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Constitutional Law of India

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1. Making of Indian Constitution:

Generally, the task of framing the constitution of a sovereign democratic nation is performed by a representative body of its people. Such a body elected by the people for the purpose of considering and adopting a constitution may be known as the constituent assembly.

The concept of a constituent assembly had always been linked with the growth of the national movement in India. The idea of a constituent assembly, whereby Indians themselves might frame a constitution for their country, was implicit in the opposition to the 1919 Act. But, the first definite reference to a constituent assembly for India, though not in those words or under that particular name, was made by Mahatma Gandhi in 1922, soon after the inauguration of the Government of India Act, 1919.

In 1922 itself, a joint meeting of members of the two Houses of the Central Legislature was held at Simla at the initiative/of Mrs. Annie Besant, which decided to call a convention for the framing of a constitution. Yet another conference attended by members of the Central and Provincial Legislatures was held in Delhi in February 1923. This conference outlined essential elements of a constitution placing India on equal footing with the self-governing Dominions of the British Empire. A "National Convention"was called which met on 24 April, under the President ship of Sir Tej Bahadur Sapru. This convention drafted the "Commonwealth of India Bill". The draft Bill was submitted in slightly amended form to a committee of the All Parties

Conference held at Delhi in January 1925, which was presided over by Mahatma Gandhi. Finally, the draft was submitted to a Drafting Committee which published the Bill.

The Bill was sent to an influential member of the Labour Party in Britain accompanied by a memorandum signed by 43 leaders of various political parties. It found wide support in the Labour Party and was accepted with slight modifications. The Bill had the first reading after it was introduced in the House of Commons. Though with the defeat of the Labour Government the fate of the Bill was sealed, it was a major effort by the Indians to outline a constitutional system for India with the help of peaceful and constitutional means.

The adoption of the famous Motilal Nehru resolution in 1924 and 1925 on the National Demand was a historic event in as much as the Central Legislature had, for the first time, lent its support to the growing demand that the future constitution of India should be framed by Indians themselves.

In November 1927, when the Simon Commission was appointed without any Indians represented on it, an all-party meeting held at Allahabad said that apart from being virtual negation of the "National Demand", it amounted to 'a "deliberate insult to the people of India" for, not only did it "definitely assign to them a position of inferiority" but also denied to them "the right to participate in the determination of the constitution of their own country". Earlier on 17 May 1927, at the Bombay Session of the Congress, Motilal Nehru had moved a resolution calling upon the Congress Working Committee to frame a constitution for India in consultation with the elected members of the Central and Provincial Legislatures and leaders of political parties.

Adopted by an overwhelming majority with amendments, it was this resolution on the Swaraj constitution which was later amplified and reiterated by Jawaharlal Nehru in a resolution passed by the Madras Session of the Congress on 28 December 1927. An All- Parties Conference organized at Bombay on 19 May 1928 appointed a committee, under the chairmanship of Motilal Nehru "to determine the principles of the constitution of India".

The report of the Committee (submitted on 10 August 1928) was later to become famous as the Nehru Report. It was the first attempt by Indians to frame a full-fledged constitution for their country and has been described by Coupland as "not only an answer to the challenge that Indian

nationalism was unconstructive" but "frankest attempt yet made by Indians to face squarely the difficulties of communalism".

The Report embodied not only the perspective of the contemporary nationalist opinion but also an outline of a draft constitution for India. The latter was based on the principle of Dominion Status with full responsible government on the parliamentary pattern. It asserted the principle that sovereignty belongs to the Indian people, laid down a set of fundamental rights and provided for a federal system with maximum autonomy granted to the units but residuary powers vesting in the Central Government and joint electorates for elections to the Federal Lower House and the Provincial Legislatures with reservation of seats for minorities in certain cases for a limited period.

It would be seen that the broad parliamentary system with a government responsible to Parliament, a chapter of justifiable fundamental rights and rights of minorities envisaged in the Nehru Report in 1928 were very largely embodied in the constitution of independent India that was adopted 21 years later, on 26 November 1949.

The White Paper issued after the third Round Table Conference outlined the British government's proposal for constitutional reforms in India. The Joint Parliamentary Committee which examined these proposals observed that "a specific grant of constituent power to authorities in India is not at the moment a practicable proposition".

In June 1934, the Congress Working Committee declared that the only satisfactory alternative to the White Paper was a constitution drawn up by a constituent assembly elected on the basis of adult suffrage. This was the first time that a definite demand for a constituent assembly was formally put forward.

The Working Committee of the All India Congress Committee at its meeting held at Patna on 5-7 December 1934 adopted a resolution rejecting the scheme of Indian constitutional Reforms as recommended in the Report of the Joint Parliamentary Committee (1933-34) and reiterated the view that the only satisfactory alternative to the scheme was a constitution drawn up by a constituent assembly.

The failure of the Simon Commission and the Round Table Conference which led to the enactment of the Government of India Act, 1935 to satisfy Indian aspirations accentuated the demand for a constituent assembly of the people of India. The Congress adopted a resolution at its Lucknow Session in April 1936 in which it declared that no constitution imposed by an outside authority shall be acceptable to India; it has to be one framed by an Indian constituent assembly elected by the people of India on adult franchise.

Since the Congress had contested elections to the Provincial Legislature on the issues of total rejection of the Act of 1935 and the demand for a, constituent assembly, following a decisive victory it adopted at Delhi on 18 March 1937 a resolution asserting the electorate's approval of the demand for a constituent assembly. It desired to frame "a constitution based on national independence, through the medium of a constituent assembly elected by adult franchise". This demand was firmly reiterated by the All India National Convention of Congress Legislators held in Delhi in March, 1937.

