, trade or business, freedom of conscience and the right to practice and propagate religion, freedom to manage religious affairs and cultural and educational 'rights. After enunciating the rights some in terms positive, some in negative, exercisable absolutely or subject to reasonable restrictions the Constitution has rendered all laws inconsistent therewith if preexisting, or made in contravention, thereof if enacted after the commencement of the Constitution, void to the extent of the inconsistency or contravention. For relief against infringement of these rights by action legislative or executive by the State, recourse may undoubtedly be had

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<sup>63</sup> AIR 1984 SC 1086

<sup>64</sup> V.N.Shukla, *Constitution of India*, Tenth Edition, Eastern Book Company.

to the ordinary Courts by institution of civil proceedings for appropriate relief. But the Constitution has conferred upon the High Courts and the Supreme Court power to issue writs for the protection of those fundamental rights, and the Constitution has guaranteed by Article 32(1) the right to move this Court for enforcement of those rights. The right to move this Court for enforcement of the fundamental rights is therefore itself made a fundamental right. Law which is repugnant to the effective exercise of the right to move this Court in enforcement of the rights described in Chapter III therefore to the extent of inconsistency or contravention would be void. Is it that the exercise of the right is to be so unfettered, that any law which imposes any restriction in any form whatever against the exercise of that right direct or indirect must be regarded as void.

In *Munna v. State of U.P.*<sup>65</sup> writ petitions were filed alleging on the basis of a news report in the Indian Express dated 2nd December, 1981 that one Mr. Madhu Mehta had visited the Kanpur Central Jail incognito and found several juvenile undertrial prisoners lodged there even though there was a Children's Home in Kanpur, and that these juvenile prisoners were being sexually exploited by adult prisoners. The inhibition against sending a child to jail does not depend upon any proof that he is a child under the age of 16 years but as soon as it appears that a person arrested is apparently under the age of 16 years this inhibition is attracted. The Court expressed its concern for protection of under trial children and held that the reason for this inhibition lies in the court solitude which the law entertains for juveniles below the age of 16 years. The law is very much concerned to see that juvenile do not come into contact with hardened criminals and their chances of reformation are not blighted by contact with criminal offenders. The law throws a cloak of protection round juveniles and seeks to isolate them from criminal offenders, because the emphasis placed by the law is not on incarceration but on reformation. How anxious is the law to protect young children from contamination with hardened criminals is also apparent.

On the basis of a news item that migrant workmen employed in the Salal Hydro Electric Project were being denied the benefits of various labour laws, the Peoples' Union for Democratic Rights addressed a letter to an Hon'ble

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<sup>65</sup> AIR 1982 SC 806.

Judge of the Court requesting that the same be treated as a writ Petition and justice be done to the workmen. The Court taking note of the issue in *Labourers, Salal Hydro Project v. State of J.K.*<sup>66</sup> directed to faithfully enforce the labour laws in the interest of the deprived workmen, it held that the Central Government must also strictly enforce the requirement that payment of wages particularly to workmen employed either directly or through khatedars by the 'piece wagers' or sub-contractors is made in the presence of an authorised representative appointed by the National Hydro Electric Power Corporation or the Central Government and wages are paid directly to the workmen without the intervention of khatedars and free from any deductions whatsoever, except those authorised by law. It is not enough merely to go periodically and examine the muster rolls or muster sheets showing payment of wages, because even where wages are paid through khatedars and deductions are made, the muster rolls or muster sheets would invariably show payment of full wages and would not reject the correct position.

The Central Government must ensure, and that is the direction we give, that every payment of wages, whether it be normal wages or over-time wages, shall be made directly to the workmen, without any deductions in the presence of an authorised representative of the National Hydro Electric Power Corporation or the Central Government. When payment of overtime wages is made to the workmen, the Central Government must ask its authorised representative to check up with reference to the overtime work done by the workmen, whether they are receiving the full amount of over-time wages due to them or any part of it is being taken away by the khatedars. This evil can to a large extent be eliminated if payment of over-time wages is made directly to the workmen instead of routing it through the khatedars, it further held under Article 24 of the Constitution no child below the age of 14 years can be employed in 'construction work' which has been declared to be a hazardous employment in the *Asiad Workers'* case. This constitutional prohibition must be enforced.<sup>67</sup>

The children of construction workers living at or near the project site should be given facilities for schooling and this may be done either by the Central Government itself or if the Central Government entrusts the project work or any

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<sup>66</sup> (1983) 2 SCC 181.

<sup>67</sup> *ibid.*

part thereof to a contractor, necessary provisions to this effect may be made in the contract with the contractor. There can be no doubt that the minimum rates of wages fixed by the Central Government include the element of weekly day of rest and that no extra wages are legally payable to the workmen for the weekly off days. The complaint made is not that extra wages are not being paid for the weekly off days but that weekly paid off days are not being given to the workmen, meaning thereby that the workmen are required to work even on their weekly paid off days. These complaints have to be remedied by the Central Government by taking appropriate action and the only way in which this can be done effectively is by carrying out periodically detailed inspections. The Central Government will at once proceed to identify inter-state migrant workmen employed in the project work and adopt necessary measures for ensuring to them the benefits and advantages provided under the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979. It will also take immediate steps for ensuring that canteen, rest rooms and washing facilities are provided by the contractors and piece-wagers' or sub-contractors to the workmen employed by them.<sup>68</sup>

The Apex Court in *People's Union For Democratic Rights v. Union of India*<sup>69</sup> upon a Public Interest Litigation, in examined the scope and need for laws in case of violation of various labour laws in relation to workmen employed in the construction work connected with the Asian Games. It directed that whenever any construction work is being carried out either departmentally or through contractors, the government or any other governmental authority including a public sector corporation which is carrying out such work must take great care to see that the provisions of the labour laws are being strictly observed and they should not wait for any complaint to be received from the workmen in regard to nonobservance of any such provision before proceeding to take action against the erring officers or contractor, but they should institute an effective system of periodic inspections coupled with occasional surprise inspections by the higher officers in order to ensure that there are no violations of the provisions of labour laws and the workmen are not denied the rights and benefits to which they

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<sup>68</sup> Ibid.

<sup>69</sup> (1982) 3 SCC 235.

are entitled under such provisions and if any such violations are found, immediate action should be taken against defaulting officers or contractors. That is the least which a government or a governmental authority or a public sector corporation is expected to do in a social welfare state.

<sup>70</sup>It opined that Public Interest Litigation which is strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief.

Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and indicate public interest which demands that violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. That would be destructive of the Rule of Law which forms one of the essential elements of public interest in any democratic form of Government. The poor too have civil and political rights and the Rule of law is meant for them also, though today it exists only on paper and not in reality. If the sugar barons and the alcohol kings have the Fundamental rights to carry on their business and to fatten their purses by exploiting the consuming public, certainly the "chamaras" to belonging to the lowest strata of society have Fundamental Right to earn on honest living through their sweat and toil. Large numbers of men, women and children who constitute the bulk of an population are today living a sub human existence in conditions of object poverty; utter grinding poverty has broken their back and sapped their moral fibre. They have no faith in the existing social and economic system. Nor can these poor and deprived sections of humanity afford to enforce their civil and political rights. The only solution of making civil and political rights meaningful to these large sections of society would be to remake the material conditions and restructure the

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<sup>70</sup> Supra.

social and economic order so that they may be able to realise the economic, social and cultural rights. The time has now come when the courts must become the courts for the poor and struggling masses of this country. They must shed their character as upholders of the established order and the status quo. They must be sensitised to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations.<sup>71</sup>

The realisation must come to them that social justice is the signature tune of our Constitution and it is their solemn duty under the Constitution to enforce the basic human rights of the poor and vulnerable sections of the community and actively help in the realisation of the constitutional goals. This new change has to come if the judicial system is to become an effective instrument of social justice for without it, it cannot survive for long. Fortunately this change is gradually taking place and public interest litigation is playing a large part in bringing about this change. It is through public interest litigation that the problems of the poor are now coming to the forefront and the entire theatre of the law is changing. Having regard to the peculiar socio economic conditions prevailing in the country where there is considerable poverty, illiteracy and ignorance obstructing and impeding accessibility to the judicial process, it would result in closing the doors of justice to the poor and deprived sections of the community if the traditional rule of standing evolved by Anglo-Saxon jurisprudence that only a person wronged can sue or judicial redress were to be blindly adhered to and followed, and it is therefore Necessary to evolve a new strategy by relaxing this traditional rule of standing in order that justice may become easily available to the lowly and the lost.<sup>72</sup>

In a landmark judgment the Supreme Court in *Khatri v. State of Bihar*,<sup>73</sup> held that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to

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<sup>71</sup> *ibid.*

<sup>72</sup> *Supra* note 51.

<sup>73</sup> (1983) 2 SCC 266.

be done by the State. It cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative liability. But even this right to free legal services would be illusory for an indigent accused unless the magistrate or the Sessions Judge before whom he is produced informs him of such right. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The Court further directed that the State and its police authorities should see to it that the constitutional, and legal requirement to produce an arrested person before a judicial magistrate within 24 hours of the arrest is scrupulously observed.

The Supreme Court in *Ram Jethmalani v. Union of India*<sup>74</sup>, held that the basic structure of the Constitution cannot be amended even by the amending power of the legislature. Our Constitution guarantees the right, pursuant to Clause (1) of Article 32, to petition this Court on the ground that the rights guaranteed under Part III of the Constitution have been violated. This provision is a part of the basic structure of the Constitution. Clause (2) of Article 32 empowers this Court to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by Part III. This is also a part of the basic structure of the Constitution. In order that the right guaranteed by Clause (1) of Article 32 be meaningful, and particularly because such petitions seek the protection of fundamental rights, it is imperative that in such proceedings the petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such information is in the possession of the State. To deny access to such information, without citing any constitutional principle or enumerated grounds of constitutional prohibition, would be to thwart the right granted by Clause (1) of Article 32.

The Bhopal Gas Tragedy is a glaring example of such imbalances and adverse impacts, where by court's intervention, poor and destitute have been provided relief and rehabilitation by resorting to Article 32 of the Constitution.<sup>75</sup>

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<sup>74</sup> (2011) 8 SCC 1.

<sup>75</sup> *Bhopal Gas Peedith Mahila Udyog Sangathan v. Union of India*, (2012) 8 SCC 326.

## 4.2. PROHIBITIONS WITHOUT ANY REFERENCE.

Article 17 provides abolition of untouchability.

The article enacts two declaration. Firstly, it announces that untouchability is abolished and its practice in any form is forbidden, and secondly it declares that the enforceability of any disabilities arising out of untouchability shall be an offence punishable in accordance with law. In 1955 Parliament in exercise of the powers conferred under Article 35 enacted the Untouchability (Offences) Act.

Bharat Ratna Babasaheb Dr. B.R. Ambedkar in his book "*The untouchables*"<sup>76</sup> has stated that the problem of untouchability is a matter of class struggle. It is a struggle between caste Hindus and the Untouchables. This is not a matter of doing injustice against one man. This is a matter of injustice being done by one class against another. This struggle is related to social status. This struggle indicates how one class should keep its relationship with another class of people. The struggle starts as soon as you start claiming equal treatment with others. Had it not been so, there would have been no struggle over simple reason like serving chapatis, wearing good quality clothes, putting on the sacred thread, fetching water in a metal pot, sitting the bridegroom on the back of a horse, etc. In these cases you spend your own money. Why then do the high-caste Hindus get irritated? The reason for their anger is very simple. Your behaving on par with them insults them. Your status in their eyes is low, you are impure, you must remain at the lowest rung. Then alone will they allow you to live happily. The moment you cross your level the struggle starts. The instances given above also prove one more fact. Untouchability is not a short or temporary feature; it is a permanent one. To put it straight, it can be said that the struggle between the Hindus and the Untouchables is a permanent phenomenon. It is eternal, because the high caste people believe that the religion which has placed you at the lowest level of the society is itself eternal. No change according to time and circumstances is possible. You are at the lowest rung of the ladder today. You shall remain lowest forever.

According to him untouchability is an indirect form of slavery and only an extension of caste system. Caste system and untouchability stand together and will

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<sup>76</sup> Dr. B.R. Ambedkar, "*The untouchables*", at page 28.

fall together. The idea of hoping to eradicate untouchability without destroying caste system is an utter futility. The problem to the Dalits is discrimination of high order next to the problem of recovering their manhood. In every nook and corner of the country, the Dalits face handicaps, suffer discrimination and are meted out injustice as a daily routine.

Neither the Constitution nor the Act defined 'Untouchability'. Reasons are obvious. It is not capable of precise definition. It encompasses acts/practices committed against Dalits in diverse forms. Mahatma Gandhi ji in his famous book '*My philosophy of Life*' stated that "untouchability means pollution by the touch of certain person by reason of their birth in a particular state of family. It is a phenomenon peculiar to Hinduism and has got no warrant in reasons or sastras".<sup>77</sup>

Empirical study conducted by Socialologists, in the Chapter "*Consciousness of Freedom among India's Untouchables*", said that the Dalits are "world's most oppressed minorities". At p. 160 he stated that severe economic domination usually has been sufficient to keep the untouchables in line, but evidence exists that the ultimate sanction was the use and threat of physical force. The numerically larger and wealthier dominant high castes are quite capable of and in fact did crush the slightest perceived resistance to their will. It was further stated that since independence, and particularly since 1970's as Untouchables have more openly resisted discrimination, reports of terrorism against them have increased both in number and in ferocity; gouging out the eyes of Untouchables in full view of assembled villagers who are terrified into silence, burning groups of Untouchables to death, chopping of their hands or feet, raping women, destroying whole villages are routine. In conclusion he stated that "Indian independence is a watershed event precisely because it both embodied this ideal of a new order and in fact has set in motion widespread and momentous changes that have affected virtually every Indian citizen,"<sup>78</sup>

In *Venkataramana Devaruand v. State of Mysore*<sup>79</sup> the Supreme Court held that a fundamental distinction between excluding persons from temples open for

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<sup>77</sup> Mahatma Gandhi , '*My philosophy of Life*' edited by A.T. Hingorani, 1961 Edn. at p. 146,

<sup>78</sup> *Social and Economic Development in India*, a Reassessment edited by Dilip K. Basu and Richard Sison, Sage Publication, New Delhi, 1986 Edition,

<sup>79</sup> AIR 1958 SC 255.

purposes of worship to the Hindu public in general on the ground that they belong to the excluded communities and excluding persons from denominational temples on the ground that they are not objects within the benefit of the foundation. The former will be hit by Article 17 and the latter protected by Article 26.

The preamble of the Indian Constitution imbued among its people with pride of being its citizens in an intergrated Bharat with fraternity, dignity of person and equality of status. But castism sectional and religious diversities and parochialism are disintegrating the people. Social stratification need restructure. Democracy meant fundamental changes in the social and economic life of the people, absence of inequitous conditions, inequalities and discrimination. There can be no dignity of person without equality of status and opportunity. Denial of equal opportunities in any walk of social life is denial of equal status and amounts to prevent equal participation in social intercourse and deprivation of equal access to social means. Humane relations based on equality, equal protection of laws without discrimination would alone generate amity and affinity among the heterogeneous sections of the Indian society and a feeling of equal participants in the democratic polity. Adoption of new ethos and environment are, therefore, imperatives to transform the diffracted society into high degree of mobility for establishing an egalitarian social order in Secular Socialist Democratic Bharat Republic. "Untouchability" of the Dalits stands an impediment for its transition and is a bane and blot on civilised society.<sup>80</sup>

Article 17 of the Constitution of India, in Part III, a Fundamental Right, made an epoch making declaration that "untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law. In exercise of the power in second part of Article 17 and Article 35(a)(ii), the Untouchability (Offences) Act 1955 was made, which was renamed in 1976 as "Protection of Civil Rights Act", for short 'the Act'. Abolition of untouchability in itself is complete and its effect is all pervading applicable to state actions as well as acts of omission by individuals, institutions, juristic or body of persons. Despite its abolition it is being

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<sup>80</sup> *State Of Karnataka v. Appa Balu Ingale*, AIR 1993 SC 1126.

practised with impunity more in breach. More than 75% of the cases under the Act are ending in acquittal at all levels. Apathy and lack of proper perspectives even by the courts in tackling the naughty problem is obvious. For the first time after 42 years of the Constitution came into force this first case has come up to this Court to consider the problem. The Act is not a penal law simpliciter but bears behind it monstrous untouchability relentlessly practised for centuries dehumanising the Dalits, constitution's animation to have it eradicated and to assimilate 1/5th of Nation's population in the main stream of national life. Therefore, I feel that it would be imperative to broach the problem not merely from the perspectives of criminal jurisprudence, but more also from sociological and constitutional angulations. While respectfully agreeing with my learned brother Kuldip Singh, J. on his reasoning, conclusions and conviction, it is expedient, therefore, to have the case considered from the above back drop and address ourselves to the questions that arose for decision.<sup>81</sup>

Article 18 provides for abolition of titles.

This article is a mere prescription of prohibition observable and enforceable by the persons and bodies concerned merely as a political obligation to the democratic State. The eminent constitutional lawyer, Sir Jennings, describing the nature of obligation created by Article 18, observes, “ The rule in Article 18, incorrectly summarized by the marginal note as abolition of titles, that no title, not being a military or academic distinction, shall be conferred by the State, is apparently part of a ‘right to equality’. It seems to be no breach of the right to equality if Sir John Brown becomes Dr John Brown, or General John Brown, or Pandit John Brown, or Mr. Justice John Brown or Rotarian John Brown, or even Sri John Brown, M.B.E , or if he rolls around a gold plated car or loads his wife with jewellery and silk saris, but if becomes an impecunious knight, the right to equality is broken. In whom is this right vested? It cannot be Sir John Brown, it is nither in rem nor in personam, neither corporeal nor incorporeal. It is in fact not a

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<sup>81</sup> Per. K. Ramaswamy, J. in *State Of Karnataka v. Appa Balu Ingale*, AIR 1993 SC 1126.

right at all, but a restriction on executive and legislative power.<sup>82</sup> It is not at all a fundamental right and must be removed from Part III of the Constitution of India.

Article 23 provides for prohibition of traffic in human beings and forced labour.

This Article embodies two declaration. First, that traffic in human beings, beggar and other similar forms of forced labour are prohibited. The prohibition applies not only to State but also to private persons, bodies and organizations. Secondly any contravention of the provisions shall be an offence punishable in accordance with law. Traffic in human beings means to deal in men and women like goods, such as to sell or let or otherwise dispose them of. It would include traffic in women and children for immoral or other purposes. The Immoral Traffic (Prevention) Act 1956 is a law made by Parliament under Article 35 of the Constitution for the purpose of punishing acts which results in traffic of human beings. Slavery is not expressly mentioned but there is no doubt that the expression 'traffic in human beings' would cover it. Under the existing law whoever imports, exports, removes, buys, sell or disposes of any person as a slave or accepts, receives or detains against his will any person as a slave shall be punished with imprisonment. In pursuance of Article 23 the bonded labour system has also been abolished and declared as illegal by the Bonded Labour System (Abolition) Act, 1976.

In a landmark judgment the Supreme Court in *People's Union For Democratic Rights v. Union of India*<sup>83</sup> held that Article 23 is not limited in its application against the State but it prohibits "traffic in human beings and begar and other similar forms of forced labour" practised by anyone else. The prohibition against "traffic in human being and begar and other similar forms of forced labour" is clearly intended to be a general prohibition, total in its effect and all pervasive in its range and it is enforceable not only against the State but also against any other person indulging in any such practice. The word "begar" in Article 23 is not a word of common use in English language, but a word of Indian origin which like many other words has found its way in English vocabulary. It is a form of forced labour

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<sup>82</sup> Jennings: Some Characteristic of the Indian Constitution, (1953).

<sup>83</sup> AIR 1982 SC 1473

under which a person is compelled to work without receiving any remuneration. Begar is thus clearly a form of forced labour. It is not merely 'begar' which is constitutionally prohibited by Article 23 but also all other similar forms of forced labour. Article 23 strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values. To contend that exacting labour by passing some remuneration, though it be inadequate will not attract the provisions of Article 23 is to unduly restrict the amplitude of the prohibition against forced labour enacted in the Article.

The Constitution makers did not intend to strike only at certain forms of forced labour leaving it open to the socially or economically powerful sections of the community to exploit the poor and weaker sections by resorting to other forms of forced labour. There could be no logic or reason in enacting that if a person is forced to give labour or service to another without receiving any remuneration at all, it should be regarded as a pernicious practice sufficient to attract the condemnation of Article 23, but if some remuneration is paid for it, then it should be outside the inhibition of that Article. To interpret Article 23 as contended would be reducing Article 23 to a mere rope of sand, for it would then be the easiest thing in an exploitative society for a person belonging to a socially or economically dominant class to exact labour or service from a person belonging to the deprived and vulnerable section of the community by paying a negligible amount of remuneration and thus escape the rigour of Article 23.<sup>84</sup>

In a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, a contract of service may appear on its face voluntary but it may, in reality, be involuntary, because while entering into the contract the employee by reason of his economically helpless condition, may have been faced with Hobson's choice, either to starve or to submit to the exploitative terms dictated by the powerful employer. It would be a travesty of justice to hold the employee in such a case to the terms of the contract and to compel him to serve the employer even though he may not wish to do so. That would aggravate the inequality and injustice from which the employee even otherwise suffers on account of his economically disadvantaged position and lend

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<sup>84</sup> Supra Note 61.

the authority of law to the exploitation of the poor helpless employee by the economically powerful employer. Article 23 therefore, provides that no one shall be forced to provide labour or service against his will, even though it be under a contractor of service. What Article 23 prohibits is 'forced labour' that is labour or service which a person is forced to provide." 'Force' which would make such labour or service 'forced labour' may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternative and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it would be 'forced labour'. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour of service provided by him would be clearly 'forced labour'. The word 'force' must therefore be construed to include not only physical or legal force but force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. Of course, if a person provides labour or service to another against receipt of the minimum wage, it would not be possible to say that the labour or service provided by him is 'forced labour' because he gets what he is entitled under law to receive. No inference can reasonably be drawn in such a case that he is forced to provide labour or service for the simple reason that would be providing labour or service against receipt of what is lawfully payable to him just like any other person who is not under the force of any compulsion. Article 23 is

intended to abolish every form of forced labour. The words "other similar forms of forced labour" are used in Article 23 not with a view to importing the particular characteristic of 'begar' that labour or service should be exacted without payment of any remuneration but with a view to bringing within the scope and ambit of that Article all other forms of forced labour and since 'begar' is one form of forced labour, the Constitution makers used the words "other similar forms of forced labour". If the requirement that labour or work should be exacted without any remuneration were imported in other forms of forced labour, they would straight-away come within the meaning of the word 'begar' and in that event there would be no need to have the additional words "other similar forms of forced labour." These words would be rendered futile and meaningless and it is a well recognised rule of interpretation that the court should avoid a construction which has the effect of rendering any words used by the legislature superfluous redundant. The object of adding these words was clearly to expand the reach and content of Article 23 by including, in addition to 'begar', other forms of forced labour within the prohibition of that Article. Every form of forced labour, 'begar' or otherwise, is within the inhibition of Article 23 and it makes no difference whether the person who is forced to give his labour or service to another is remunerated or not. Even if remuneration is paid, labour supplied by a person would be hit by Article 23 if it is forced labour, that is, labour supplied not willingly but as a result of force or compulsion. Article 23, strikes at every form of forced labour even if it has its origin in a contract voluntarily entered into by the person obligated to provide labour or service, for the reasons, namely; (i) it offends against human dignity to compel a person to provide labour or service to another if he does not wish to do so, even though it be breach of the contract entered into by him; (ii) there should be no serfdom or involuntary servitude in a free democratic India which respects the dignity of the individual and the worth of the human person. Social Welfare legislation like the Contract Labour (Regulation and Abolition) Act 1970, Equal Remuneration Act, 1976, Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979, Minimum Wages Act, 1948, etc have taken an important role in rendering social justice to the citizen of all classes in the country.

In *Labourers, Salal Hydro Project v. State of J & K*<sup>85</sup>, the Supreme Court examined the implementation of the labour laws benefits and facilities provided for workmen under Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, Contract Labour (Regulation and Abolition) Act, 1970, Minimum Wages Act, 1948, Prohibition of child labour in construction work under Art. 24 and issued directives to the State and Center asking them to implement these social welfare legislation in true letter and spirit.

The Supreme Court upon examining the constitutionality of the Rajasthan Famine Relief Works Employees (Exemption from Labour Laws) Act, 1964 in *Sanjit Roy v. State of Rajasthan*<sup>86</sup> opined that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the meaning of the words 'forced labour' and attracts the condemnation of Article 23. Every person who provides labour or service to another is entitled at the least to the minimum wage and if anything less than the minimum wage is paid to him, he can complain of violation of his fundamental right under Article 23 and ask the court to direct payment of the minimum wage to him so that the breach of Article 23 may be abated. The constitutional validity of the Exemption Act in so far as it excludes the applicability of the Minimum Wages Act, 1948 providing that minimum wage may not be paid to a workman employed in any famine relief work, cannot be sustained in the face of Article 23. Article 23 mandates that no person shall be required or permitted to provide labour or service to another on payment of anything less than the minimum wage. Whenever any labour or service is taken by the State from any person, whether he be affected by drought and scarcity conditions or not, the State must pay, at the least, minimum wage to such person.

When the State undertakes famine relief work, it is no doubt true, that it does so in order to provide relief to persons affected by drought and scarcity conditions but, none-the-less it is work which enures for the benefit of the State representing the society and if labour or service is provided by the affected persons for carrying out such work, the State cannot pay anything less than the minimum wages to the affected persons. It is not as if dole or bounty is given by the State to

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<sup>85</sup> (1983) 2 SCC 181.

<sup>86</sup> (1983) 1 SCC 525.

the affected persons in order to provide relief to them against drought and scarcity conditions nor is the work to be carried out by the affected persons worthless or useless to the society so that under the guise of providing work what the State in effect and substance seeks to do is to give dole or bounty to the affected persons. The State cannot be permitted to take advantage of the helpless condition of the affected persons and extract labour or service from them on payment of less than the minimum wage. No work of utility and value can be allowed to be constructed on the blood and sweat of persons who are reduced to a state of helplessness on account of drought and scarcity conditions.

The law laid in *Asiad Workers case*<sup>87</sup> and followed in *Sanjit Roy's case*<sup>88</sup> has been fully endorsed by the Supreme Court in *Bandhua Mukti Morcha v. Union of India*<sup>89</sup> where the Court declared bonded labour as a crude form of forced labour prohibited by Article 23. The Court has also held that failure of the State to identify the bonded labourers, to release them from their bondage and to rehabilitate them as envisaged by the Bonded Labour System (Abolition) Act, 1976, violates Article 21 and Article 23 of the Constitution<sup>90</sup>.

In a case<sup>91</sup> before the Supreme Court, the State of Gujrat have strongly opposed the right of the prisoners to claim minimum wages under the Minimum Wages Act. They say the prisoners have no right to claim wages at all except those provided under the provisions of the prisons Act, 1894 and the rules made thereunder and non-payment of wages to prisoners undergoing sentence of imprisonment with hard labour could not be violative of Article 23 of the Constitution. In support of the submission States have referred to the Constitutions of various countries and to the Universal Declaration of Human Rights and Covenants on Civil and political rights. States are, however, agreed that the prisoners are entitled to certain wages as prescribed but only by way of incentive/bonus/honorarium/gratuity/reward/stipend or the like. The amount so paid and by whatever name called has to bear some reasonable nexus to the work

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> (1984) 3 SCC 161.

<sup>90</sup> *Neerja Chaudhary v. State of M.P.*, (1984) 3 SCC 243.

<sup>91</sup> *State of Gujrat v. Hon'ble High Court of Gujrat*, (1998) 7 SCC 392.

performed by the prisoners and wages cannot be arbitrary to be paid as a dole or as a pittance.

Negating the view the Supreme Court opined that putting prisoner to hard labour and not paying wages to him would be violative of clause (1) of Article 23 of the Constitution and this violation is saved only under clause (2) thereof which provides that nothing in Article 23 shall prevent the State from imposing compulsory service for public purposes.

In dealing with a question of regularization of casual and adhoc service the Supreme Court in *State of Karnataka v. Uma Devi (3)*<sup>92</sup> expressed that Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated equals. Thus, any public employment has to be in terms of the constitutional scheme. A sovereign government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary appointments or engaging workers on daily wages. Going by a law newly enacted, The National Rural Employment Guarantee Act, 2005, the object is to give employment to at least one member of a family for hundred days in an year, on paying wages as fixed under that Act. But, a regular process of recruitment or appointment has to be resorted to, when regular vacancies in posts, at a particular point of time, are to be filled up and the filling up of those vacancies cannot be done in a haphazard manner or based on patronage or other considerations. Regular appointment must be the rule.

It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the employees permanent, would be violative of Article 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic features, has included Articles

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<sup>92</sup> (2006) 4 SCC 1.

14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the Constitution of India, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The acceptance of the argument on behalf of the respondents would really negate the rights of the others conferred by Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality.

Article 24 provided ‘Prohibition of employment of children in factories, etc.’

Under the Constitution employment of children below the age of 14 in any factory or mine or other hazardous occupation is forbidden. Obviously this provision is in the interest of health and strength of young person. But as seen in view of our socio-economic realities the Constitution makers could not prohibit the employment of children generally.

In a landmark judgment the Supreme Court in *Peoples Union for Democratic Rights v. Union of India*<sup>93</sup> the court held that Article 24 of the Constitution provides that no child below the age of 14 shall be employed to work in any factory or mine or engaged in any other hazardous employment. This is a constitutional prohibition which, even if not followed up by appropriate legislation, must operate *proprio vigore* and construction work being plainly and indubitably a hazardous employment, it is clear that by reason of this Constitutional prohibition, no child below the age of 14 years can be allowed to

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<sup>93</sup> (1982)3 SCC 235.

be engaged in construction work. Therefore, notwithstanding the absence of specification of construction industry in the Schedule to the Employment of Children Act 1938, no child below the age of 14 years can be employed in construction work and the Union of India as also every state Government must ensure that this constitutional mandate is not violated in any part of the Country.

Article 24 of the Constitution embodies a Fundamental Right which is plainly and indubitably enforceable against every one and by reason of its compulsive mandate, no one can employ a child below the age of 14 years in a hazardous employment. Since, construction work is a hazardous employment, no child below the age of 14 years can be employed in constructions work and therefore, not only are the contractors under a constitutional mandate not to employ any child below the age of 14 years, but it is also the duty of the Union of India, the Delhi Administration and the Delhi Development Authority to ensure that this constitutional obligation is obeyed.

The Supreme Court in *Bandhua Mukti Morcha v. Union of India*<sup>94</sup> in its golden words opined “Child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to the humanity. Mankind has best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood - socially, economically, physically and mentally - the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and goods citizenry. The founding fathers of the

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<sup>94</sup> (1984) 3 SCC 161

Constitution, therefore, have bestowed the importance of the role of the child in its best for development. Dr. Bhim Rao Ambedkar, was for a head of his time in his wisdom projected these rights in the Directive Principles including the children as beneficiaries. Their deprivation has deleterious effect on the efficacy of the democracy and the rule of law.

Various welfare enactments made by the Parliament and the appropriate State Legislatures are only teasing illusions and a promise of unreality unless they are effectively implemented and make the right to like to the child driven to labour a reality, meaningful and happy. Article 24 of the Constitution prohibits employment of the child below the age of 14 years in any factory or mine or in any other hazardous employment, but it is a hard reality that due to poverty child is driven to be employed in a factory, mine or hazardous employment. Pragmatic, realistic and constructive steps and actions are required to be taken to enable the child belonging to poor, weaker sections, Dalit and Tribes and minorities, enjoy the childhood and develop its full blossomed personality - educationally, intellectually and culturally - with a spirit of inquiry, reform and enjoyment of leisure. The child labour, therefore, must be eradicated through well-planned, poverty- focussed alleviation, development and imposition of trade actions in employment may drive the children and mass them up into destitution and other mischievous environment, making them vagrant, hard criminals and social risk etc. Therefore, while exploitation of the child must be progressively banned, other simultaneously alternatives to the child should be evolved including providing education, health care, nutrient food, shelter and other means of livelihood with self-respect and dignity of person. Immediate ban of child labour would be both unrealistic and counter-productive. Ban of employment of children must begin from most hazardous and intolerable activities like slavery, bonded labour, trafficking, prostitution, pornography and dangerous forms of labour and the like. Illiteracy has many adverse effects in democracy governed by rule of law. A free educated citizen could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop spirit of tolerance and reform. Therefore, education is compulsory. Primary education to the children, in particular, to the child from poor, weaker sections, Dalits and Tribes and minorities is mandatory. The basic education and

employment- oriented vocational education should be imparted so as to empower the children with these segments of the society to retrieve them from poverty and, thus, develop basic abilities, skills and capabilities to live meaningful life for economic and social empowerment. Compulsory education, therefore, to these children is one of the principal means and primary duty of the State for stability of the democracy, social integration and to eliminate social tensions.

Child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society.<sup>95</sup>

The Court in *Labourers, Salal Hydro Project v.State of J & K*<sup>96</sup> held that under Article 24 of the Constitution no child below the age of 14 years can be employed in 'construction work' which has been declared to be a hazardous employment in the *Asiad Workers'* case. This constitutional prohibition must be enforced. The children of construction workers living at or near the project site should be given facilities for schooling and this may be done either by the Central Government itself or if the Central Government entrusts the project work or any part thereof to a contractor, necessary provisions to this effect may be made in the contract with the contractor. It further expressed that the problem of child labour is a difficult problem and it is purely on account of economic reasons that parents often want their children to be employed in order to be able to make two ends meet. The possibility of augmenting their meagre earnings through employment of children is very often the reason why parents do not send their children to schools and there are large drop outs from the schools. This is an economic problem and it cannot be solved merely by legislation. So long as there is poverty and destitution in this country, it will be difficult to eradicate child labour. But even so an attempt has to be made to reduce, if not eliminate the incidence of child labour, because it is absolutely essential that a child should be able to receive proper education with a view to equipping itself to become a useful member of the society and to play a

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<sup>95</sup> Supra Note 72.

<sup>96</sup> (1983) 2 SCC 181

constructive role in the socioeconomic development of the country. We must concede that having regard to the prevailing socioeconomic conditions, it is not possible to prohibit child labour altogether and in fact, any such move may not be socially or economically acceptable to large masses of people. That is why Article 24 limits the prohibition against employment of child labour only to factories, mines or other hazardous employments. Clearly, construction work is a hazardous employment and no child below the age of 14 years can therefore be allowed to be employed in construction work by reason of the prohibition enacted in Article 24 and this constitutional prohibition must be enforced by the Central Government.

In *M.C Mehta v. State of T. N*<sup>97</sup> Hansaria, J. referred these beautiful poetry,

"I am the child.

All the world waits for my coming.

All the earth watches with interest to see what I shall become.

Civilization hangs in the balance,

For what I am, the world of tomorrow will be.

I am the child.

You hold in your hand my destiny.

You determine, largely, whether I shall succeed or fail,

Give me, I pray you, these things that make for happiness.

Train me, I beg you, that I may be a blessing to the world".

The Court further opined that "Our Constitution makers, wise and sagacious as they were, had known that India of their vision would not be a reality if the children of the country are not nurtured and educated. For this, their exploitation by different profit makers for their personal gain had to be first indicted. It is this need, which has found manifestation in Article 24, which is one of the two provisions in Part IV of our Constitution on the fundamental right against exploitation. The farmers were aware that this prohibition alone would not permit the child to contribute its mite to the nation building work unless it receives at least basic education.

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<sup>97</sup> (1996) 6 SCC 756.

In the case of *Bandhu Mukti Morcha v. Union of India*<sup>98</sup> the Supreme Court had held that while exploitation of the child must be progressively banned, other simultaneously alternatives to the child should be evolved including providing education, health care, nutrient food, shelter and other means of livelihood with self-respect and dignity of person. Immediate ban of child labour would be both unrealistic and counter-productive. Ban of employment of children must begin from most hazardous and intolerable activities like slavery, bonded labour, trafficking, prostitution, pornography and dangerous forms of labour and the like. Illiteracy has many adverse effects in a democracy governed by rule of law. A free educated citizen could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop spirit of tolerance and reform. Therefore, education is compulsory. Primary education to the children, in particular, to the child from poor, weaker sections, Dalits and Tribes and minorities is mandatory. The basic education and employment- oriented vocational education should be imparted so as to empower the children with these segments of the society to retrieve them from poverty and, thus, develop basic abilities, skills and capabilities to live meaningful life for economic and social empowerment. Compulsory education, therefore, to these children is one of the principal means and primary duty of the State for stability of the democracy, social integration and to eliminate social tensions.

Article 21 A was enacted in the Constitution of India to provide free and compulsory education to a child under 14 years of age.

One can safely say that the legislations brought this provision introducing free education to children in lines with the benevolent object of Article 24.

The 86th Amendment in the Constitution of India was made in 2002 introducing the provision of Article 21-A, declaring the right to free and compulsory education of the children between the age of 6 to 14 years as a fundamental right. Correspondingly, the provisions of Article 45 have been amended making it an obligation on the part of the State to impart free education to the children. Amendment in Article 51-A of the Constitution inserting the clause-

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<sup>98</sup> AIR 1997 SC 2218

'k' has also been made making it obligatory on the part of the parents to provide opportunities for education to their children between the age of 6 to 14 years.

The directive principle contained in Article 45 has made a provision for free and compulsory education for all children upto the age of 14 years within 10 years of promulgation of the Constitution of India but the nation could not achieve this goal even after 50 years of adoption of the provision. The task of providing education to all children in this age group gained momentum after National Policy of Education (NPE) was announced in 1986. It was felt that though the Government of India in partnership with State Governments had made strenuous efforts to fulfill the mandate and though significant improvements were seen in various educational indicators, the ultimate goal of providing universal and quality education still remained unfulfilled. In order to fulfill that goal, it was felt that an explicit provision should be made in the Part of the Constitution relating to Fundamental Rights. Right to Education is now a guaranteed fundamental right under Article 21A. It commands that the State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine. The State as at present is under the constitutional obligation to provide education to all children of the age of 6 to 14 years. The State by virtue of Article 21A is bound to provide free education, create necessary infrastructure and effective machinery for the proper implementation of the right and meet total expenditure of the schools to that extent. Right to Education guaranteed by Article 21A would remain illusory in the absence of State taking adequate steps to have required number of schools manned by efficient and qualified teachers. Before teachers are allowed to teach the children, they are required to receive appropriate and adequate training from a duly recognized training institute.<sup>99</sup>

Right to education flows directly from Article 21 and is one of the most important fundamental rights.

In *Ashoka Kumar Thakur v. Union of India*<sup>100</sup>, while deciding the issue of reservation, the Supreme Court made a reference to the provisions of Articles 15(3)

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<sup>99</sup> *State Of U.P. v. Bhupendra Nath Tripathi*, (2010) 13 SCC 203.

<sup>100</sup> (2008) 6 SCC 1.

and 21A of the Constitution, observing that without Article 21A the other fundamental rights are rendered meaningless. Therefore, there has to be a need to earnestly on implementing Article 21A. Without education a citizen may never come to know of his other rights. Since there is no corresponding constitutional right to higher education – the fundamental stress has to be on primary and elementary education, so that a proper foundation for higher education can be effectively laid.

The Supreme Court in *State of Tamil Nadu v. K. Shyam Sunder*,<sup>101</sup> opined that, “In the post constitutional era, attempts have been made to create an egalitarian society by removing disparity among individuals and in order to do so, education is the most important and effective means. There has been an earnest effort to bring education out of commercialism/mercantilism. The right of a child should not be restricted only to free and compulsory education but should be extended to have quality education without any discrimination on economic, social and cultural grounds”.

Education is an issue, which has been treated at length in our Constitution. It is a well accepted fact that democracy cannot be flawless; but, we can strive to minimize these flaws with proper education. Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs.<sup>102</sup>

Directing all the States and the Union Territories to ensure that toilet facilities are made available in all the schools the Supreme Court in *Environmental & Consumer Protection Foundation v. Delhi Administration*<sup>103</sup> opined that it is imperative that all the schools must provide toilet facilities. Empirical researches have indicated that wherever toilet facilities are not provided in the schools, parents do not send their children (particularly girls) to schools. It clearly violates the right to free and compulsory education of children guaranteed under Article 21-A of the Constitution.

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<sup>101</sup> (2011) 8 SCC 737.

<sup>102</sup> *Bhartiya Seva Samaj Trust v. Yogeshbhai Ambalal Patel*, (2012) 9 SCC 310.

<sup>103</sup> (2011) 13 SCC 1.

Unlike other fundamental rights, the right to education places a burden not only on the State, but also on the parent or guardian of every child, and on the child herself. Article 21A, places one obligation primarily on the State, which reads as follows, “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.”

By contrast, Article 51A(k), which reads as follows, places burden squarely on the parents. Fundamental duties - it shall be the duty of every citizen of India who is the parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

The Constitution directs both burdens to achieve one end: the compulsory education of children, free from the fetters of cost, parental obstruction, or State inaction. The two articles also balance the relative burdens on parents and the State. Parents sacrifice for the education of their children, by sending them to school for hours of the day, but only with a commensurate sacrifice of the State's resources. The right to education, then, is more than a human or fundamental right. It is a reciprocal agreement between the State and the family, and it places an affirmative burden on all participants in our civil society.<sup>104</sup>

Articles 21 and 21-A of the Constitution require that India's school children receive education in safe schools. In order to give effect to the provisions of the Constitution, we must ensure that India's schools adhere to basic safety standards without further delay. The Constitution likewise provides meaning to the word “education” beyond its dictionary meaning. Parents should not be compelled to send their children to dangerous schools, nor should children suffer compulsory education in unsound buildings. Likewise, the State's reciprocal duty to parents begins with the provision of a free education, and it extends to the State's regulatory power. No matter where a family seeks to educate its children, the State must ensure that children suffer no harm in exercising their fundamental right and

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<sup>104</sup> *Avinash Mehrotra vs Union Of India*, (2009) 6 SCC 398.

civic duty. States thus bear the additional burden of regulation, ensuring that schools provide safe facilities as part of a compulsory education.<sup>105</sup>

It has become necessary that the Government set a realistic target within which it must fully implement Article 21A regarding free and compulsory education for the entire country. The Government should suitably revise budget allocations for education. The priorities have to be set correctly. The most important fundamental right may be Article 21A, which, in the larger interest of the nation, must be fully implemented. Without Article 21A, the other fundamental rights are effectively rendered meaningless. Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education. This is ultimately why the judiciary must oversee Government spending on free and compulsory education.<sup>106</sup>

In a decision of far reaching implication the Supreme Court in *Society for Unaided Private School of Rajasthan v. Union of India*<sup>107</sup> has opined that Article 21A has used the expression "such manner" which means the manner in which the State has to discharge its constitutional obligation and not offloading those obligations on unaided educational institutions. If the Constitution wanted that obligation to be shared by private unaided educational institutions the same would have been made explicit in Article 21A. Further, unamended Article 45 has used the expression "state shall endeavour....for" and when Article 21A was inserted, the expression used therein was that the "State shall provide" and not "provide for" the duty, which was directory earlier made mandatory so far as State is concerned. Article 21 read with 21A, therefore, cast an obligation on the State and State alone. The State has necessarily to meet all expenses of education of children of the age 6 to 14 years, which is a constitutional obligation under Article 21A of the Constitution. Children have also got a constitutional right to get free and compulsory education, which right can be enforced against the State, since the obligation is on the State. Children who opt to join an unaided private educational institution cannot claim that right as against the unaided private educational

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<sup>105</sup> Ibid.

<sup>106</sup> *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

<sup>107</sup> (2012) 6 SCC 1.

institution, since they have no constitutional obligation to provide free and compulsory education under Article 21A of the Constitution.

Needless to say that if children are voluntarily admitted in a private unaided educational institution, children can claim their right against the State, so also the institution. Article 51A(k) of the Constitution states that it shall be the duty of every citizen of India, who is a parent or guardian, to provide opportunities for education to his child. Parents have no constitutional obligation under Article 21A of the Constitution to provide free and compulsory education to their children, but only a constitutional duty, then one fails to see how that obligation can be offloaded to unaided private educational institutions against their wish, by law, when they have neither a duty under the Directive Principles of State policy nor a constitutional obligation under Article 21A, to those 25% children, especially when their parents have no constitutional obligation.

Article 28 provided freedom of attendance at religious instructions or religious worship in certain educational education.

Clause 1 of the Article provides that no religious instruction shall be forwarded to any educational institution wholly maintained out of State funds.

I explaining the reasons for prohibiting religious instructions in educational institution wholly maintained by the State, Dr Ambedkar, Chairman of the Drafting, said:

“ I take the liberty of saying that the Draft as it stands, strikes the mean which I hope will be accepted by the House. There are three reasons in my judgment which militate against the acceptance of the view, namely, that there ought to be no ban on religious instructions.

The first reason is this. We have accepted this proposition which is embodied in Article 27, that public funds raised by taxes shall not be utilized for the benefit of any particular community. For instance, if we permit any particular religious instructing, say is a school established by a district or local board gives religious instructions on the ground that the majority of the students studying in

that school are Hindus; the effect would be that such action would militate against the provision contained in Article 27.

The Second difficulty is much more real than the first, namely, the multiplicity of religion that we have in this country. For, instance, take a city like Bombay which contains a heterogeneous population believing in different creeds. Suppose, for instance, there was a school in the city of Bombay maintained by the municipality. Obviously, such a school would contain children of Hindus, there will be pupils belonging to the Christian community, Zoroastrian community, or the Jewish community. The educational institutions are required to treat all these children on a footing of equality and provide religious instructions to all denominations.

The third thing which I would like to mention in this connection is that unfortunately the religion which prevails in this country are not merely non-social, so far as their mutual relation is concerned, they are anti-social, one religion claiming that its teaching constitute the only path for salvation, that all other religions are wrong. The Muslims believe that anyone who does not believe in the dogmas of Islam is a Kaffer, not entitled to brotherly treatment with the Muslims. The Christians have a similar belief. In view of this it seems to me that we should be considerably disturbing the peaceful atmosphere of an institution if these controversies with regard to the truthful character of any particular religion and the erroneous character of the other were brought into juxtaposition in the school itself. I, therefore, say that in laying down in Article 28(1) that in State institutions there shall be no religious instructions, we have in my judgment travelled the path of complete safety.<sup>108</sup>

In *D.A.V. College, Jullundur v. State of Punjab*,<sup>109</sup> Section 4 of the Guru Nanak University Act, which enjoyed the State to make provision for the study and research on the life and teachings of Guru Nanak, was questioned on the ground that as the University was maintained wholly on the State funds, Section 4 of the Act offended Article 28(1) and was not saved by clause (2) thereof. The Court did not accept this argument because what Section 4 enjoyed the University was to

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<sup>108</sup> Dr Ambedkar: Constituent Assembly Debates, Vol.7, pp. 883-884.

<sup>109</sup> AIR 1971 SC 1737.

encourage an academic study of the life and teachings of Guru Nanak, which need not necessarily amount to religious instructions or promotion of any particular religion.

The Supreme Court in *Bachan Bachao Andolan v. Union of India*<sup>110</sup> dealt with a matter of great significance. The petition had been filed in public interest under Article 32 of the Constitution in the wake of serious violations and abuse of children who are forcefully detained in circuses, in many instances, without any access to their families under extreme inhuman conditions. There are instances of sexual abuse on a daily basis, physical abuse as well as emotional abuse. The children are deprived of basic human needs of food and water.

It was brought into the notice of the Court about gross violation of statutory provisions of law like Employment of Children's Act, 1938, The Children (Placing of Labour) Act, 1933, The Child Labour (Prohibition and Regulation) Act, 1986, Minimum Wages Act, 1976, The Prevention of Immoral Traffic Act, Equal Remuneration Act, 1976 and Rules made thereunder and the Bonded Labour System (abolition) Act, 1976 read with rules made their under, the Factories Act, 1948, Motor Transport Workers Act, 1961 etc. Existing labour laws and legitimacy of contracts of employment for children. The legitimacy of contracts of employment for children and working conditions.

Learned Solicitor General further brought into light that there was a blatant violation of Child Labour (Prohibition and Regulation) Act, 1986, Children Pledging of Labour Act, 1933, the Bonded Labour System Abolition Act, 1976, the Factories Act, 1948, the Plantation Labour Act, 1951, the Mines Act, 1952, the Merchant Shipping Act, 1958, the Apprentices Act, 1961, the Motor Transport Workers Act, 1961, the Bidi and Cigar Workers (Conditions of Employment) Act, 1966, the West Bengal Shops and Establishment Act, 1963.<sup>111</sup>

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<sup>110</sup> (2011) 5 SCC 1

<sup>111</sup> supra

The Honb'ble Supreme Court taking serious note into the matter ordered to implement the fundamental right of the children under Article 21A as it is imperative that the Central Government must issue suitable notifications prohibiting the employment of children in circuses within two months from today. The Court further directed to conduct simultaneous raids in all the circuses to liberate the children and check the violation of fundamental rights of the children. The rescued children be kept in the Care and Protective Homes till they attain the age of 18 years. The State was also directed to talk to the parents of the children and in case they are willing to take their children back to their homes, they may be directed to do so after proper verification. It direct the government to frame proper scheme of rehabilitation of rescued children from circuses.<sup>112</sup>

#### 4.3 Rights in Specific Form of Restriction on State Action.

Article 14 provides equality before law. It says that 'The State shall not deny to any person equality before the law or the equal protection of laws within the territory of India'.

The makers of the Indian Constitution were not satisfied with the kind of undertaking of the right of equality. They knew of the wide spread social and economic inequalities in the country sanctioned for thousand of years by public policies and exercise of public powers supported by religion and other social norms and practice. Such inequalities could not be removed, minimized or taken care of by a provision like Article 14 alone. Therefore, they expressly abolished and prohibited some of the existing inequalities not only in public but even in private affairs and expressly authorized the State to take necessary steps to minimize and remove them. Article 14 is a provision in the Constitution which cannot be divorced with any of the social welfare legislation promoting social justice. Article 14 connotes two concept of equality one, equality before law and the other equal protection of law. The word 'law' in the former expression is used in its generic sense in a philosophical sense and whereas the word 'laws' is the latter expression denotes specific laws.

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<sup>112</sup> supra

In *State of W.B. v. Anwar Ali Sarkar*<sup>113</sup> the Apex Court held that a rule of procedure laid down by law comes as much within the purview of Art. 14 of the Constitution as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for rebel and for defence with like protection and without discrimination. If it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position, it is not incumbent upon him before he can claim relief on the basis of fundamental rights to assert and prove that, in making the law, the legislature was actuated by a hostile or inimical intention against a particular person or class, nor would the operation of Article 14 be excluded merely because it is proved that the legislature had no intention to discriminate, though discrimination was the necessary consequence of the Act. The Court further opined that Article 14 is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic and, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all embracing scope and meaning, for to do so would be to violate its magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.

In *Sri. Srinivasa Theatre v. Govt. of T.N*<sup>114</sup> explaining the concept of Article 14 the Court held that Article 14 of the Constitution enjoins upon the State not to deny any persons 'Equality before law' or 'the equal protection of law' within the territory of India. The two expressions do not mean the same thing even if there may be much in common. Their meaning and content has to be found and determined having regard to the context and scheme of our Constitution. The word "law" in the former expression is used in a generic sense - a philosophical sense - whereas the word "laws" in the latter expression denotes specific laws in force. Equality before law is a dynamic concept having many facets. One facet - the most commonly acknowledge - is that there shall be no privileged person or class and that none shall be above law. A facet which is of immediate relevance herein is the obligation upon the State to bring about,

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<sup>113</sup> AIR 1952 SC 75.

<sup>114</sup> (1992) SCC 643.

through the machinery of law, a more equal society envisaged by the preamble and part IV of our Constitution. For equality before law can be predicate meaningfully only in an equal society i.e., in a society contemplated by Article 38 of the Constitution.

It is well settled that the equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To put it simply, all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left.

In *D.S. Nakara v. Union of India*<sup>115</sup> the Apex Court has held that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is attracted where equals are treated differently without any reasonable basis. The principle underlying the guarantee is that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same. Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation. The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question. In other words, there ought to be causal connection between the basis of classification and the object of the statute. The doctrine of classification was evolved by the Court for the purpose of sustaining a legislation or State action

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<sup>115</sup> (1983) 1 SCC 305.

designed to help weaker sections of the society. Legislative and executive action may accordingly be sustained by the court if the State satisfies the twin tests of reasonable classification and the rational principle correlated to the object sought to be achieved. A discriminatory action is liable to be struck down unless it can be shown by the Government that the departure was not arbitrary but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

The preamble to the Constitution envisages the establishment of a socialist republic. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave.

In *Maneka Gandhi v. Union of India*<sup>116</sup> the Supreme Court opined that Article 14 is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic and, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all embracing scope and meaning, for to do so would be to violate its magnitude.

In *E.R. Royappa v. State of T.N*<sup>117</sup>, the Supreme Court propounding a new approach of Article 14 held that equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. Equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other to the whim and caprice of an absolute monarch. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omni-presence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be right and just and fair and not arbitrary, fanciful or oppressive.

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<sup>116</sup> (1978) 1 SCC 248

<sup>117</sup> (1974) 4 SCC 3.

In *Ajay Hasia v. Khalid Mujib Sehravardi*<sup>118</sup> the Supreme Court with the unanimous opinion of a Constitution bench held that Article 14 must not be identified with the doctrine of classification. What Article 14 strikes at is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions, namely, (1) that the classification is founded on an intelligible differentia and (2) that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action, the impugned legislative or executive action, would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever, therefore, there is arbitrariness in State action whether it be the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.

The Apex Court in *Ramana Dayaram Shetty v. International Airport Authority of India*<sup>119</sup> held that where a corporation is an instrumentality or agency of Government it would be subject to some constitutional or public law limitations on Government. The rule inhibiting arbitrary action by Government must apply equally where such corporation is dealing with the public and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will. Its action must be in conformity with some principles which meets the test of reason and relevance. It is well established that Article 14 requires that action must not be arbitrary and must be based on some rational and relevant principle which is non-discriminatory. It must not be guided by extraneous or irrelevant considerations. The State cannot act arbitrarily in enter into relationship,

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<sup>118</sup> (1981) 1 SCC 722.

<sup>119</sup> (1979) 3 SCR 1014.

contractual or otherwise, with a third party. Its action must conform to some standard or norm which is rational and non-discriminatory.

In *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar*<sup>120</sup> the Supreme Court enunciated the following principals that may be called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws enshrined under Article 21.

- (a) that a law may be constitutional even though it relatesto a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;
- (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
- (c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
- (d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest ;
- (e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation;
- (f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

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<sup>120</sup> (1959) SCR 279.

The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and -violative of the equal protection of the laws.

A close perusal of the decisions of this Court in which the above principles have been enunciated and applied by this Court will also show that a statute which may come up for consideration on a question of its validity under Art. 14 of the Constitution.

The Supreme Court in *Sudhir Chandra Sarkar v. Tata Iron & Steel Co. Ltd.*<sup>121</sup> referring to the principles adopted in *Western India Match Company Ltd. v. Workmen*<sup>122</sup>, held that our Constitution envisages a society governed by rule of law. Absolute discretion uncontrolled by guidelines which may permit denial of equality before law is the anti-thesis of rule of law. Absolute discretion not judicially reviewable inheres the pernicious tendency to be arbitrary and is, therefore, violative of Article 14. Equality before law and absolute discretion to grant or deny benefit of the law are diametrically opposed to each other and cannot co-exist. Therefore also the conferment of absolute discretion by Rule 10 of the Gratuity Rules to give or deny the benefit of the rules cannot be upheld and must be rejected as unenforceable.

Article 14 has been invoked to prohibit sexual harassment of working women on the ground of violation of the right of gender equality<sup>123</sup>.

Earmarking of seats for children belonging to a specified category who face financial barrier in the matter of accessing education satisfies the test of classification in Article 14<sup>124</sup>.

One of the reasons for deletion of the right to property from Part III of the Constitution vide the Constitution (Forty-fourth Amendment) Act, 1978 was that the economic liberties of freedom of property came in direct conflict with egalitarian values including inter-generational equity. This aspect needs to be kept

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<sup>121</sup> AIR 1984 SC 1064.

<sup>122</sup> (1974)1 SCR 434.

<sup>123</sup> *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

<sup>124</sup> *Society of Unaided Private School of Rajasthan v. Union of India*, (2012) 6 SCC 1.

in mind as in this case the substantive challenge to the Constitution (Thirty- fourth Amendment) Act, 1974 is based on the right to property in the garb of over-arching principles like separation of powers, rule of law and abrogation of the power of judicial review. The doctrine of classification under Article 14 has several facets and none of those facets have been abrogated by the Constitution (Thirty-fourth Amendment) Act, 1974. Equality is a comparative concept. A person is treated unequally only if that person is treated worse than others, and those others (the comparison group) must be those who are similarly situated.<sup>125</sup>

In *K.C. Vasanth Kumar v. State of Karnataka*<sup>126</sup>, Venkatramaiah J. observed:

"Article 14 of the Constitution consists of two parts. It asks the State not to deny to any person equality before law. It also asks the State not to deny the equal protection of the laws. Equality before law connotes absence of any discrimination in law. The concept of equal protection required the State to mete out differential treatment to persons in different situations in order to establish an equilibrium amongst all. This is the basis of the rule that equals should be treated equally and unequals must be treated unequally if the doctrine of equality which is one of the corner-stone of our Constitution is to be duly implemented. In order to do justice amongst unequals, the State has to resort to compensatory or protective discrimination. Article 15(4) and Article 16(4) of the Constitution were enacted as measures of compensatory or protective discrimination to grant relief to persons belonging to socially oppressed castes and minorities."

Affirmative action is employed to eliminate substantive social and economic inequality by providing opportunities to those who may not otherwise gain admission or employment. Articles 14, 15 and 16 allow for affirmative action. To promote Article 14 egalitarian equality, the State may classify citizens into groups, giving preferential treatment to one over another. When it classifies, the State must keep those who are unequal out of the same batch to achieve constitutional goal of egalitarian society.<sup>127</sup>

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<sup>125</sup> *Glanrock Estate (P) Ltd. v The State Of Tamil Nadu*, (2010) 10 SCC 96.

<sup>126</sup> AIR 1985 SC 1495.

<sup>127</sup> *Ashok Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

The new developments of equality also include increasing emphasis on positive equality or affirmative action. In several decisions the Court has emphasized that equality is a positive right and requires the State to minimize the existing inequalities and to treat unequals or under privilege with special care as envisaged in the Constitution.

Article 15 of the Constitution provides prohibition on ground of religion, race, caste, sex or place of birth.

Article 14 embodies the general principal of equality before law. A specific application of the same principle is provided in Article 15. Article 15 concretize and enlarges the scope of Article 14. The article is aimed to provide social justice by prohibiting discrimination of citizens on ground of religion, race, caste, sex or place of birth.

Invalidating an Act of the State legislature which provides for election on the basic of separate electorates of members of different religious communities the Supreme Court in *Nain Sukh Das v. State of Uttar Pradesh*<sup>128</sup> held that it cannot be seriously disputed that any law providing for elections on the basis of separate electorates for members of different religious communities offends against article 15 (1) of the Constitution. The constitutional mandate to the State not to discriminate against any citizen on the ground, inter- alia, of religion clearly extends to political as well as to other rights, and any election held after the Constitution in, pursuance of such a law subject to clause (4) must be held void as being repugnant to the Constitution.

The Supreme Court in *Yusuf Abdul Aziz v. The State of Bombay*<sup>129</sup>, which held that section 497 of the Penal Code does not offend Articles 14 and 15 of the Constitution. In *R.C Poudyal v. Union of India*, the Supreme Court upheld reservation of one seat in the State assembly in favour of Sangha on the ground that Sangha is merely not a religious institution but historically a political and social institution. Therefore such reservation does not violate Article 15(1) .

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<sup>128</sup> AIR 1953 SC 384.

<sup>129</sup> AIR 1954 SC 321.

The Supreme Court in *Thota Sesharathamma v. Thota Manikyamma*<sup>130</sup> held that the Constitution of India accords socio-economic and political justice, equality of status and of opportunity assuring the dignity of person with stated freedoms. Article 14 guarantees equality. In other words frowns upon discrimination on any ground. Article 15(1) abolishes discrimination and removed disability, liability or restriction on grounds of sex and ensures equality of status. To enliven and alongate this constitutional goal to render socioeconomic justice, to relieve Hindu female from degradation, disabilities, disadvantages and restrictions under which Hindu females have been languishing over centuries and to integrate them in national and international life.

Bharat Ratna Dr. Baba Saheb Ambedkar, the first Law Minister and rounding father of the Constitution drafted Hindu Code Bill. The Hindu, Marriage Act, Adoption and Maintenance Act, Minority and Guardianship Act and Succession Act 1956. They ensue equal status and socio-economic justice to Hindu female. In a socialist democracy governed by rule of law, law as a social engineering should bring about transformation in-the social structure. Whenever a socio-economic legislation or the rule or instruments touching the implementation of welfare measures arise for consideration, this historical evidence furnishes as the foundation and all other relevant material would be kept at the back of the court's mind.

Art. 15(3) relieves from the rigour of Art. 15(1) and charges the State to make special provision to accord to women socioeconomic equality. Article 15(3) treats women as a class, mitigates the rigour of absolute equality enshrined in Article 14 and its species Article 15(1) & 16(1) and enjoins the State to make any special provision to remedy past injustice and to advance their status, socio economic and political.

The Court<sup>131</sup> further made a scholarly research on the writes of women and observed as follows: “In Vedic society woman enjoyed equal status economically, socially and culturally with men. The initiation to education upanayanam was performed in Vedic period to the girls as well as boys. Women studied the

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<sup>130</sup> (1994) SCC 312.

<sup>131</sup> supra

Vedas, even composed Vedic rhymes. They participated in public life freely. Vishvavara, Apala, Lopamudra and Shashayasi are only few examples in the initial Vedic period. Thereafter Ghosha, Maitrai and Gargi occupied prime of place for equality in intellectual excellence and equal status with men. Selfishness and male chauvinism made woman to gradually degrade and were given no voice even in the settlement of their marriages or so on. She was denied participation in public affairs. Though Yajnavalkya was a proponent to her economic status but ultimately Manu Smriti took firm hold and in Manu stated that woman had no right to study the Vedas. Thereby, denied the right to education, fundamental human right to acquire knowledge and cultural and intellectual excellence. He stated that woman must not seek separation from father, husband or son and bonded her for ever. The husband was declared to be one with the wife that the wife can seek no divorce but allowed immunity to a male to discard an unwanted wife. All through the ages till Hindu Marriage Act, 1955 was made a male was allowed polyandry. Manu further stated that a wife, a son and a slave are declared to have no property and if they happened to acquire it would belong to male under whom she is in protection. Thus she was denuded of her right to property or incentive to decent and independent living and made her a dependent only to rare children and bear the burdens. When she becomes a widow, she was declared to have only maintenance and if in possession of her husband's property or coparcenary, to be a widow's estate with reversionary right to the heirs of last male holder. Fidelity was a condition precedent to receive maintenance. He prescribed corporeal punishment to a wife who commits faults, should be beaten with a rope or a split bamboo. If she was murdered it was declared to be an Upapattaka that is a minor offence. I did not adhere to literal translation but attempted to portray their sweep and deep incursion on social order. Thus laid firm foundation to deny a Hindu female of equality of status, opportunity and dignity of person with no independent right to property and made her a subservient, socially, educationally and culturally. Widows were murdered by inhuman Sati and now by bride burnings.

Gautam Budha gave her equality of status and opportunity. Efforts of social reformers like Raja Ram Mohan Ray, Kandukuri Veeresalingam and a host of other enlightened made the British Rulers gradually to make statute law, given

her right to separate residence and maintenance and a right over property of her husband or joint family for maintenance and a charge by a decree of court. Mahatma Gandhiji, the father of the nation, in *Young India* on October 17, 1929 had written thus: "I am uncompromising in the matters of women's rights. In my opinion she should live under no legal disability, no suffering by men, we should treat the daughters and sons on the footing of perfect equality". Shri Ravindra Nath Tagore, the Noble laureate in his speech in 1913 reprinted in "To the Women" at page 18 stated "that women is the champion of man, gifted with equal mental capacity. She has a right to participate in any minutest activity of men and she has equal right of freedom and liberty with him".

This Court in *Pratap Singh v. Union of India*<sup>132</sup>, held that Section 14 of the Hindu Succession Act, 1956 does not discriminate on grounds of sex and is in violation of Article 15(3). The preferential treatment accorded, thereby was held to be not violative of Arts. 14 and 15(1). Sub-section (2) of section 14 of the Act attempts to denude the object of sub-section (1) and emasculates its efficacy. It should, therefore, be read as an exception or a proviso to sub-section (1) of section 14. The interpretation of the proviso or an exception should not be to allow to 'eat away the vital veins of full ownership accorded by sub-section (1) of s. 14 when this Court upheld the validity of section 14(1) on the enfil of Art; 15(3) what should be the message thus intended to convey? It would mean that the court would endeavour to give full effect to legislative and constitutional vision of socio-economic equality to female 'citizen by granting full ownership of property to a Hindu female. As a fact Article 15(3) as a fore runner to common code does animate 'to 'make law to accord socio economic equality to every female citizen of India, irrespective of religion, race cast or region.

In *Kalawatibai v. Soiryabai*<sup>133</sup> the mother of the parties, a Hindu widow gifted adverse possession as against the other co-owner unless it was so asserted and acquiesced by the respondent. Therefore, the decree for partition was upheld and the suit for injunction was dismissed. The ratio therein does not assist the appellant. Thus I hold that' the Act revolutionised the status of a 'Hindu female; used section 14(1) of the Hindu Succession Act, 1956, as a tool to undo past

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<sup>132</sup> (1985) Supp. 2 SCR 773.

<sup>133</sup> (1991) 3 SCC 410.

injustice to elevate her to equal status with dignity of person on par with man; extinguished pre-existing limitation of woman's estate, or widow's estate known to Shastric law removed all the fetters to blossom the same into full Ownership. The discrimination suffered by Hindu female under Shastric law was exterminated by legislative fiat. The social change thus envisaged must be endeavoured to be given full vigour, thrust and efficacy. Section 14(1) enlarges the restricted estate into full ownership when the Hindu female has pre-existing right to maintenance etc.

In *Bai Tahira v. Ali Hussain Fissalli Chothia*<sup>134</sup> explaining the benevolent feature of Article 15 (3) held that the welfare laws must be so read as to be effective delivery systems of the salutary objects sought to be served by the Legislature and when the beneficiaries are the weaker sections, like destitute women, the spirit of Article 15(3) must be in light of the meaning of the section.

The Constitution is a pervasive omnipresence brooding over the meaning and transforming the values of every measure.

The Apex Court in *Government of Andhra Pradesh v. P.B. Vijayakumar*<sup>135</sup> held that the power conferred by Article 15(3) is wide enough to cover the entire range of State activity including employment under the State. The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women. To say that under Article 15(3), job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this Article. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power

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<sup>134</sup> (1979) 2 SCC 316

<sup>135</sup> AIR 1995 SC 1648.

conferred under Article 15(3), is not whittled down in any manner by Article 16. What then is meant by "any special provision for women" in Article 15(3)? This "special provision", which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation.

It is important to note that in the case of *P.A. Inamdar v.State of Maharashtra*<sup>136</sup>, this Court held that there shall be no reservations in private unaided colleges and that in that regard there shall be no difference between the minority and non-minority institutions. However, by the Constitution (Ninety-third Amendment) Act, 2005, Article 15 is amended. It is given Article 15(5). The result is that *P.A. Inamdar*<sup>137</sup> has been overruled on two counts: (a) whereas this Court in *P.A. Inamdar*<sup>138</sup> had stated that there shall be no reservation in private unaided colleges, the Amendment decreed that there shall be reservations; (b) whereas this Court in *P.A. Inamdar*<sup>139</sup> had said that there shall be no difference between the unaided minority and non-minority institutions, the Amendment decreed that there shall be a difference. Article 15(5) is an enabling provision and it is for the respective States either to enact a legislation or issue an executive instruction providing for reservation except in the case of minority educational institutions referred to in Article 30(1). The intention of the Parliament is that the minority educational institution referred to in Article 30(1) is a separate category of institutions which needs protection of Article 30(1) and viewed in that light we are of the view that unaided minority school(s) needs special protection under Article 30(1). Article 30(1) is not conditional as Article 19(1)(g). In a sense, it is absolute as the Constitution framers thought that it was the duty of the Government of the day to protect the minorities in the matter of preservation of culture, language and script via establishment of educational institutions for religious and charitable purposes.

In *Ashok Kumar Thakur v. Union of India*<sup>140</sup> the question arose before the Supreme Court was that does the 93rd Amendment violate the Basic Structure of

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<sup>136</sup> (2004) 8 SCC 139

<sup>137</sup> *ibid*

<sup>138</sup> *ibid*

<sup>139</sup> *ibid*

<sup>140</sup> (2008) 6 SCC 1.

the Constitution by imposing reservation on unaided institutions? Answering in the affirmative the Court opined, Yes, it does. Imposing reservation on unaided institutions violates the Basic Structure by stripping citizens of their fundamental right under Article 19(1)(g) to carry on an occupation. *T.M.A. Pai's case*<sup>141</sup> and *Inamdar*<sup>142</sup> affirmed that the establishment and running of an educational institution falls under the right to an occupation. The right to select students on the basis of merit is an essential feature of the right to establish and run an unaided institution. Reservation is an unreasonable restriction that infringes this right by destroying the autonomy and essence of an unaided institution. The effect of the 93rd Amendment is such that Article 19 is abrogated, leaving the Basic Structure altered. To restore the Basic Structure, I sever the 93rd Amendment's reference to "unaided" institutions.

Article 16 ensures equality of opportunity in matters of public employment.

Article 16 is an instance of the application of the general rule of equality before law laid down in Article 14 and of the prohibition of discrimination in Article 15 (1) with respect to the opportunity for employment or appointment to any office under the State.

Explaining the relationship between Article 14, 15 and 16 the Supreme Court in *Gzula Dasaratha Rama Rao v. State of A.P.*,<sup>143</sup> held that Article 14 enshrines the fundamental right of equality before the law or the equal protection of the laws within the territory of India. It is available to all, irrespective of whether the person claiming it is a citizen or not. Article 15 prohibits discrimination on some special grounds-religion, race, caste, sex, place of birth or any of them. It is available to citizens only, but is not restricted to any employment or office under the State. Article 16 clause (1), guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and clause (2) prohibits discrimination on certain grounds in respect of any such employment or appointment. It would thus appear that Article

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<sup>141</sup> (2002) 8 SCC 481

<sup>142</sup> *ibid*

<sup>143</sup> AIR 1961 SC 564.

14 guarantees the general right of equality, Article. 15 and 16 are instances of the same right in favour of citizens in some special circumstances. Article 15 is more general than Art. 16, the latter being confined to matters relating to employment or appointment to any office under the State. It is also worthy of note that Article 15 does not mention 'descent' as one of the prohibited grounds of discrimination, whereas Article 16 does. We do not see any reason why the full ambit of the fundamental right guaranteed by Article 16 in the matter of employment or appointment to any office under the State should be cut down by a reference to the provisions in Part XIV of the Constitution which relate to Services or to provisions in the earlier Constitution Acts relating to the same subject.

Again the Supreme Court in *State of Kerala v. N.M. Thomas*<sup>144</sup> held that Articles 14, 15 and 16 form part of a string of constitutionally guaranteed rights. These rights supplement each other. Article 16 is an incident of guarantee of equality contained in Article 14. Both Articles 14 and 16(1) permit reasonable classification having a nexus to the objects to be achieved. Under Article 16 there can be a reasonable classification of the employees in matters relating to employment or appointment. Under Article 16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class.

The expression 'matter relating to employment' must include all matters in relation to employment both prior and subsequent to the employment which are incidental to the employment and form part of the terms and conditions of the employment. Thus the guarantee in Clause 1 of Article 16 will cover (a) initial appointments, (b) promotions, (c) termination of employment, (d) matters relating to salary, periodical increments, leave, gratuity, pension, age of superannuation etc. Principle of equal pay for equal work is also covered by equality of opportunity in Article 16(1). Terminating the service of a temporary employee may itself constitute denial of equal protection and offend the equality clause in Article 14 and 16(1).

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<sup>144</sup> (1976) 2 SCC 310.

In *Krishan Chander Nayar v. Central Tractor Organisation*<sup>145</sup> the Court held that arbitrary imposition of a ban against a person's entry into Government service amounts to an infringement of his right to equality of opportunity guaranteed by Article 16(1) of the Constitution. That Article guarantees not merely the right to make an application for State employment but also a consideration on merits of that application when made.

In deciding the scope and ambit of the fundamental right of equality of opportunity guaranteed under Article 16 the Supreme Court in *General Manager, Southern Railway v. Rangachari*,<sup>146</sup> held that it is necessary to bear in mind that in construing the relevant Article a technical or pedantic approach must be avoided. We must have regard to the nature of the fundamental right guaranteed and we must seek to ascertain the intention of the Constitution by construing the material words in a broad and general way. If the words used in the Article are wide in their import they must be liberally construed in all their amplitude. Thus construed it would be clear that matters relating to employment cannot be confined only to the initial matters prior to the act of employment. The narrow construction would confine the application of Article 16(1) to the initial employment and nothing else but that clearly, is only one of the matters relating to employment. The other matters relating to employment would inevitably be the provision as to the salary and periodical increments therein, terms as to leave, as to gratuity, as to pension and as to the age of superannuation. These are all matters relating to employment and they are, and must be, deemed to be included in the expression "matters relating to employment" in Article 16(1). Article 16(2) provides that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. This sub-Article emphatically brings out in a negative form what is guaranteed affirmatively by Article 16(1). Discrimination is a double-edged weapon; it would operate in favour of some persons and against others and Article 16(2) prohibits discrimination and thus assures the effective enforcement of the fundamental right of equality of opportunity guaranteed by Article 16(1). The words "in respect of any

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<sup>145</sup> AIR 1962 SC 602.

<sup>146</sup> AIR 1962 SC 36.

employment" used in Article 16(2) must, therefore, include all matters relating to employment as specified in Article 16(1). Therefore that promotion to selection posts 'is included both under Article 16(1) and (2).

In holding that the principle of equal pay for equal work is also covered by equality of opportunity in Article 16(1) the Apex Court in *Randhir Singh v. Union of India*<sup>147</sup> observed that it is true that the principle of "equal pay for equal work" is not expressly declared by our Constitution to be a fundamental right. But it certainly is a Constitutional goal. Article 39 (d) of the Constitution proclaims "equal pay for equal work for both men and women" as a Directive Principle of State Policy. "Equal pay for equal work for both men and women" means equal pay for equal work for every one and as between the sexes. Directive Principles have to be read into the fundamental rights as a matter of interpretation. Article 14 of the Constitution enjoins the State not to deny any person equality before the law or the equal protection of the laws and Article 16 declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. These equality clauses of the Constitution must mean something to everyone. To the vast majority of the people the equality clauses of the Constitution would mean nothing if they are unconcerned with the work they do and the pay they get. To them the equality clauses will have some substance if equal work means equal pay. Questions concerning wages and the like, mundane they may be, are yet matters of vital concern to them and it is there, if at all that the equality clauses of the Constitution have any significance to them. The preamble to the Constitution declares the solemn resolution of the people of India to constitute India into a Sovereign Socialist Democratic Republic. Again the word 'Socialist' must mean something. Even if it does not mean 'to each according to his need', it must at least mean 'equal pay for equal work'. From a construction of Articles 14 and 16 in the light of the Preamble and Article 39(d), it is clear that the principle "equal pay for equal work" is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.

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<sup>147</sup> (1982) 1 SCC 618.

In a landmark judgment reflecting the dynamic concept of equality enshrined in Article 16 in *Akhil Bharatiya Soshit Karamchhari Sangh v. Union Of India*<sup>148</sup> held that Article 16(1), Article 16(2) expressly forbids discrimination on the ground of caste and here the question arises as to whether the Scheduled Castes and Tribes are castes within the meaning of Article 16(2). Assuming that there is discrimination, Article 16(2) cannot be invoked unless it is predicated that the Scheduled Castes are "castes". There are sufficient indications in the Constitution to suggest that the Scheduled Castes are not mere castes. They may be something less or something more and the time badge is not the fact that the members belong to a caste but the circumstance that they belong to an indescribably backward human group. Articles 14 to 16 form a Code by themselves and contain a constitutional fundamental guarantee. The Directive Principles which are fundamental in the governance of the country enjoin upon the State the duty to apply that principle in making laws. Article 46 obligates the State to promote with special care the educational and economic interests of the weaker sections of the people and in particular of the Scheduled Castes and the Scheduled Tribes. Article 46 read with Article 16(4) makes it clear that the exploited lot of the harijan groups in the past shall be extirpated with special care by the State.

The preamble to the Constitution of India proclaims the resolution of the people to secure to all its citizens justice, social, economic and political, equality of status and opportunity and to promote fraternity assuring the dignity of the individual. The right to equality before the law and equality of opportunity in the matter of public employment are guaranteed as fundamental rights. The State is enjoined upon by the Directive Principles to promote the welfare of the people, to endeavour to eliminate inequalities in status, facilities and opportunities and special provisions have been made, in particular, for the protection and advancement of the Scheduled Castes and Scheduled Tribes in recognition of their low social and economic status and their failure to avail themselves of any opportunity of self-advancement. In short the constitutional goal is the establishment of a socialist democracy in which justice-economic, social and political is secure and all men are equal and have equal opportunity. Inequality

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<sup>148</sup> (1981) 1 SCC 246.

whether of status, facility or opportunity is to end, privilege is to cease and exploitation is to go. The under-privileged, the deprived and the exploited are to be protected and nourished so as to take their place in an egalitarian society. State action is to be towards those ends. It is in this context that Article 16 has to be interpreted when State action is questioned as contravening Article 16.<sup>149</sup>

Doctrine of protective discrimination envisaged in Article 16 would bring within its ambit all such people who are backward not only in a State or Union Territory but also throughout the length and breadth of the country as envisaged under clause (1) of Article 16 thereof.<sup>150</sup>

A Constitution, such as ours, must receive generous interpretation so as to give an its citizens the full measure of justice so proclaimed. While interpreting the Constitution the expositors must concern themselves not so much with words as with the spirit and sense of the Constitution which could be found in the Preamble the Directive Principles and other such provisions. At one time it was assumed that because the fundamental rights are enforceable in a court of law while Directive Principles are not, the former were superior to the latter, that way of thinking has become obsolete. The current thinking is that while Fundamental Rights are primarily aimed at assuring political freedom to the citizens against excessive State action, the Directive Principles are aimed at securing social and economic freedoms by appropriate State action. The Directive Principles are made unenforceable in a limited sense because no Court can compel a Legislature to make laws. But that does not mean that they are less important than Fundamental Rights or that they are not binding on the various organs of the State. They are all the same fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

The Directive Principles should serve the Courts as a Code of Interpretation. Every law attacked on the ground of infringement of Fundamental Right should be examined to see if the impugned law does not advance one or other of the Directive Principles or if it is not in the discharge of some of the

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<sup>149</sup> *supra*

<sup>150</sup> *Subhash Chandra v. Delhi Subordinate Service Selection Board*, (2009) 15 SCC 458.

undoubted obligations of the State towards its citizens flowing out of the Preamble, the Directive Principles and other provisions of the Constitution. Reservation of posts and all other measures designed to promote the participation of the Scheduled Castes and Scheduled Tribes in public services at all levels are a necessary consequence flowing from the Fundamental Rights guaranteed by Article 16(1). This very idea is emphasized further by Article 16(4) which is not in the nature of an exception to Article 16(1) but a facet of that Article.

In *B. Venkataramana v. State of Tamil Nadu*<sup>151</sup> reservation of posts in favour of Hindus, Muslims and Christians were held to be violative of Article 16 (2). The Court held that the ineligibility created by the Communal G. O. does not appear to us to be sanctioned by cl. (4) of Article 16 & is an infringement of the fundamental right guaranteed to the petitioner as an individual citizen under Article 16 (1)& (2). The Communal G. O., in our opinion, is repugnant to the provisions of Article 16 and is as such void & illegal.

The judgments of the Supreme Court in the case of *Union of India v. Virpal Singh Chauhan*<sup>152</sup> and *Ajit Singh Januja (No.1) v. State of Punjab*<sup>153</sup>, which led to the issue of the O.M. dated 30th January, 1997, have adversely affected the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes category in the matter of seniority on promotion to the next higher grade. The Government servants belonging to the Scheduled Castes and the Scheduled Tribes had been enjoying the benefit of consequential seniority on their promotion on the basis of rule of reservation. This has led to considerable anxiety and representations have also been received from various quarters including Members of Parliament to protect the interest of the Government servants belonging to Scheduled Castes and Scheduled Tribes. The Government has reviewed the position in the light of views received from various quarters and in order to protect the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes, it has been decided to negate the effect of O.M. dated 30th January 1997 immediately. Mere withdrawal of the O.M. dated 30th will not meet the desired purpose and review or revision of seniority of the Government servants

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<sup>151</sup> AIR 1951 SC 229.

<sup>152</sup> (1995) 6 SCC 684.

<sup>153</sup> AIR 1996 SC 1189.

and grant of consequential benefits to such Government servants will also be necessary.

This will require amendment to Article 16(4A) of the Constitution to provide for consequential seniority in the case of promotion by virtue of rule of reservation. It is also necessary to give retrospective effect to the proposed constitutional amendment to Article 16(4A) with effect from the date of coming into force of Article 16(4A) itself, that is, from the 17th day of June, 1995 as a consequence thereof the Government introduced the "The Constitution (Eighty-Fifth Amendment) Act, 2001. This amendment was further challenged in the case of *M. Nagaraj v. Union of India*<sup>154</sup> and the Court held the amendments constitutional and not violative to the basic structure of the Constitution.

In *Indra Sawhney case*<sup>155</sup> the Supreme Court made reference of *State of AP v. USV Balram*<sup>156</sup>, where it has been indicated that Clause (4) of Article 16 is not in the nature of an exception to Clauses (1) and (2) of Article 16 but an instance of classification permitted by Clause (1). It has also been indicated in the said decision that Clause (4) of Article 16 does not cover the entire field covered by Clauses (1) and (2) of Article 16. In *Indra Sawhney case*<sup>157</sup> this Court has also indicated that in the interests of the Backward classes of citizens, the State cannot reserve all the appointments under the State or even a majority of them. The doctrine of equality of opportunity in Clause (1) of Article 16 is to be reconciled in favour of backward classes under Clause (4) of Article 16 in such a manner that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality.

In *Jitendra Kumar Singh v. State of U.P.*<sup>158</sup> the Supreme Court opined that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture; all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and horizontal

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<sup>154</sup> AIR 2007 SC 71.

<sup>155</sup> AIR 1993 SC 477.

<sup>156</sup> 1972 AIR 1375.

<sup>157</sup> Ibid.

<sup>158</sup> (2010) 3 SCC 119.

reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped under clause (1) of Article 16 can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relating to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments.

Article 21 of the Constitution provides protection of life and personal property. No person shall be deprived of his life or personal liberty except according to the procedure established by law.

The Supreme Court in *A.K. Gopalan v. State of Madras*<sup>159</sup> while examining the origin of the expression it held that the expression had its roots in the expression "per legem terrae" (law of the land) used in Magna Charta in 1215. In the reign of Edward III, however, the words "due process of law" were used in a statute guaranteeing that no person will be deprived of his property or imprisoned or indicted or put to death without being brought in to answer by due process of law. The expression was afterwards adopted in the American Constitution and also in the Constitutions of some of the constituent States, though some of the States preferred to use the words "in due course of law" or "according to the law of the land." In the earliest times, the American Supreme Court construed "due process of law" to cover matters of procedure only, but gradually the meaning of the expression was widened so as to cover substantive law also, by laying emphasis on the word "due." It seems plain that the Constituent Assembly did not adopt this expression on account of the very elastic meaning given to it, but preferred to use the words "according to procedure established by law".

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<sup>159</sup> (1950) SCR 88.

The Supreme Court in *Additional District Magistrate, Jabalpur v. S. S. Shukla*<sup>160</sup> held that Article 21 is our Rule of Law regarding life and liberty. No other Rule of Law can have separate existence as a distinct right. The negative language of Fundamental Right incorporated in Part III imposes limitations on the power of the State and declares the corresponding guarantees of the individual to that fundamental right. Limitation and guarantee are complementary. The limitation of State action embodied in a Fundamental Right couched in a negative form is the measure of the protection of the individual. Article 21 of the Constitution is primarily a protection against illegal deprivations by the executive action of the State's agents or officials although, read with other Articles, it could operate also as a protection against unjustifiable legislative action purporting to authorise deprivations of personal freedom. Article 21 was only meant, on the face of it, to keep the exercise of executive power, in ordering deprivations of life or liberty, within the bounds of power prescribed by procedure established by legislation. Article 21 furnishes the guarantee of "Lex", which is equated with statute law only, and not of "jus" or a judicial concept of what procedural law ought really to be. The whole idea in using this expression was to exclude judicial interference with executive action in dealing with lives and liberties of citizens and others living in our country on any ground other than that it is contrary to procedure actually prescribed by law which meant only statute law. According to well established canons of statutory construction, the express terms of "Lex" (assuming, of course, that the "Lex" is otherwise valid), prescribing procedure, will exclude "Jus" or judicial notions of "due process" or what the procedure ought to be.

In examining the safeguard to the citizens enshrined under Article 21 the Supreme Court in *Kharak Singh v. State of U.P.*<sup>161</sup> referred that the protection under Article 21 is only against State action and not against private individuals and the protection, it secures, it is a limited one. The only safeguard enacted by Article 21 is that a person cannot be deprived of his personal liberty except according to procedure prescribed by "State made" law. It is clear on plain natural construction of its language that Article 21 imports two requirements

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<sup>160</sup> (1976) Suppl. SCR 172.

<sup>161</sup> (1964) 1 SCR 332.

first, there must be a law authorising deprivation of personal liberty and secondly, such law must prescribe a procedure. The first requirement is indeed implicit in the phrase "except according to procedure prescribed by law". When a law prescribes a procedure for depriving a person of personal liberty, it must a fortiori authorise such deprivation. Article 21, thus, provides both substantive as well as procedural safeguards. Two other ingredients of Article 21 are that there must not only be a law authorising deprivation of personal liberty there must also be a procedure prescribed by law or in other words law must prescribe a procedure.

In *Indira Nehru Gandhi v. Shri Rai Narain*<sup>162</sup> the Supreme Court held that according to Article 21 no one can be deprived of his right to personal liberty except in accordance with the procedure established by law. Procedure for the exercise of power of depriving a person of his right of personal Liberty necessarily postulates the existence of the substantive power. When Article 21 is in force, law relating to deprivation of life and personal liberty must provide both for the substantive power as well as the procedure for the exercise of such power. When right to move in court for enforcement of right guaranteed by Article 21 is suspended, it would have the effect of dispensing with the necessity of prescribing procedure for the exercise of substantive power to deprive a person of his life and personal liberty, it cannot have the effect of permitting an authority to deprive a person of his life or personal liberty without the existence of such substantive power.

In considering the effect of Presidential order suspending the right of a person to move court for enforcement of right guaranteed by Article 21 the Supreme Court<sup>163</sup> opined that the suspension of the right to move a court for the enforcement of the right contained in Article 21 cannot have the effect of debarring an aggrieved person from approaching the courts with the complaint regarding deprivation of life or personal liberty by an authority on the score that no power has been vested in the authority to deprive a person of life or liberty. The pre-supposition of the existence of substantive power to deprive a person of his life or personal liberty in Article 21 even though that article only mentions the

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<sup>162</sup> (1976) 2 SCR 347.

<sup>163</sup> Ibid.

procedure, would not necessarily point to the conclusion that in the event of the suspension of the right to move any court for the enforcement of Article 21, the suspension would also dispense with the necessity of the existence of the substantive power. The co-existence of substantive power and procedure established by law for depriving a person of his life and liberty which is implicit in Article 21 would not lead to the result that even if there is suspension of the right regarding procedure, suspension would also operate upon the necessity of substantive power. What is true of a proposition need not be true of the converse of that proposition. The suspension of the right to make any court for the enforcement of the right contained in Article 21 may have the effect of dispensing with the necessity of prescribing procedure for the exercise of substantive power to deprive a person of his life or personal liberty, it can in no case have the effect of permitting an authority to deprive a person of his life or personal liberty without the existence of substantive power. The close bond which is there between the existence of substantive power of depriving a person of his life or personal liberty and the procedure for the exercise of that power, if the right contained in Article 21 were in operation, would not necessarily hold good if that right were suspended because the removal of compulsion about the prescription of procedure for the exercise of the substantive power would not do away with the compulsion regarding the existence of that power.

The Supreme Court in the case of *Maneka Gandhi v. Union of India*<sup>164</sup> held that natural law rights were, meant to be converted into our Constitutionally recognised fundamental rights, at least so far as they are expressly mentioned, so that they are to be found within it and not outside it. To take a contrary view would involve a conflict between natural law and our Constitutional law. I am emphatically of opinion that a divorce between natural law and our Constitutional law will be disastrous. It will defeat one of the basic purposes of our Constitution. The implication of what I have indicated above is that Article 21 is also a recognition and declaration of rights which inhere in every individual. Their existence does not depend on the location of the individual. Indeed, it could be argued that what so inheres is inalienable and cannot be taken away at all. This may seem theoretically correct and logical. But, in fact, we are often met with

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<sup>164</sup> (1978) 1 SCC 248.

denials of what is, in theory, inalienable or "irrefragible". Hence, we speak of "deprivations" or "restrictions" which are really impediments to the exercise of the "inalienable" rights' Such deprivations or restrictions or regulations of rights may take place, within prescribed limits, by means of either statutory law or purported actions under that law.

The degree to which the theoretically recognised or abstract right is concretised is thus determined by the balancing of principles on which an inherent right is based against those on which a restrictive law or orders under it could be imposed upon its exercise. We have to decide in each specific case, as it arises before us, what the result of such a balancing is.

In *Olga Tellis v. Bombay Municipal Corporation*<sup>165</sup> while examining whether pavement and slum dwellers forcible eviction and removal of their hutments under Bombay Municipal Corporation Act deprives them of their means of livelihood and consequently right to life and whether Right to life would include right to livelihood, the Court held that the sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to live, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life.

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<sup>165</sup> (1985) 3 SCC 545.

If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.

In the judgment of *Francis Coralie v. Union Territory of Delhi*<sup>166</sup>, Bhagwati, J, held: “ We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingle with fellow human beings.”

Again in *Bandhua Mukti Morcha v. Union of India*<sup>167</sup>, Bhagwati, J, held: Article 21 mandates that no person shall be deprived of his life or personal liberty except according to the "procedure established by law" which this Court has interpreted to mean "due process of law". The bare of the poverty is the root of the child labour and they are being subjected to deprivation of their meaningful right to life, leisure, food, shelter, medical aid and education. Every child shall have without any discrimination on the ground of cast, birth, colour, sex, language, religion, social origin, property or birth alone, in the matter of right to health, well being, education and social protection.

Illiteracy has many adverse effects in a democracy governed by rule of law. A free educated citizen could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop spirit of tolerance and reform. Therefore, education is compulsory. Primary education to the children, in particular, to the child from poor, weaker sections, Dalits and Tribes and minorities is mandatory. The basic education and employment oriented vocational education should be imparted so as to empower the children with these segments of the society to retrieve them from poverty and, thus, develop

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<sup>166</sup> (1981) 1 SCC 608.

<sup>167</sup> (1984) 3 SCC 161.

basic abilities, skills and capabilities to live meaningful life for economic and social empowerment. Compulsory education, therefore, to these children is one of the principal means and primary duty of the State for stability of the democracy, social integration and to eliminate social tensions.

The Supreme Court, further upholding the right of the people in hill areas for a suitable approach road in State of *Himachal Pradesh v. Umed Ram Sharma*<sup>168</sup> held that every person is entitled to life as enjoined in Article 21 of the Constitution. He has the right under Article 19(1)(d) to move freely throughout the territory of India and he has also the right under Article 21 to his life and that right under article 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself. Therefore, there should be road for communication in reasonable conditions in view of constitutional imperatives and denial of that right would be denial of the life as understood in its richness and fullness by the ambit of the Constitution.

In *Unni Krishnan v. State of A.P.*<sup>169</sup> the Supreme court in deciding one of the most relevant and important issue held that the Right to education is not stated expressly as a Fundamental Right in Part III of the Constitution of India. However, having regard to the fundamental significance of education to the life of an individual and the nation, right to education is implicit In and flows from the right to life guaranteed by Article 21. That the right to education has been treated as one of transcendental importance in the life of an individual has been all over the world. Without education being provided to the citizen of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. The Constitution would fail. It goes without saying that the limits of economic capacity are, ordinarily speaking matters within the subjective satisfaction of the State. Therefore, it is not correct to say that reading the right to education into Article 21, this Court would be enabling each and every citizen of this, country to approach the courts to compel the State to provide him such education as he chooses. The right to free education is available only to children until they complete the age of 14 years. Thereafter, the obligation of the State to

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<sup>168</sup> (1986) 2 SCC 86.

<sup>169</sup> (1993) 1 SCC 645.

provide education is subject to the limits of its economic capacity and development.

The Apex Court in *Saroj Rani v. Sudarshan Kumar Chadha*<sup>170</sup> held that Section 9 of the Hindu Marriage Act is not violative of Article 14 or Article 21 of the Constitution if the purpose of the decree for restitution of conjugal rights in the said Act is understood in its proper perspective and if the method of execution in cases of disobedience is kept in view. It is significant that unlike a decree of specific performance of contract a decree for restitution of conjugal rights, where the disobedience to such a decree is willful i.e. is deliberate, might be enforced by attachment of property. Where the disobedience follows as a result of a willful conduct i.e. where conditions are there for a wife or a husband to obey the decree for restitution of conjugal rights but disobeys the same in spite of such conditions, then only the properties have to be attached, is provided for. This is so to enable the Court in appropriate cases when the Court has decreed restitution for conjugal rights to offer inducement for the husband or wife to live together and to settle up the matter amicably. It serves a social purpose, as an aid to the prevention of break-up of marriage.

Right to free legal aid at the cost of the State to an accused who cannot afford legal service for reasons of poverty, indigence or incommunicado situation is part of fair, just and reasonable procedure under Article 21.<sup>171</sup>

In *Kartar Singh v. State of Punjab*,<sup>172</sup> a Constitution Bench considered the right to speedy trial and opined that the delay is dependent on the circumstances of each case, because reasons for delay will vary. This Court held:

“The right to a speedy trial is a derivation from a provision of Magna Carta. This principle has also been incorporated into the Virginia Declaration of Rights of 1776 and from there into the Sixth Amendment of the Constitution of United States of America which reads, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...”. It may be pointed out, in this connection, that there is a Federal Act of 1974 called ‘Speedy Trial Act’ establishing a set of time-

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<sup>170</sup> (1984) 4 SCC 90.

<sup>171</sup> *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 98.

<sup>172</sup> (1994) 3 SCC 569.

limits for carrying out the major events, e.g., information, indictment, arraignment, in the prosecution of criminal cases. The right to a speedy trial is not only an important safeguard to prevent undue and oppressive incarceration, to minimise anxiety and concern accompanying the accusation and to limit the possibility of impairing the ability of an accused to defend himself but also there is a societal interest in providing a speedy trial”.

The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309 of the Code of Criminal Procedure.<sup>173</sup>

In directing that children be provided suitable conditions in homes the Supreme Court in the case of *Sheela Barse v. Secretary, Children Aid Society*<sup>174</sup> has held that in recent years, children and their problems have been receiving attention both of the Government as also of the society but we must say that the problems are of such enormous magnitude that all that has been done till now is not sufficient. If there be no proper growth of children of today, the future of the country will be dark. It is the obligation of every generation to bring up children who will be citizens of tomorrow in a proper way. Today's children will be the leaders of tomorrow who will hold the country's banner high and maintain the prestige of the Nation. If a child goes wrong for want of proper attention, training and guidance, it will indeed be a deficiency of the society and of the Government of the day. A problem child is indeed a negative factor. Every society must, therefore, devote full attention to ensure that children are properly cared for and brought up in a proper atmosphere where they could receive adequate training, education and guidance in order that they may be able to have their rightful place in the society when they grow up.

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<sup>173</sup> *supra*

<sup>174</sup> (1987) 3 SCC 50.

The Supreme Court in *Vikram Deo Singh Tomar v. State of Bihar*<sup>175</sup> held that the right under Article 21 included right of female inmates of 'Care Homes' established by State to live with human dignity. Directing the State the Court ordered that the State Government should provide suitable alternative accommodation expeditiously for housing the inmates of the present "Care Home". It is necessary meanwhile to put the existing building, in which the inmates are presently housed, into proper order immediately, and for that purpose to renovate the building and provide sufficient amenities by way of living room, bathrooms and toilets within the building, and also to provide adequate water and electricity. A suitable range of furniture, including Cots must be provided at once, and an adequate number of blankets and sheets, besides clothing, must be supplied to the inmates. The Welfare Department of the State Government will take immediate steps to comply with these directions. Every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen under Article 21 of the Constitution. And, so, in the discharge of its responsibilities to the people, the State recognises the need for maintaining establishments for the care of those unfortunates, both women and children, who are the castaways of an imperfect social order and for whom, therefore, of necessity provision must be made for their protection and welfare. Both common humanity and considerations of law and order require the State to do so. To abide by the constitutional standards recognised by well accepted principle, it is incumbent upon the State when assigning women and children to these establishments, to provide at least the minimum conditions ensuring human dignity. India is a welfare State governed by a Constitution which lays special emphasis on the protection and well-being of the weaker sections of society and seeks to improve their economic and social status. It shows a particular regard for women and children, and notwithstanding the pervasive ethos of the doctrine of equality it contemplates special provision being made for them by law.

Bhagwati J. in *Hussianinara Khatoon (I) v. Home Secretary, Bihar*,<sup>176</sup> held that a procedure which keeps such large number of people behind bars without

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<sup>175</sup> (1988) Supp. SCC 734.

<sup>176</sup> (1980) 1 SCC 81.

trials so long cannot possible be regarded reasonable, just and fair so as to be in conformity with the requirement of Article 21. He further said, that although the right to speedy trial is not specifically mentioned as a fundamental right, it is implicit in the broad sweep and content of Article 21.

In the case of *Gulzar Ahmed Azmi v. Union of India*,<sup>177</sup> the petitioners have preferred this writ petition under Article 32 read with Article 21 of the Constitution seeking constitution of committee headed by retired Judge of Supreme Court with aid of competent investigating officers and experts to ascertain truth about Muslim youths alleged to have falsely been implicated in various bomb blast cases since 2002. Dismissing the said writ petition the Court held that it was premature to express which of accused was innocent and had been falsely implicated. There were various measures available to protect interest of persons claiming to be innocent and it would be open for them to demonstrate it before court concerned. It would be futile to entrust statutory duty of investigation to a supernumerary body headed by retired Judge of Supreme Court would lead to creation of parallel body without any statutory sanction.

The Supreme Court in a number of decisions has laid down exemplary cost on the wrong doers while exercising public duties in applications brought before it under Article 32 complaining violation of right to life enshrined under Article 21 of the Constitution.

The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by the Supreme Court or under Article 226 by the High Courts for established infringement of the indefeasible right guaranteed under Article 21 is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting ‘compensation’ in proceedings under Article 32 or 226 seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State

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<sup>177</sup> (2012) 10 SCC 731.

which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen.<sup>178</sup>

The factors governing the quality of life have been included in the expression "life" contained in Article 21 by reason of creative interpretation of the said provision by this Court, is it possible to argue that Article 21 does not provide for an absolute immunity? Article 21 does not only refer to the necessity to comply with procedural requirements, but also substantive rights of a citizen. It aims at preventive measures as well as payment of compensation in cases human rights of a citizen are violated.<sup>179</sup>

In the case of *Budhadev Karmaskar v. State Of West Bengal*<sup>180</sup>, the Supreme Court laudably proceeded with the aim at looking possible ways for providing a life of dignity to the sex workers in our country by giving them some technical skills through which they can earn their livelihood instead of by selling their bodies. The legal background of these orders is Article 21 of the Constitution, in which the word 'life' has been interpreted by this Court to mean a life of dignity, and not just an animal life.

The right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. The State should 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. It cannot avoid

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<sup>178</sup> Referring to Dr. A.S. Anand J., (as his Lordship then was) in *Mehmood Nayyar Azam vs State Of Chattisgarh*, (2012) 8 SCC 1.

<sup>179</sup> *Bombay Dyeing & Mfg. Co. Ltd v. Bombay Environmental Action Group*, (2006) 3 SCC 434.

<sup>180</sup> (2011) 11 SCC 538.

its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative liability.<sup>181</sup>

Right to free legal aid is a basic tenant under Article 21 of the Constitution. Upholding the right the Supreme Court had provided free legal assistance in appeal before it for the appellants in the famous case of *Mohd. Ajmal Amir Kasab v. State of Maharashtra*.<sup>182</sup>

The requirement of providing free and adequate legal representation to an indigent person and a person accused of an offence. In that case, it was reiterated that an accused need not ask for legal assistance – the Court dealing with the case is obliged to inform him or her of the entitlement to free legal aid. This Court observed that it was now “settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21 of the Constitution<sup>183</sup>”.

In a case before it the Supreme Court has set aside the conviction and sentence of an accused on the view that since the requirements of law were not met in that case, and in the absence of the accused person being provided with legal representation at State cost, it was held that there was a violation of the fundamental right of the accused under Article 21 of the Constitution. The trial was held to be vitiated on account of a fatal constitutional infirmity.<sup>184</sup>

Article 22 of the Constitution provides protection against arrest and detention in certain cases.

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

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<sup>181</sup> *Khatri v. State Of Bihar*, (1981) 1 SCC 627.

<sup>182</sup> (2012) 9 SCC 1.

<sup>183</sup> *Suk Das v. Union Territory of Arunachal Pradesh*, (1986) 2 SCC 401

<sup>184</sup> *Rajoo v. State of Madhya Pradesh*, (2012) 8 SCC 553.

Article 22 was initially taken to be the only safeguard against the legislature in respect of laws relating to deprivation of life and liberty protected by Article 21.

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

The Supreme Court in *A.K. Gopalan v. State of Madras*<sup>185</sup> while examining Article 22 has opined that Article 22 has gone to the extent of even providing that Parliament may by law lay down the procedure to be followed by an advisory board. On all important points that could arise in connection with the subject of preventive detention provision has been made in Article 22 and that being so, the only correct approach in examining the validity of a law on the subject of preventive detention is by considering whether the law made satisfied the requirements of Article 22 or in any way abridges or contravenes them and if the answer is in the affirmative, then the law will be valid, but if the answer is in the negative, the law would be void. In expressing the view that Article 22 is in a sense self-contained on the law of preventive detention I should not however be understood as laying down that the framers of the article in any way overlooked the safeguards laid down in Article 21. Article 21, in my opinion lays down substantive law as giving protection to life and liberty in as much as it says that they cannot be deprived except according to the procedure established by law; in other words, it means that before a person can be deprived of his life or liberty as a condition precedent there should exist some substantive law conferring authority for doing so and the law should further provide for a mode of procedure for such deprivation. This article gives complete immunity against the exercise of despotic power by the executive. It further gives immunity against invalid laws which contravene the Constitution. It gives also further guarantee that in its true concept there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty. It negatives the idea of

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<sup>185</sup> AIR 1950 SC 27.

fantastic, arbitrary and oppressive forms of proceedings. The principles therefore underlying Article 21 have been kept in view in drafting Article 22. A law properly made under Article 22 and which is valid in all respects under that article and lays down substantive as well as adjective law on this subject would fully satisfy the requirements of Article 21, and that being so, there is no conflict between these two articles.

However the Court in *Maneka Gandhi v. Union of India*<sup>186</sup> taking a different view and elaborating the Article has held that the questions relating to either deprivation or restrictions of personal liberty, concerning laws falling outside Article 22 remain really unanswered by the *Gopalan's case*<sup>187</sup>. The field of 'due process' for cases of preventive detention is fully covered by Article 22 but other parts of that field not covered by Article 22 are 'unoccupied' by its specific provisions. In what may be called unoccupied portions of the vast sphere of personal liberty, the substantive as well as procedural laws made to cover them must satisfy the requirements of both Arts 14 and 19 of the Constitution.

In *State of M.P. v. Shobharam*<sup>188</sup> the Supreme Court, deciding on the question whether the constitutional right under Article 22 (1) would be attracted, at the trial when the accused were on bail, held that Under Article 22(1) a person arrested has the constitutional right to consult a legal practitioner concerning his arrest and, a person who has been arrested as well as one who though not arrested runs the risk of loss of personal liberty as a result of a trial, have the constitutional right to be defended by an advocate of their choice. But in a trial under a law which does not provide for an order resulting in the loss of his personal liberty, he is not entitled to the constitutional right, because, the Article is concerned only with giving protection to personal liberty. The Act does not give any power to deprive any one of his personal liberty either by way of arrest before the trial or by way of sentence of imprisonment as a result of the trial nor does it deprive an arrested person of his constitutional right to take steps against the arrest or to defend himself at a trial which might occasion the loss of his personal liberty. The

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<sup>186</sup> (1978) 1 SCC 248.

<sup>187</sup> Supra.

<sup>188</sup> AIR 1966 SC 1910.

fact that the respondents were arrested under another statute, namely, the Criminal Procedure Code cannot make either the section or the Act void.

The State and its police authorities should see to it that the constitutional, and legal requirement to produce an arrested person before a judicial magistrate within 24 hours of the arrest is scrupulously observed. The provision inhibiting detention without remand is a very healthy provision which enables the magistrates to keep check over the police investigation and it is necessary that the magistrates should try to enforce this requirement and where it is found to be disobeyed come down heavily upon the police.<sup>189</sup>

If the police officer is forbidden from keeping an arrested person beyond twenty four hours without order of a magistrate, what should happen to the arrested person after the said period? It is a constitutional mandate that no person shall be deprived of his liberty except in accordance with the procedure established in law. Close to its heels the Constitution directs that the person arrested and detained in custody shall be produced before the nearest magistrate within 24 hours of such arrest. The only time permitted by Article 22 of the Constitution to be excluded from the said period of 24 hours is "the time necessary for going from the place of arrest to the court of the magistrate". Only under two contingencies can the said direction be obviated. One is when the person arrested is an "enemy alien". Second is when the arrest is under any law for preventive detention. In all other cases the Constitution has prohibited peremptorily that "no such person shall be detained in custody beyond the said period without the authority of a magistrate".<sup>190</sup>

Right under Article 22(2) is available only against illegal detention by police. It is not available against custody in jail of a person pursuant to a judicial order. Article 22(2) does not operate against the judicial order.<sup>191</sup>

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<sup>189</sup> *Khatri v. State Of Bihar*, (1981) 1 SCC 627

<sup>190</sup> *Manoj v. State Of Madhya Pradesh*, (1999) 3 SCC 715.

<sup>191</sup> *Pragyna Singh Thakur vs State Of Maharashtra*, (2011) 10 SCC 445.

#### 4.4. RIGHTS REQUIRING STATE ACTION.

Clause (4) of Article 15 provides that “Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Schedule Caste and the Schedule Tribe”.

The constitutional stultification of an integrated India through misuse of 'reservation' power provided for in Article 15 and 16 meant for the direct 'dalits' the pollution, by the political executive, of our founding creed of an egalitarian order by playing casteification politics and the morbid dilution of 'backwardness' marring the dream of a secular republic by the nightmare of a feudal vivisection of the people-if this picture drawn by be true, even in part, the basic task of transforming the economic order through social justice will be baulked through destructive communal disputes among the masses. Maybe, this may weaken the social revolution, leave an indelible stain and incurable wound on the body politic and justify the censure by history of the engineers of our political power and electoral processes. "Is caste the largest political party?" Has protective discrimination, so necessary in an insufferably unequal society, created a Frankenstein's monster? Have we no dynamic measures to drown social, economic and educational backwardness of whole masses except the traditional self-perpetuating quasi-apartheidisation called 'reservation'? Surely, our democratic, secular socialist republic is no wane moon but a creative power rooted in equal manhood, an egalitarian reservoir of vast human potential, a demographic distribution of talent benumbed by brahman centuries of social injustice but now seeking human expression under a new dispensation where 'chill penury' shall no longer 'repress their noble rage'. Caste, undoubtedly, in a deep-seated pathology to eradicate which the Constitution took care to forbid discrimination based on caste, especially in the field of education and services under the State. The rulings of this court, interpreting the relevant Articles, have hammered home the point that it is not constitutional to base identification of backward classes on caste alone qua caste. If a large number of castes masquerade as backward classes and perpetuate that division in educational campuses and public offices, the whole process of a caste-free society will be reversed. Is a

caste system being created and perpetuated by over-indulgent concessions, even at promotional levels, to the Scheduled Castes and the Scheduled Tribes, which are only a species of castes. "Each according to his ability" is being substituted by "each according to his caste", and underscore the unrighteous march of the officials belonging to the SCs & STs over the humiliated heads of their senior and more meritorious brothers in service. The after-math of the caste-based operation of promotional preferences is stated to be deterioration in the over-all efficiency and frustration in the ranks of members not fortunate enough to be born SCs & STs. Indeed, the 'inefficiency' bogie was so luridly presented that even the railway accidents and other operational calamities and managerial failures were attributed to the only villain of the piece viz., the policy of reservation in promotions. A constitutionally progressive policy of advantage in educational and official career based upon economic rather than social backwardness was commended as more in keeping with the anti-caste, pro-egalitarian tryst with our constitutional destiny.

Clause (4) was added by the Constitution (First Amendment) Act, 1951, as a result of the decision of the Supreme Court in the *State of Madras v. Champakam Dorairajan*<sup>192</sup>.

In a land mark judgment the Supreme Court in *M. R. Balaji v. State of Mysore*<sup>193</sup> held that Article 15 (4) authorises the State to make special provision for the advancement of socially and educationally backward classes of citizens as distinguished from the Scheduled Castes and Scheduled Tribes. Some backward classes may, by presidential order, be included in Scheduled Castes and Tribes, and in that sense the backward classes for whose improvement provision is made in Art. 15 (4) are comparable to Scheduled Castes and Scheduled Tribes. The backwardness under Article 15 (4) must be social and educational. It is not either social or educational, but it is both social and educational. Though caste in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or dominant test. There are certain sections of Indian society such as Christians, Jains, Muslims, etc., who do not believe in caste system, and the test of caste does not apply to them. Moreover, social backwardness is in the ultimate analysis the

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<sup>192</sup> AIR 1951 SC 226.

<sup>193</sup> AIR 1963 SC 649.

result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically socially backward. Moreover, the occupation of citizens and the place of their habitation also result in social backwardness. The problem of determining who are socially backward classes, is undoubtedly very complex, but the classification of socially backward citizens on the basis of their castes alone is not permissible under Art. 15(4).

In determining the educational backwardness of a class of citizens, the literacy test supplied by the Census Reports is not adequate. It is doubtful if the test of the average of the student population in the last three high school classes is appropriate in determining educational backwardness. In any case, the State is not justified in including, in the list of backward classes castes or communities whose average of student population per thousand is slightly above or very near or just below the State average. The legitimate view to take is that the classes of citizens whose average is well or substantially below the State average can be treated as educationally backward. It is not for this Court to lay down any hard and fast rule in this matter. It is the duty of the State to decide the matter in a manner which is consistent with the requirements of Article 15 (4). The division of backward classes into two categories of backward classes and more backward classes is not warranted by Article 15 (4). Article 15 (4) authorises special provision being made for the really backward classes but by introducing two categories, what is intended is to devise measures for all classes of citizens who are less advanced as compared to the most advanced classes in the State. That is not the scope of Art. 15 (4). The object of making a special provision for the advancement of castes or communities is to carry out the Directive Principle enshrined in Article 46. Unless the educational and economic interests of the weaker sections of the people are promoted quickly and liberally, the ideal of establishing social and economic equality cannot be attained. Article 15 (4) authorises the State to take adequate steps to achieve the object.

The Constitutional validity of tests for determining backwardness under Articles 15(1) and (4) and 29(2) came for consideration before the Supreme Court

in *State of Uttar Pradesh v. Pradip Tandon*<sup>194</sup> and the court held that reservation in favour of candidates from rural areas is unconstitutional. The reservations for the hill and Uttrakhand areas are severable and are valid. Art. 15(1) states that the State shall not discriminate against any citizen grounds only of religion, race, caste, sex, place of birth or any of them. Article 29(2) states that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

The Constitution does not enable the State to bring socially and educationally backward areas within the protection of Article 15(4). The backwardness contemplated under Article 15(4) is both social and educational. Article 15(4) speaks of backwardness of classes of citizens and, therefore, socially and educationally backward classes of citizens in Article 15(4) could not be equated with castes'.

Neither caste nor race nor religion can be made the basis of classification for the Purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination on grounds only of religion, race and caste, caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1). When a classification takes recourse to caste as one of the criteria in determining socially and educationally backward classes the expression "classes" in that case violates the rule of expression *unius est exclusio alterius*. The socially and educationally backward classes of citizens are groups other than, groups based on caste.

The place of habitation and its environment is also a determining factor in judging the social and educational backwardness. Backwardness is judged by economic basis that each region has its own measurable possibilities for the Maintenance of human number, standards of living and fixed property. From an economic point of view the classes of citizens are backward when they do not make effective use of resources. Neglected opportunities and people in remote

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<sup>194</sup> (1971) 1 SCC 267.

places raise walls of social backwardness of people. People in the hill like Utrakhnad areas illustrate the educationally backward classes of citizens because lack of educational facilities keep them stagnant and they have neither meaning and values nor awareness for education.

Gajendragadkar J. in *M. R. Balaji v. State of Mysore*<sup>195</sup>, opined that: "When Art 15(4) refers to the special provision for the advancement of certain classes or scheduled castes or scheduled tribes, it must not be ignored that the provision which is authorised to be made is a special provision it is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Art. 15(4) authorises special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Art. 15(4). It would be extremely unreasonable to assume that in enacting Art.15(4) the Parliament intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored."

Article 15(4) speaks about "socially and educationally backward classes of citizens" while Article 16(4) speaks only of "any backward class of citizens." However, it is now settled that the expression "backward class of citizens" in Article 16(4) means the same thing as the expression "any socially and educationally backward class of citizens" in Article 15(4). In order to qualify for being called a 'backward class citizen' he must be a member of a socially and educationally backward class. It is social and educational backwardness of a Class which is material for the purposes of both Article 15(4) and 16(4). Many State Governments had found it difficult to determine which class of citizens can be properly regarded as socially and educationally backward.

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<sup>195</sup> AIR 1963 SC 649.

Reservation should and must be adopted to advance the prospects of weaker sections of society, but while doing so, care should be taken not to exclude admission to higher educational centres of deserving and qualified candidates of other communities. Reservations under Article 15 (4) and 16 (4) must be within reasonable limits. The interests of weaker sections of society, which are a first charge on the States and the Centre, have to be adjusted with the interests of the community as a whole. Speaking generally and in a broad way, a special provision should be less than 50%. The actual percentage must depend upon the relevant prevailing circumstances in each case.

The object of Article 15 (4) is to advance the interests of the society as a whole by looking after the interests of the weaker elements in society. If a provision under Article 15 (4) ignores the interests of society, that is clearly outside the scope of Article 15 (4). It is extremely unreasonable to assume that in enacting Article 15 (4), Parliament intended to provide that where the advancement of the backward classes or the Scheduled Castes and Tribes were concerned, the fundamental right of the citizens constituting the rest of the society were to be completely and absolutely ignored. Considerations of national interest and the interests of the community and the society as a whole have already to be kept in mind.<sup>196</sup>

Article 15 was amended and Art. 15 (4) was added in view of the judgment of this Court in the *State of Madras v. Smt. Champakam Dorairajan*<sup>197</sup>. Article 15 (4) is a proviso or an exception to Articles 15 (1) and 29 (2). If an order is justified by the provisions of Article 15 (4), its validity cannot be questioned on the ground that it violates Article 15 (4) or Article 29 (2).

It is true that the Constitution contemplates the appointment of a commission whose report and recommendations can be of assistance to the authorities concerned for taking adequate steps for the advancement of backward classes, but this does not mean that the appointment of the commission and the subsequent steps that would follow it are a condition precedent to any action being taken under Article 15 (4). The special provisions contemplated under Article 15

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<sup>196</sup> *M. R. Balaji v. State of Mysore*, AIR 1963 SC 649.

<sup>197</sup> AIR 1951 SC 226.

(4) can be made by the Union or the States by an executive order. It cannot be said that the President alone can make special provision for the advancement of the backward classes.<sup>198</sup>

Article 15 (4) authorises the State to make special provision for the advancement of socially and educationally backward classes of citizens as distinguished from the Scheduled Castes and Scheduled Tribes. Some backward classes may, by presidential order, be included in Scheduled Castes and Tribes, and in that sense the backward classes for whose improvement provision is made in Article 15 (4) are comparable to Scheduled Castes and Scheduled Tribes. The backwardness under Article 15 (4) must be social and educational. It is not either social or educational, but it is both social and educational. Though caste in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or dominant test. There are certain sections of Indian society such as Christians, Jains, Muslims, etc., who do not believe in caste system, and the test of caste does not apply to them. Moreover, social backwardness is in the Ultimate analysis the result of poverty to a very large extent.

It was pointed out in *Indira Sawhney v. Union of India*<sup>199</sup>, that reservations are not to be made on the basis of population of a particular category. Reservation for education is to be made under Article 15(4) keeping in view the social and educational backwardness and the need to provide adequate educational opportunities.

In a case challenging the quota system for various categories in Andaman and Nicobar Island the Supreme Court in *Parents Association v. Union Of India*<sup>200</sup> opined that we may make it clear, even at the outset, that the 'quotas' fixed in the various proceedings, except the quota fixed for Tribals, do not fall under Article 15(4) at all. The question of the validity of the quotas for the Central Government servants, the pre-1942 and post 1942 settlers and the 10 year old is to be considered on the basis of Article 14 and not under Article 15(4).

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<sup>198</sup> Ibid.

<sup>199</sup> 1992 Suppl (3) SCC 217.

<sup>200</sup> (2000) 2 SCC 657.

Taking a different view the Supreme Court in the case of *Subhash Chandra v. Delhi Subordinate Services Selection Board*,<sup>201</sup> examined the relation ship between Article 15(4) and 16(4). The Court opined that the equality clause contained in Articles 14, 15 and 16 constitutes a set of fundamental rights of all persons whether they are citizens of India or not. Whereas in terms of Article 14 of the Constitution of India all persons similarly situated are entitled to enforcement of their fundamental right of equality before the law and equal protection of the laws. Articles 15 and 16 although aim at equality but also provide for certain exceptions. In terms of the aforementioned provisions, enabling provisions have been made so as to enable the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes as provided for in clause (4) of Article 15 of the Constitution of India and for making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services of the State as provided for in clause (4) of Article 16 thereof. We may at the outset notice the distinction between clause (4) of Article 15 and clause (4) of Article 16 of the Constitution. The words 'backward classes' and 'Scheduled Castes and Scheduled Tribes' find place in clause (4) of Article 15 but only the words 'backward class of citizens' find place in clause (4) of Article 16. It is, however, beyond any doubt or dispute that the term 'backward class of citizens' contained in clause (4) of Article 16 includes Scheduled Castes and Scheduled Tribes for all intent and purport.

The principle behind Article 15(4) is that a preferential treatment can be given validly when the socially and educationally backward classes need it. This article enables the State Government to make provisions for upliftment of Scheduled Castes and Scheduled Tribes including reservation of seats for admission to educational institutions. It was also held that Article 15(4) is not an exception but only makes a special application of the principle of reasonable classification. Article 15(4) does not make any mandatory provision for reservation and the power to make reservation under Article 15(4) is discretionary and no writ

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<sup>201</sup> (2009) 15 SCC 458

can be issued to effect reservation. Such special provision may be made not only by the Legislature but also by the Executive.<sup>202</sup>

In *AIIMS Student's Union vs. AIIMS*<sup>203</sup>, while considering the similar issue, it was held, that when protective discrimination for promotion of equalisation is pleaded, the burden is on the party who seeks to justify the ex facie deviation from equality. The basic rule is equality of opportunity for every person in the country, which is a constitutional guarantee. A candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance when we reach the higher levels and education like postgraduate courses. Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped -- the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation.

It is a well-accepted premise in our legal system that ideas such as 'substantive equality' and 'distributive justice' are at the heart of our understanding of the guarantee of 'equal protection before the law'. The State can treat unequals differently with the objective of creating a level- playing field in the social, economic and political spheres. The question is whether 'reasonable classification' has been made on the basis of intelligible differentia and whether the same criteria bears a direct nexus with a legitimate governmental objective. When examining the validity of affirmative action measures, the enquiry should be governed by the standard of proportionality rather than the standard of 'strict scrutiny'. Of course, these affirmative action measures should be periodically reviewed and various measures are modified or adapted from time to time in keeping with the changing

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<sup>202</sup> *Gulshan Prakash v. State Of Haryana*, (2010) 1 SCC 477.

<sup>203</sup> (2002) 1 SCC 428.

social and economic conditions. Reservation of seats in Panchayats is one such affirmative action measure enabled by Part IX of the Constitution.<sup>204</sup>

In *Ashok Kumar Thakur v. Union of India*<sup>205</sup> answering to the queries whether Articles 15(4) and 15(5) mutually contradictory, such that 15(5) is unconstitutional?

The Court opined that I am able to read them harmoniously.

Article 15(5) is specific in that it refers to special provisions that relate to admission in educational institutions, whereas 15(4) makes no such reference to the type of entity at which special provisions are to be enjoyed.

Because 15(5) is later in time and specific to the question presented, it must neutralize 15(4) in regard to reservation in education. Constitutional articles are to be read harmoniously, not in isolation. Our interpretation is harmonious because Article 15(4) still applies to other areas in which reservation may be passed.

<sup>206</sup>Does Article 15(5)'s exemption of minority institutions from the purview of reservation violate Article 14 of the Constitution?

Given the inherent tension between Articles 29(2) and 30(1), I find that the overriding constitutional goal of realizing a casteless/classless society should serve as a tie-breaker. We will take a step in the wrong direction if minority institutions (even those that are aided) are subject to reservation.

Minority aided institutions were subject to a limited form of reservation. In order to preserve the minority character of the institution, reservation could only be imposed to a reasonable extent. Minority aided institutions could select their own students, contingent upon admitting a reasonable number of non-minority students per the percentage provided by the State Government. This conclusion was derived from two conflicting constitutional articles. Of course, I am only concerned with minority aided institutions because I have already determined that the State shall

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<sup>204</sup> *Union of India v. Rakesh Kumar*, (2010) 4 SCC 50.

<sup>205</sup> (2008) 6 SCC 1.

<sup>206</sup> *Supra* Note 132.

not impose reservation on unaided institutions (minority or non-minority). Article 30(1) provides that "all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice." Article 29(2) states that "no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them." In other words, 30(1) by itself would allow minority aided institutions to reject all non-minority candidates, and 29(2) by itself would preclude the same as discrimination based solely on religion. Yet neither provision exists by itself. Rather than disturb the Constitution, this Court struck a compromise and diluted each provision in order to uphold both.

<sup>207</sup>At what point is a student no longer Educationally Backward and thus no longer eligible for special provisions under 15(5)?

Once a candidate graduates from a university, the said candidate is educationally forward and is ineligible for special benefits under Article 15(5) of the Constitution for post graduate and any further studies thereafter.

<sup>208</sup>Would it be reasonable to balance OBC reservation with societal interests by instituting OBC cut-off marks that are slightly lower than that of the general category?

It is reasonable to balance reservation with other societal interests. To maintain standards of excellence, cut off marks for OBCs should be set not more than 10 marks out of 100 below that of the general category.

The insertion of Clause (5) of Article 15, the 93rd Constitutional Amendment has empowered the State to enact legislations that may have very far reaching beneficial consequences for the nation. In point of fact, each and every one of the beneficial consequences we have discussed as being possible, would enhance the social justice content of the equality code, provide for enhancements of social and economic welfare at the lower end of the social and economic spectrum which can only behoove to the benefit of all the citizens thereby promoting the values inherent in Article 21, promote more informed, reasoned and

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<sup>207</sup> Supra Note 132.

<sup>208</sup> Supra Note 132.

reasonable debate by individuals belonging to various deprived segments of the population in the debates and formation of public opinion about choices being made, and the course that political and institutional constructs are taking in this country. Consequently we find that clause (5) of Article 15 strengthens the social fabric in which the Constitutional vision, goals and values could be better achieved and served. Or in terms of the analogy to Ship of Theseus, Clause (5) of Article 15 may be likened to a necessary replacement and in fact an enhancement in the equality code, so that it makes our national ship, the Constitution, more robust and stable.<sup>209</sup> Clause (5) of Article 15 does not violate the basic structure of the Constitution.

Clause (4) of Article 16 provides that “Nothing in this Article shall prevent the State from making any provisions for the reservation of appointments or posts in favour of any backward class of citizen which, in the opinion of the State, is not adequately represented in the service under the State.

Discrimination is the essence of classification. Equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved.

Swami Vivekananda in one of his letters addressed to his disciples in Madras dated 24.1.1894 has stated thus: Caste or no caste, creed or no creed, or class, or caste, or nation, or institution which bars the power of free thought and action of an individual - even so long as that power does not injure others - is devilish and must go down.<sup>210</sup>

The preamble to the Constitution of India proclaims the resolution of the people to secure to all its citizens justice, social, economic and political,

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<sup>209</sup> *Indian Medical Association v. Union of India*, (2011) 7 SCC 179.

<sup>210</sup> *The Complete Works of Swami Vivekananda*, Vol. V page 29'.

equality of status and opportunity and to promote fraternity assuring the dignity of the individual. The right to equality before the law and equality of opportunity in the matter of public employment are guaranteed as fundamental rights. The State is enjoined upon by the Directive Principles to promote the welfare of the people, to endeavour to eliminate inequalities in status, facilities and opportunities and special provisions have been made, in particular, for the protection and advancement of the Scheduled Castes and Scheduled Tribes in recognition of their low social and economic status and their failure to avail themselves of any opportunity of self-advancement. In short the constitutional goal is the establishment of a socialist democracy in which justice-economic, social and political is secure and all men are equal and have equal opportunity. Inequality whether of status, facility or opportunity is to end, privilege is to cease and exploitation is to go. The under-privileged, the deprived and the exploited are to be protected and nourished so as to take their place in an egalitarian society. State action is to be towards those ends. It is in this context that Article 16 has to be interpreted when State action is questioned as contravening Article 16.

The provision of preferential treatment for members of backward classes including Scheduled Castes and Scheduled Tribes is that contained in clause (4) of Article 16. There is no scope for spelling out such preferential treatment from the language of clause (1) of Article 16 because the language of that clause does not warrant any preference to any citizen against another citizen. The language of Article 16(4) indicates that but for this clause it would not have been permissible to make any reservation of appointments or posts in favour of any backward class of citizens.

*In State of Madras v. Champakkam Dorairajan*<sup>211</sup> a seven-Judge Bench of this Court in that case referred to clause (4) of article 16 of the Constitution and observed:

"If the argument founded on article 46 were sound then clause (4) of article 16 would have been wholly unnecessary and redundant. Seeing, however, that clause (4) was inserted in article 16, the omission of such an express provision from article 29 cannot but be regarded as significant. It may well be that the

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<sup>211</sup> AIR 1951 SC 226.

intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds. The protection of backward classes of citizens may require appointment of members of backward classes in State services and the reason why power has been given to the State to provide for reservation of such appointments for backward classes may under those circumstances be understood. That consideration, however, was not obviously considered necessary in the case of admission into an educational institution and that may well be the reason for the omission from article 29 of a clause similar to clause (4) of article 16."

In *Triloki Nath State Of Jammu & Kashmir*<sup>212</sup> the Supreme Court has held that the expression 'backward class' is not used as synonymous with 'backward caste' or 'backward community'. The expression 'class' in its ordinary connotation may mean a homogenous section of the people grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like; but, for purposes of Article 16(4) in determining whether a section forms a class a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution. The members of an entire caste or community may in the social, economic and educational scale of values at a given time, be backward and may, on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class.

A Nine-Judge Bench of the Supreme Court in *Indra Sawhney vs. Union of India*<sup>213</sup> referred to as the "Mandal case" authoritatively interpreted various aspects of Article 16(4) of the Constitution of India. While holding that Article 16(4) aims at group backwardness this Court came to the conclusion that socially advanced members of backward class- 'creamy layer' - have to be excluded from the said class'. It was held that the 'class' which remains after excluding the 'creamy layer' would more appropriately serve the purpose and object of Article 16(4). The protective discrimination in the shape of job

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<sup>212</sup> AIR 1967 SC 1283.

<sup>213</sup> (1992) Suppl. (3) SCC 217.

reservations under Article 16(4) has to be programmed in such a manner that the most deserving section of the backward class is benefitted. Means-test by which 'creamy layer' is excluded, ensures such a result. The process of identifying backward class cannot be perfected to the extent that every member of the said class is equally backward. There are bound to be disparities in the class itself. Some of the members of the class may have individually crossed the barriers of backwardness but while identifying the class they may have come within the collectivity. It is often seen that comparatively rich persons in the backward class are able to move in the society without being discriminated socially. The members of the backward class are differentiated into superior and inferior. The discrimination which was practiced on them by the higher class is in turn practiced by the affluent members of the backward class on the poorer members of the same class. The benefits of social privileges like job reservations are mostly chewed up by the richer or more affluent sections of the backward class and the poorer and the really backward sections among them keep on getting poorer and more backward. It is only at the lowest level of the backward class where the standards of deprivation and the extent of backwardness may be uniform. The jobs are so very few in comparison to the population of the backward classes that it is difficult to give them adequate representation in the State services. It is, therefore, necessary that the benefit of the reservation must reach the poorer and the weakest section of the backward class. Economic ceiling to cut off the backward class for the purpose of job reservations is necessary to benefit the needy sections of the class. The means-test is, therefore, imperative to skim-off the affluent section of the backward class.

Pursuant to the directions by this Court in *'Mandal Case'*<sup>214</sup> Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) issued office memorandum dated September 8, 1993 providing for 27% reservation for the Other Backward Classes. Para 2(c) of the memorandum excludes the persons/sections mentioned in column 3 of the Schedule to the said memorandum. In other words, the Schedule consists of the 'creamy layer'.

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<sup>214</sup> Supra.

The Supreme Court in *Ashoka Kumar Thakur v. State of Bihar*<sup>215</sup> after carefully examining the criteria for identifying the 'creamy layer' laid down by the government of India in the Schedule, quoted above, and we are of the view that the same is in conformity with the law laid down by this Court in 'Mandal case', held, " We have no hesitation in approving the rule of exclusion framed by the Government of India in para 2(c) read with the Schedule of the Office Memorandum quoted above. This Court, in 'Mandal Case' has clearly and authoritatively laid down that the affluent part of a backward class called 'creamy layer' has to be excluded from the said class and the benefit of Article 16(4) can only be given to the "class" which remains after the exclusion of the 'creamy layer'. The backward class under Article 16(4) means the class which has no element of 'creamy layer' in it. It is mandatory under Article 16(4) as interpreted by this Court - that the State must identify the 'creamy layer' in a backward class and thereafter by excluding the 'creamy layer' extent the benefit of reservation to the 'class' which remains after such exclusion. This Court has laid down, clear and easy to follow, guidelines for the identification of 'creamy layer'.

R.M. Sahai, J. held that the exclusion of 'creamy layer' is a social purpose. Any legislation or executive action to remove such persons individually or collectively cannot be constitutionally invalid. The learned Judge elaborated his conclusions as under:-

"More backward and backward is an illusion. No constitutional exercise is called for it. What is required is practical approach to the problem. The collectivity or the group may be backward class but the individuals from that class may have achieved the social status or economic affluence. Disentitle them from claiming reservation. Therefore, while reserving posts for backward classes, the departments should make a condition precedent that every candidate must disclose the annual income of the parents beyond which one could not be considered to be backward. What should be that limit can be determined by the appropriate State. Income apart, provision should be made that wards of those backward classes of persons who have achieved a particular status in society either political or social or economic or if their parents are in higher services

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<sup>215</sup> (1995) 5 SCC 403.

then such individuals should be precluded to avoid monopolisation of the services reserved for backward classes by a few. Creamy layer, thus, shall stand eliminated."

A bench of three learned Judges of the Supreme Court in *State of U.P. v. Pradip Tandon*<sup>216</sup> had to consider whether the scheme of reservation of seats in medical colleges in favour of hill and Uttarakhand areas of State of U.P. was sustainable as per Article 15(1)(4) and Article 29(2) of the Constitution of India. Upholding the said scheme on 19th November 1974 this Court speaking through Chief Justice Ray observed as under:

" The hill and uttarakhand areas in Uttar Pradesh are instance of socially and educationally backward classes of citizens for these reasons. Backwardness is judged by economic basis that each region has its own measurable possibilities for the maintenance of human numbers, standards of living and fixed property. From an economic point of view the classes of citizens are backward when they do not make effective use of resources. When large areas of land maintain a parse, disorderly and illiterate population whose of social backwardness is observed. When effective territorial specialisation is not possible in the absence of means of communication and technical processes as in the hill and Uttrakhand areas the people (residing there) are socially backward classes of citizens. Neglected opportunities and people in remote places raise walls of social backwardness of people. Educational backwardness is ascertained with reference to these factors. Where people have traditional apathy for education on account of social and environmental conditions or occupational handicaps, it is an illustration of educational backwardness. The hill and Uttrakhand areas are inaccessible. There is lack of educational institutions and educational aids. People in the hill and Uttrakhand areas illustrate the educationally backward classes of citizens because lack of educational facilities keep them stagnant and they have either meaning and values nor awareness for education."

It is, therefore, obvious that residents of hills and Uttarakhand areas were treated as socially and educationally backward classes of citizens entitled to benefit under Articles 15(1),15(4) and 29(2) of the Constitution. But simply on this basis

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<sup>216</sup> AIR 1975 SC 563.

it cannot be urged that this class of citizens could be condemned as socially and educationally backward class of citizens till eternity, however, much they may like to be stigmatized as educationally and socially backward class of citizens. This class is always required to be judged in the light of the existing fact situation at a given point of time. There cannot be a class of citizens which can be treated perpetually to be a socially and educationally backward class of citizens, Every citizen has right to develop socially and educationally.

The Supreme Court in *Subhash Chandra v. Delhi Subordinate Services Selection Board*,<sup>217</sup> opined that Article 16(4) is an enabling provision and confers a discretionary power on the State to make reservation in the matter of appointments in favour of backward classes of citizens which in its opinion are not adequately represented either numerically or qualitatively in services of the State. But it confers no constitutional right upon the members of the backward classes to claim reservation. Article 16(4) is not controlled by a Presidential Order issued under Article 341(1) or Article 342(1) of the Constitution in the sense that reservation in the matter of appointment on posts may be made in a State or Union territory only for such Scheduled Castes and Scheduled Tribes which are mentioned in the schedule appended to the Presidential Order for that particular State or Union territory. This Article does not say that only such Scheduled Castes and Scheduled Tribes which are mentioned in the Presidential Order issued for a particular State alone would be recognized as backward classes of citizens and none else. If a State or Union territory makes a provision where under the benefit of reservation is extended only to such Scheduled Castes or Scheduled Tribes which are recognized as such, in relation to that State or Union territory then such a provision would be perfectly valid. However, there would be no infraction of clause (4) of Article 16 if a Union territory by virtue of its peculiar position being governed by the President as laid down in Article 239 extends the benefit of reservation even to such migrant Scheduled Castes or Scheduled Tribes who are not mentioned in the schedule to the Presidential Order issued for such Union territory.

It can also be no longer disputed that reservation under Article 16 (4) of the Constitution of India aims at group backwardness. It provides for group right.

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<sup>217</sup> (2009) 15 SCC 458.

Article 16 (1) of the Constitution of India guarantees equality of opportunity to all citizens in matters relating to employment. However, in implementing the reservation policy, the State has to strike a balance between the competing claims of the individual under Article 16(1) and the reserved categories falling within Article 16(4). A Constitution Bench of this Court in the case of *Indra Sawhney case*<sup>218</sup>, this Court reiterated the need to balance the Fundamental Right of the individual under Article 16(1) against the interest and claim of the reserve category candidates under Article 16(4) of the Constitution. It needs no emphasis to say that the principal aim of Article 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provision have to be harmonized keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article The provision under Article 16(4) conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society.

It is relevant to point out that Dr. Ambedkar<sup>219</sup> himself contemplated reservation being confined to a minority of seats. No other member of the Constituent Assembly suggested otherwise. It is thus, clear that reservation of a majority of seats were never envisaged by the found Fathers.

With regard to the rule of 50% reservation the Supreme Court in *Jitendra Kumar Singh v. State of U.P.*,<sup>220</sup> expressed that we are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification at this juncture is required. All reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes under Article 16(4) may be called vertical reservations whereas reservations in favour of physically handicapped under clause (1) of

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<sup>218</sup> AIR 1993 SC 477

<sup>219</sup> Dr. Ambedkar, speech in *Constituent Assembly Debates*, set out in para 28

<sup>220</sup> (2010) 3 SCC 119

Article 16 can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations, what is called interlocking reservations.

In *Ashok Kumar Gupta v. State of U.P.*<sup>221</sup>, it has been laid down that the right to promotion is only a "statutory right" while the rights covered by Articles 16(4) and 16(4A) are "fundamental rights". It reads as follows:- "It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or class of posts depends upon the operation of the conditions of service. Article 16(4) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as a fundamental right where they do not have adequate representation consistently with the efficiency of administration. Article 16(4) has come into force from 17.6.1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right."

Equality has two facets "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for Backward Classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognise the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions

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<sup>221</sup> (1997) 5 SCC 201.

are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between "equality in law" and "equality in fact". If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of "guided power". We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred".<sup>222</sup>

#### 4.5 POSITIVE DECLARATION OF RIGHTS.

Article 19 embodies the "Right to Freedom" clause in the Constitution.

It provides protection of certain rights regarding freedom of speech, etc. Article 19 of the Constitution guarantees to the citizen of India the six fundamental freedoms which are exercisable by them throughout and in all parts of the territory of India. These are (a) freedom of speech and expression, (b) freedom of assembly, (c) freedom of Association, (d) freedom of movement, (e) freedom of residence and settlement, and (f) freedom of profession, occupation, trade or business.

However it must be remembered that a free man has far more and wider rights than those stated in Article 19 (1) of the Constitution. For example, a free

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<sup>222</sup> *Ashoka Kumar Thakur v. Union Of India*, (2008) 6 SCC 1

man can eat what he likes subject to rationing laws, work as much as he likes or idle as much as he likes. He can drink anything he likes subject to the licensing laws and smoke and do a hundred and one things which are not included in Article 19. If freedom of person was the result of Article 19, then a free man would only have the seven rights mentioned in that article. But obviously the free man in India has far greater rights."

The freedoms enumerated in Article 19(1) and those great and basic rights which are recognized as the natural rights inherent in the status of a citizen and these rights form a mechanism to impart social justice in this welfare State.

Article 19(1)(a) secures to every citizens the freedom of speech and expression. This clause should be read with clause (2) which provides that the said right shall not prevent the operation of law relating to the matters specified therein.

Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law, so that they may not conflict with public welfare or general morality. Article 19 uses the expression 'freedom' and mentions the several forms and aspects of it which are secured to individuals, together with the limitations that could be placed upon them in the general interests of the society. The right to the safety of one's life and limbs and to enjoyment of personal liberty, in the sense of freedom from physical restraint and coercion of any sort, are the inherent birthrights of a man. The essence of these rights consists in restraining others from interfering with them and hence they cannot be described in terms of "freedom" to do particular things. There is also no question of imposing limits on the activities of individuals so far as the exercise of these rights is concerned. For these reasons, these rights have not been mentioned in Article 19 of the Constitution. An individual can be deprived of his life or personal liberty only by action of the State, either under the provisions of any penal enactment or in the exercise of any other coercive process vested in it under law. What the Constitution does therefore is to put restrictions upon the powers of the State, for protecting the rights of the individuals. The restraints on State authority operate as guarantees of individual freedom and secure to the people the

enjoyment of life and personal liberty which are thus declared to be inviolable except in the manner indicated in these articles.

Das. J. in *A.K Gopalan v. State of Madras*<sup>223</sup> in deciding whether law relating to preventive detention infringes Fundamental Right as to freedom of movement, opined that Article 19 (1) postulates a legal capacity to exercise the rights guaranteed by it and if a citizen loses the freedom of his person by reason of lawful detention as a result of a conviction for an offence or otherwise he cannot claim the rights under sub-clauses (a) to (e) and (g) of Article 19(1) likewise if a citizen's property is compulsorily acquired under Article 31, he cannot claim the right under sub clause (f) of Article 19 (1) with respect to that property. In short the rights under sub-clauses (a) to (e) and (g) end where lawful detention begins and therefore the validity of a preventive detention Act cannot be judged by Article 19 (5).

In *Hari Khemu Gawali v. Deputy Commissioner of Police, Bombay*<sup>224</sup> the Court, held that Article 19 of the Constitution has guaranteed the several rights enumerated under that article to all citizens of India. After laying down the different rights to freedom in clause(1), clauses (2) to (6) of that article recognize the right of the State to make laws putting reasonable restrictions on those rights in the interest of the general public, security of the State, public order, decency or morality and for other reasons set out in those sub-clauses, so that there has to be a balance between individual rights guaranteed under Article 19(1) and the exigencies of the State which is the custodian of the interests of the general public, public order, decency or morality and all other public interests which may compendiously be described as social welfare. For preventing a breach of the public peace or the invasion of private rights the State has sometimes to impose certain restrictions on individual rights. It therefore becomes the duty of the State not only to punish the offenders against the penal laws of the State but also to take preventive action. "Prevention, is better than cure" applies not only to individuals but also to the activities of the State in relation to the citizens of the State.

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<sup>223</sup> AIR 1950 SC 27.

<sup>224</sup> AIR 1956 SC 559.

The *Bank Nationalization Case*<sup>225</sup> has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected.

Bhagwati, J. in the *Express Newspapers case*<sup>226</sup> speaking for the Court said that the freedom of speech and expression includes freedom of propagation of ideas which freedom is ensured by the freedom of circulation and that the liberty of the press is an essential part of the right to freedom of speech and expression and that the liberty of the press consists in allowing no previous restraint upon publication.

Describing the impugned Act in the *Express Newspapers case* as a measure which could be legitimately characterised to affect the press this Court said that if the intention or the Proximate effect and operation of the Act was such as to bring it within the mischief of Article 19(1) (a) it would certainly be liable to be struck down.

The Supreme Court in *Bennett Coleman & co. v. Union of India*,<sup>227</sup> held that although, our Constitution does not contain a separate guarantee of Freedom of the Press, apart from the freedom of expression and opinion contained in Article 19(1) (a) of the Constitution, yet it is well recognised that the Press provides the principal vehicle of expression of their views to citizens. It has been said : "Freedom of the Press is the Ark of the Covenant of Democracy because public criticism is essential to the working, of its institutions. Never has criticism been more necessary than today, when the weapons of propaganda are so strong and so subtle. But, like other liberties, this also must be limited." The extent of permissible limitations on freedom of expression is also indicated by our Constitution which contains the fundamental law of the land. To that law all Governmental policies, rules and regulations, orders and directions, must conform

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<sup>225</sup> *R.C. Cooper v. Union of India*, (1970) 1 SCC 248.

<sup>226</sup> *Express Newspapers (P) Ltd. v. Union of India*, AIR 1958 SC 578.

<sup>227</sup> (1972) 2 SCC 788.

so that there is "a Government of laws and not of men", or, in other words, a Government whose policies are based on democratic principles and not on human caprice or arbitrariness. Article 19(2) of the Constitution requires that Governmental action which affects freedom of speech and expression of Indian citizens should be founded on some "law" and also that such "law" should restrict freedom of expression and opinion reasonably only "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, Public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence." Although, the ambit of restrictions which can be imposed by "law" on freedom to carry on any occupation, trade, or business, guaranteed by Article 19 (1) (g) of the Constitution, is wider than that of restrictions on freedom of speech and expression, yet, these restrictions have also to be limited to those which are reasonably necessary "in the interest of the general public" as contemplated by Article 19(6) of the Constitution.

The right to freedom under Article 19 has been long recognized as a natural and inalienable right that belongs to all citizens. Indeed, what would Independence mean without it? Chief Justice Sikri cites the following passage in *Kesavananda*<sup>228</sup> at para 300: "That article (Article 19) enumerates certain freedoms under the caption "right to freedom" and deals with those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country."

In a landmark judgment explaining the concept of freedom of expression as envisaged in our Constitution the Supreme Court in *Maneka Gandhi v. Union of India*,<sup>229</sup> held that Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not, mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow unimpeded and impartial justice (social, economic and political), freedom (not only of thought, expression, belief, faith and worship, but also of association, movement vocation or occupation as well as of acquisition and possession of reasonable property), or equality (of status and of opportunity, which imply

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<sup>228</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>229</sup> (1978) 1 SCC 248.

absence of unreasonable or unfair discrimination between individuals, groups and classes), and of fraternity (assuring dignity-of the individual and the unity of the nation) which our Constitution visualizes. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat very objects of such protection. Article 19(1)(a) guarantees to Indian Citizens the right to freedom of speech and expression. It does not delimit the grant of that right in any manner and there is no reason arising either out of interpretational dogmas or pragmatic considerations why courts should strain the language of the Article to cut down amplitude of that right. The plain meaning of the clause guaranteeing free speech and expression is that Indian citizens are entitled to exercise that right wherever they choose regardless of geographical considerations here are no geographical limitations to freedom of speech and expression guaranteed under Art. 19(1) (a) and this freedom is exercisable not only in India but also outside and if State action sets up barriers to its citizens' freedom of expression in any country in the world, it would violate Article 19(1) (a) as much as if it inhibited such expression within the country. This conclusion would on a parity of reasoning apply equally in relation to fundamental right to practise any profession or to carry on any occupation, trade or business, guaranteed under Article 19(1)(g). Freedom to go abroad incorporates the important function of an *ultimum refugium liberatis* when other basic freedoms are refused. Freedom to go abroad has much social value and represents a basic human right of great significance. It is in fact incorporated as an alienable human right in Article 13 of the Universal Declaration of Human Rights. But it is not specifically named as a fundamental right in Art. 19(1) of the Constitution.

Even if a right is not specifically named in Art. 19(1) it may still be a fundamental right covered by some clause of that Article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence, is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right, nor can it be regarded as such merely because it may not be possible otherwise to

effectively exercise that fundamental right. What is necessary to be seen is and that is the test which must be applied, whether the right claimed by the petitioner is an, integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental, right is in reality and substance nothing but an instance of the exercise of, the named fundamental right. If this be the correct test, the right to go abroad cannot in all circumstances be regarded as included in freedom of speech and expression.<sup>230</sup>

In *Additional District Magistrate, Jabalpur v. Shivkant Shukla*,<sup>231</sup> the Supreme Court through Kania, Chief Justice while distinguishing the objects and natures of Articles 21 and 19, gave a wide enough scope to Article 21.

Kania CJ said "Deprivation (total loss) of personal liberty, which inter alia includes the right to eat or sleep when one likes or to work or not to work as and when one pleases and several such rights sought to be protected by the expression 'personal liberty' in Article 21, is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by Article 19(1)(d). Deprivation of personal liberty has not the same meaning as restriction of free movement in the territory of India. This is made clear when the provisions of the Criminal Procedure Code in Chapter VIII relating to security of peace or maintenance of public order are read. Therefore Article 19 (5) cannot apply to a substantive law depriving a citizen of personal liberty. I am unable to accept the contention that the word 'deprivation' includes within its scope 'restriction' when interpreting Article 21.

Article 22 envisages the law of preventive detention. So does Article 246 read with Schedule Seven, List I, Entry 9, and 1 List III, Entry 3. Therefore, when the subject of preventive detention is specifically dealt with in the Chapter on Fundamental Rights I do not think it is proper to consider a legislation permitting preventive detention as in conflict with the rights mentioned in Article 19(1). Article 19(1) does not purport to cover all aspects of liberty or of personal liberty. In that article only certain phases of liberty are dealt with. 'Personal liberty' would primarily mean liberty of the physical body. The rights given

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<sup>230</sup> supra

<sup>231</sup> (1976) 2 SCC 521.

under article 19(1) do not directly come under that description. They are rights which accompany the freedom or liberty of the person. By their very nature they are freedoms of a person assumed to be in full possession of his personal liberty. If Article 19 is considered to be the only article safeguarding personal liberty several well-recognised rights, as for instance, the right to eat or drink, the right to work, play, swim and numerous other rights and activities and even the right to life will not be deemed protected under the Constitution. I do not think that is the intention. It seems to me improper to read Article 19 as dealing with the same subject as Article 21.

The expression 'freedom of press' has not been used in Article 19 of the Constitution but, as declared by this Court, it is included in Article 19 (1) (a) which guarantees freedom of speech and expression. Freedom of press means freedom from interference from authority which would have the effect of interference with the content and circulation of newspapers.<sup>232</sup>

There could not be any kind of restriction on the freedom of speech and expression other than those mentioned in Article 19 (2) and it is clear that there could not be any interference with that freedom in the name of public interest. Even when clause (2) of Article 19 was subsequently substituted under the Constitution (First Amendment) Act, 1951 by a new clause which permitted the imposition of reasonable restrictions on the freedom of speech and expression in the interests of sovereignty and integrity of India, these unity of the State, friendly relations with foreign States, public order, decency or morality in relation to contempt of court, defamation or incitement to an offence. Parliament did not choose to include a clause enabling the imposition of reasonable restrictions in the public interest. Freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Newspapers being purveyors of news and views

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<sup>232</sup>*Indian Express Newspapers (Bombay) Private Ltd v. Union of India*, (1985) 1 SCC 641.

having a bearing on public administration very often carry material which would not be palatable to governments and other authorities. With a view to checking malpractices which interfere with free flow of information, democratic constitutions all over the world have made provisions guaranteeing the freedom of speech and expression laying down the limits of interference with it. It is the primary duty of all the national courts to uphold the said freedom and invalidate all laws or administrative actions which interfere with it, contrary to the constitutional mandate.<sup>233</sup>

A new dimension was given to the right of sovereign i.e. the people to make choice of their representatives after knowing the assets and antecedents of the persons seeking election to the legislatures. The judgment also gave an expansive meaning to the term 'expression' used in Article 19(1)(a) by declaring that in the democratic set up of our country the elector's right to have complete information about the candidates and then express his choice for a particular person, are necessary concomitant of the freedom of expression guaranteed under Article 19(1)(a).<sup>234</sup>

Article 19(1)(g) employs four expressions, viz., profession, occupation, trade and business. Their fields may overlap, but each of them does have a content of its own. Education is per se regarded as an activity that is charitable in nature has so far not been regarded as a trade or business where profit is the motive. Even if there is any doubt about whether education is a profession or not, it does appear that education will fall within the meaning of the expression "occupation". Article 19(1) (g) uses the four expressions so as to cover all activities of a citizen in respect of which income or profit is generated, and which can consequently be regulated under Article 19(6).<sup>235</sup>

The source of right to information does not emanate from the Right to Information Act. It is a right that emerges from the constitutional guarantees under Article 19(1)(a) as held by the Supreme Court in a catena of decisions. The Right to Information Act is not repository of the right to information. Its repository is the

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<sup>233</sup> supra

<sup>234</sup> People's Union For Civil Liberties v. Union Of India, (2009) 3 SCC 200

<sup>235</sup> T.M.A.Pai Foundation & Ors vs State Of Karnataka, (2002) 8 SCC 481

constitutional rights guaranteed under Article 19(1)(a). The Act is merely an instrument that lays down statutory procedure in the exercise of this right. Its overreaching purpose is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and to help the governors accountable to the governed.<sup>236</sup>

Answering to the question as to whether the 93rd Amendment violate the Basic Structure of the Constitution by imposing reservation on unaided institutions? Answering in the affirmative the Supreme Court has opined: Yes, it does. Imposing reservation on unaided institutions violates the Basic Structure by stripping citizens of their fundamental right under Article 19(1)(g) to carry on an occupation.<sup>237</sup>

Article 19 gives the rights specified therein only to the citizens of India while Article 21 is applicable to all persons. The word citizen is expressly defined in the Constitution to indicate only a certain section of the inhabitants of India. Moreover, the protection given by Article 21 is very general. It is of 'law' whatever that expression is interpreted to mean. The legislative restrictions on the law-making powers of the legislature are not here prescribed in detail as in the case of the rights specified in Article 19. In my opinion therefore Article 19 should be read as a separate complete article".

#### 4.6. REASONABLE RESTRICTION IN THE INTEREST OF THE GENERAL PUBLIC.

Article 19(5) permits the imposition of reasonable restrictions on each of the constituent elements of property namely, to acquire, hold and dispose of, in the interest of the general public or for the protection of the interest of any schedule tribe.

Ordinarily the individual proprietary rights are respected, unless a clear case is made out for imposing restriction thereon, in the interest of the general

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<sup>236</sup> *Supreme Cour of India. v. Subhash Chandra Agarwal*, (2011) 1 SCC 496

<sup>237</sup> *Ashoka Kumar Thakur vs Union Of India*, (2008) 6 SCC 1

public, and even then the restriction sought to be imposed must not be arbitrary, but have reasonable relation to the object sought to be achieved. There must be a harmonious balancing between the fundamental right declared by Article 19(1)(f) and the 'social control' permitted by Article 19(5).

Whether a restriction is in the interest of the general public or not is justiciable issue. 'In the interest of the general public' means the same thing as 'in the public interest', and will include public order, public health, morality etc.

In a number of cases restrictions on the freedom of property have been upheld on the ground of their being in the interest of the general public. A law limiting the size of holdings in the hands of a single individual to a specific limit or a law promoting consolidation of holdings has been upheld as being in the interest of the general public. Ban on possession, sale, consumption or use of liquor has been upheld as a reasonable restriction in the public interest. Limitation imposed on owners of land by Municipal bye-laws to construct buildings have been held valid.

In *Bhau Ram v. B. Baijnath Singh*<sup>238</sup>, law of pre-emption giving the right of pre-emption to a co-sharer imposes a reasonable restriction on the right to acquire, hold, and dispose of property, as in the interest of the general public. The Court held that in view of the Indian way of life to live in compact communities this was a reasonable restriction. It would also avoid disputes that may arise if a stranger were allowed to come in. The reasons for upholding pre-emption on the ground of being co-sharers were equally applicable to pre-emption on the ground of vicinage.

In *Prem Dulari v. Raj Kumari*<sup>239</sup> the Supreme Court has held that in the case of properties having a common entrance, the owners of the buildings would stand more or less in the position of co-sharers and the right of pre-emption is sustainable as a reasonable restriction.

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<sup>238</sup> AIR 1962 SC 1476.

<sup>239</sup> AIR 1967 SC 1578.

In *Manchegowda v. State of Karnataka*<sup>240</sup> the Supreme Court upheld the provision of an Act which prohibits transfer of land by the SC and ST members. The Court held that persons belonging to scheduled castes and scheduled tribes to whom the lands were granted were, because of their poverty, lack of education and general backwardness, exploited by various persons who could and would take advantage of bonafide the said plight of these poor persons for depriving them of their lands. The imposition of the condition of prohibition on transfer for a particular period could not, therefore, be considered to constitute any unreasonable restriction on the right of the grantees to dispose of the granted lands. The imposition of such a condition on prohibition in the very nature of the grant was perfectly valid and legal.

The Supreme Court in *Municipal Corporation of Ahmedabad v. Jan Mohammed Usmanbhai*<sup>241</sup> held that Clause (6) of Article 19 protects a law which imposes in the interest of general public, reasonable restrictions on the exercise of the right conferred by sub-clause (g) of clause (1) of Art. 19. It is left to the Court in case of a dispute to determine the reasonableness of the restriction imposed by the law. But the Court cannot proceed on a general notion of what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or persons on whom the restrictions are imposed. The right conferred by sub-clause (g) is expressed in general language and if there had been no qualifying provision like clause (6) the right so conferred would have been an absolute one. What the Court has to do is to consider whether the restrictions imposed are reasonable in the interest of general public. The expression "in the interest of general public" is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution. Nobody can dispute a law providing for basic amenities; for the dignity of human labour as a social welfare measure in the interest of general public.

The Supreme Court in *Fatehchand Himmatlal v. State of Maharashtra*<sup>242</sup>, a question was raised whether rural money lending is a trade in the context of

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<sup>240</sup> (1984) 3 SCC 301.

<sup>241</sup> (1986) 3 SCC 20.

<sup>242</sup> (1977) 2 SCC 670.

determining the validity of the Maharashtra Debt Relief Act 1976. The Court held that the freedom while it is wide is not absolute. Every systematic, profit oriented activity, however sinister, suppressive or socially diabolic, cannot ipso facto exalt itself into a trade. Dealings of Banks and similar institutions having some nexus with trade, actual or potential, may itself be trade or intercourse. All modern commercial credit and financial dealings amount to trade. However, village based age old, feudal pattern of money lending to those below the subsistence level to the village artisan, the bonded labourer, the marginal tiller and the broken farmer, who borrows and repays in perpetual labour, hereditary service, periodical delivery of grain and unvouchered usurious interest is a countryside incubus. Such debts ever swell never shrink, such captive debtor never become quits. Such countryside creditors never get off the backs of the victims.

In a landmark judgment the Supreme Court in *Unni Krishan v. State of U.P.*<sup>243</sup> held that Article 19(1)(g) of the Constitution declares that all citizens of country shall have the right to any profession, or to carry on any occupation, trade or business. No opinion is expressed on the question whether the right to established an education institution can be said to be on any 'occupation' within the meaning of Article 19(1)(g). Assuming that it is occupation such activity can in no event be a trade or business nor can it be a profession within the meaning of Article 19 (1) (g). Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sensibilities of this nation. The argument to the contrary has an unholy ring to it. Imparting of education has never been treated as a trade or business in this country since times immemorial. It has been treated as a religious duty, and a charitable activity, but never as trade or business. Education in its true aspect is more a mission and a vocation rather than a profession, trade or business, however wide may be the denotation of the two latter words. The Parliament too has manifested its intention repeatedly (by enacting the U.G.C. Act, I.M.C. Act and A.I.C.T.E. Act) that commercialisation of education is not permissible and that no person shall be allowed to steal a march over a more meritorious candidate because of his economic power.

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<sup>243</sup> (1993) 1 SCC 645.

The Supreme Court has held that the State has powers to fix minimum wages with regard to workers under the Minimum Wages Act, 1948. The learned Judge in *U. Unichoyi v. The State of Kerala*<sup>244</sup> held that the restrictions were imposed in the interest of the general public and with a view to carry out one of the directive principles of State policy as embodied in Art. 43 and so the impugned sections were protected by the terms of clause (6) of Article 19. In repelling the argument of the employers' inability to meet the burden of the minimum wage rates it was observed that "the employers cannot be heard to complain if they are compelled to pay minimum wages to their labourers even though the labourers on account of their poverty and helplessness are willing to work on lesser wages, and that if individual employers might find it difficult to carry on business on the basis of minimum wages fixed under the Act that cannot be the reason for striking down the law itself as unreasonable. The inability of the employers may in many cases be due entirely to the economic conditions of those employers."

Similarly the provision in Payment of Gratuity Act, 1972, requiring the employer to pay gratuity to the employee after five years continuous service is not an unreasonable restriction.<sup>245</sup> The provision in the Industrial Dispute Act, 1947, requiring prior permission of concerned authorities by the employer before effecting lay off of employees is a reasonable restriction.<sup>246</sup>

In *Naramada Bachao Andolan v. Union of India*<sup>247</sup>, Dr. A.S. Anand, C.J., speaking for himself and B.N. Kirpal, J. (as he then was) observed as under: "We wish to emphasise that under the cover of freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the court and bring it into disrepute or ridicule. Courts are not unduly sensitive to fair comment or even outspoken comments being made regarding their judgments and orders made objectively, fairly and without any malice, but no one can be permitted to distort orders of the court and deliberately

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<sup>244</sup> AIR 1962 SC 12.

<sup>245</sup> *Bakshish Singh v. M/s Darshan Engineering Works*, AIR 1994 SC 251.

<sup>246</sup> *Papnasam Labour Union v. Madura Coats Ltd*, AIR 1995 SC 2200.

<sup>247</sup> (1999) 8 SCC 308

give a slant to its proceedings, which have the tendency to scandalise the court or bring it to ridicule, in the larger interest of protecting administration of justice.

Ordinarily, the Court would not use the power to punish for contempt for curbing the right of freedom of speech and expression, which is guaranteed under Article 19(1)(a) of the Constitution. Only when the criticism of judicial institutions transgresses all limits of decency and fairness or there is total lack of objectivity or there is deliberate attempt to denigrate the institution then the Court would use this power.<sup>248</sup>

In the case of *S. Rangarajan v. Jagjivan Ram*<sup>249</sup>, this Court noticed as under: The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a spark in a power keg.

Rights guaranteed under Article 19(1)(g) can also be restricted or curtailed in the interest of general public imposing reasonable restrictions on the exercise of rights conferred under Article 19(1)(g). Laws can be enacted so as to impose regulations in the interest of public health, to prevent black marketing of essential commodities, fixing minimum wages and various social security legislations etc., which all intended to achieve socio-economic justice. Interest of general public, it may be noted, is a comprehensive expression comprising several issues which affect public welfare, public convenience, public order, health, morality, safety etc. all intended to achieve socio-economic justice for the people. The law is

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<sup>248</sup> *Indirect Tax Practitioners Assn. v. R.K.Jain*, (2010) 8 SCC 281.

<sup>249</sup> (1989) 2 SCC 574

however well settled that the State cannot travel beyond the contours of Clauses (2) to (6) of Article 19 of the Constitution in curbing the fundamental rights guaranteed by Clause (1), since the Article guarantees an absolute and unconditional right, subject only to reasonable restrictions. The grounds specified in clauses (2) to (6) are exhaustive and are to be strictly construed. The Court, it may be noted, is not concerned with the necessity of the impugned legislation or the wisdom of the policy underlying it, but only whether the restriction is in excess of the requirement, and whether the law has over-stepped the Constitutional limitations. Right guaranteed under Article 19(1)(g), it may be noted, can be burdened by constitutional limitations like sub-clauses (i) to (ii) to Clause (6). Article 19(6)(i) enables the State to make law relating to professional or technical qualifications necessary for practicing any profession or to carry on any occupation, trade or business. Such laws can prevent unlicensed, uncertified medical practitioners from jeopardizing life and health of people. Sub clause (ii) to Article 19(6) imposes no limits upon the power of the State to create a monopoly in its favour. State can also by law nationalize industries in the interest of general public. Clause (6)(ii) of Article 19 serves as an exception to clause (1)(g) of Article 19 which enable the State to enact several legislations in nationalizing trades and industries.<sup>250</sup>

Reference may be made to Chapter-4 of the Motor Vehicles Act, 1938, The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, General Insurance Business (Nationalization) Act, 1972 and so on. Sub-clause 6(ii) of Article 19 exempts the State, on the conditions of reasonableness, by laying down that carrying out any trade, business, industry or services by the State Government would not be questionable on the ground that it is an infringement on the right guaranteed under Article 19(1)(g).<sup>251</sup>

The Supreme Court in the case of *Re-Ramlila Maidan Incident*<sup>252</sup> directed that the State has a duty to ensure fulfillment of the freedom enshrined in our Constitution and so it has a duty to protect itself against certain unlawful actions. It

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<sup>250</sup> *Society for Un-aided Private Schools of Rajasthan v. Union of India*, (2012) 6 SCC 1.

<sup>251</sup> *Supra*.

<sup>252</sup> (2012) 5 SCC 1.

may, therefore, enact laws which would ensure such protection. The rights and the liberties are not absolute in nature and uncontrolled in operation. While placing the two, the rule of justice and fair play requires that State action should neither be unjust nor unfair, lest it attracts the vice of unreasonableness or arbitrariness, resultantly vitiating the law, the procedure and the action taken thereunder.

It is neither correct nor judicially permissible to say that taking of police permission for holding of dharnas, processions and rallies of the present kind is irrelevant or not required in law. Thus, in my considered opinion, the requirement of associating police, which is an important organ of the State for ensuring implementation of the rule of law, while holding such large scale meetings, dharnas and protests, would not infringe the fundamental rights enshrined under Articles 19(1)(a) and 19(1)(b) of the Constitution. This would squarely fall within the regulatory mechanism of reasonable restrictions, contemplated under Articles 19(2) and 19(3). Furthermore, it would help in ensuring due social order and would also not impinge upon the rights of others, as contemplated under Article 21 of the Constitution of India. The police authorities, who are required to maintain the social order and public tranquility, should have a say in the organizational matters relating to holding of dharnas, processions, agitations and rallies of the present kind. However, such consent should be considered in a very objective manner by the police authorities to ensure the exercise of the right to freedom of speech and expression as understood in its wider connotation, rather than use the power to frustrate or throttle the constitutional right.

Part III of the Constitution is the soul of the Constitution. It is not only a charter of the rights that are available to Indian citizens, but is even completely in consonance with the basic norms of human rights, recognized and accepted all over the world. The fundamental rights are basic rights, but they are neither uncontrolled nor without restrictions. In fact, the framers of the Indian Constitution themselves spelt out the nature of restriction on such rights. Exceptions apart, normally the restriction or power to regulate the manner of exercise of a right would not frustrate the right. Take, for example, the most valuable right even from amongst the fundamental rights, i.e., the right to freedom of speech and expression. This right is conferred by Article 19(1)(a) but in turn, the Constitution itself

requires its regulation in the interest of the 'public order' under Article 19(2). The State could impose reasonable restrictions on the exercise of the rights conferred, in the interest of the sovereignty and integrity of India, the security of the State, free relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement of an offence. Such restrictions are within the scope of -constitutionally permissible restriction. Exercise of legislative power in this respect by the State can be subjected to judicial review, of course, within a limited ambit. Firstly, the challenger must show that the restriction imposed, at least prima facie, is violative of the fundamental right. It is then that the burden lies upon the State to show that the restriction applied is by due process of law and is reasonable. If the restriction is not able to satisfy these tests or either of them, it will vitiate the law so enacted and the action taken in furtherance thereto is unconstitutional. It is difficult to anticipate the right to any freedom or liberty without any reasonable restriction. Besides this, the State has to function openly and in public interest. The width of the expression 'public interest' cannot be restricted to a particular concept. It may relate to variety of matters including administration of justice.<sup>253</sup>

The constitution- makers had decided to incorporate Fundamental Rights in the Constitution because of several reasons, such as, consciousness of the massive minority problem in India, memories of the protracted struggle against the despotic British Rule, acknowledgement of the Gandhian ideals, the climate of international opinion and the American experience.

But it can be seen from the past history that inclusion of Fundamental Rights under the Indian Constitution was also a reasonable step towards the natural apprehension of any such autocratic rule and arbitrariness in future and to prevent it. In other words, to limit the government acts.

The courts are also playing a crucial role in guaranteeing these rights to the people besides broadening them with changing circumstances and conditions and making them even more efficient for protection against any arbitrary act on the part of the govt. or any individual.

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<sup>253</sup> *N.K.Bajpai v. Union Of India*, (2012) 4 SCC 653.

The Supreme Court as the sentinel on the qui vive, is constitutionally obligated to enforce the fundamental rights of all the citizens of the country and to protect them from exploitation and to provide guidance and direction for facilities and opportunities to them for securing socio-economic justice, empowerment and to free the handicapped persons from the disabilities with which they suffer from and to make them realise and enjoy the fundamental rights ensured to them under the Constitution.

Part III of the Constitution dealing with the Fundamental Right Chapter has played a pivotal role in ensuring the principle that the right to fundamental right is a necessary concomitant to social justice or else such rights would be rendered illusory.

This is what the principle of constitutionalism also calls for. Thus, it can very well be said that Fundamental Rights are really an expression of constitutionalism in India.