During August October 1937, the Central Legislative assembly and the Provincial Assemblies of each of the Provinces where the Congress held office, adopted resolutions reiterating the Congress demand to convene a constituent assembly to frame a new constitution for a free India. After the outbreak of the War in 1939, the demand for a constituent assembly was reiterated in a long statement issued by the Congress Working Committee on 14 September, 1939.

Gandhiji wrote an article entitled "The Only Way" in the Harijan of 19 November 1939 in which he expressed the view that" constituent assembly alone can produce a constitution indigenous to the country and truly and fully representing the will of the people". He declared that the only way out to arrive at a just solution of communal and other problems was a constituent assembly

The demand for a constituent assembly was for the first time authoritatively conceded by the British Government, though in an indirect way and with important reservations, in what is known as the" August Offer" of 1940.

The Cripps proposals marked an advance over the "August Offer" in that the making of the new constitution was now to rest solely and not merely "primarily" in Indian hands and a clear undertaking to accept the constitution framed by the proposed constitution-making body was given by the British Government. After the failure of the Cripps Mission, no steps were taken for

the solution of the Indian constitutional problem until the War in Europe came to an end in May, 1945.

In July, with the new Labour Government coming into power in England, its Indian policy was announced on 19 September 1945 by Lord Wavell who had succeeded Lord Linlithgow as Viceroy in 1943. The Viceroy affirmed His Majesty's Government's intention to convene a constitution making body" as soon as possible".

The Cabinet Mission realized that the most satisfactory method to constitute a constitution-making body would have been by election based on adult franchise, but that would have caused "a wholly unacceptable delay" in the formulation of the new constitution.

"The only practicable course" according to them was, therefore, "to utlize the recently elected Provincial Legislative Assemblies as electing bodies". As what they called the "fairest and as most practicable plan" in the circumstances, the Mission recommended that the representation of the Provinces in the constitution making body be on the basis of population, roughly in the ratio of one Member to a million and the seats allocated to the Provinces be divided among the principal communities, classified for this purpose as Sikhs, Muslims and General (all except Sikhs and Muslims), on the basis of their numerical strength. The representatives of each community were to be chosen by members of that community in the Provincial assembly and voting was to be by the method of proportional representation with single transferable vote. The number of Members allotted to the Indian States was also to be fixed on the same basis of population as adopted for British India, but the method of their selection was to be settled later by consultation. The strength of the constitution making body was to be 389. Of these 296 representatives were to be from British India, (292 representatives drawn from the eleven Governors' Provinces of British India and a representative each from the four Chief Commissioners' Provinces of Delhi, Ajmer Merwara, Coorg and British Baluchistan) and 93 representatives from the Indian States.

The Cabinet Mission recommended a basic framework for the constitution and laid down in some detail the procedure to be followed by the constitution-making body.

2. Debates of Constituent Assembly relating to drafting of Constitution

Elections for the 296 seats assigned to the British Indian Provinces were completed by July-August 1946. The Congress won 208 seats including all the General seats except nine and the Muslim League 73 seats, that is, all but five of the seats allotted to Muslims.

With the partition and independence of the country, on 14-15 August 1947, the Constituent Assembly of India could be said to have become free from the fetters of the Cabinet Mission Plan.

It became a fully sovereign body and the successor to the British Parliament's plenary authority and power in the country. Moreover, following the acceptance of the Plan of 3 June, the members of the Muslim League .party from the Indian Dominion also took their seats in the assembly.

The representatives of some of the Indian states had already entered the Assembly on 28 April 1947. By 15 August 1947 most of the States were represented in the Assembly and the remaining States also sent their representatives in due course.

The Constituent Assembly thus became a body, it was believed, fully representative of the states and provinces in India and full sovereign of all extreme authority. It could abrogate or alter any law made by the British Parliament applying to India, including the Indian Independence Act itself.

The 'Constituent Assembly duly opened on the appointed day Monday, the ninth day of December, 1946 at eleven in the morning.

The historic Objectives Resolution was moved in the Constituent Assembly by Nehru, on 13 December 1946, after it had been in session for some days. The beautifully worded draft of the Objectives Resolution cast the horoscope, so to say, of the Sovereign Democratic Republic that India was to be.

The resolution envisaged a federal polity with the residuary powers vesting in the autonomous units and sovereignty belonging to the people.

"Justice, social, economic and political; Equality of status, of opportunity and before the law; Freedom of thought, expression, belief, faith, worship, vocation, association and I, action" were to be guaranteed to all the people along with "adequate safeguards" to "minorities, backward and tribal areas and depressed and other backward classes". Thus, the Resolution gave to the Assembly its guiding principles and the philosophy that was to permeate its tasks of constitution making.

It was finally adopted by the Assembly on 22 January 1947 and later took the form of the Preamble to the Constitution. Framing the Constitution The assembly appointed a number of committees to deal with different aspects of the problem of framing the constitution. These included the Union Constitution Committee, Union Powers Committee, Committees on Fundamental Rights, Minorities, etc. Some of these Committees were headed by either Nehru or Patel to whom the President of the assembly gave the credit for working out the fundamentals of the constitution. The Committees worked hard and in a businesslike manner and produced valuable reports.

Between the third and the sixth sessions, the Assembly considered the reports of committees on Fundamental Rights, on Union Constitution, on Union Powers, on Provincial Constitution, on Minorities andon Scheduled Areas and Scheduled Tribes.

Recommendations of the other Committees were later considered by the Drafting Committee.

The first draft of the constitution of India was prepared in October, 1947 by the Advisory Branch of the Office of the Constituent Assembly under Sir B.N. Rau.

Before the preparation of this draft, voluminous background material had been collected and supplied to the members of the assembly in the shape of three series of 'Constitutional Precedents' which gave salient texts from the constitutions of about 60 countries. The Constituent Assembly on 29

August 1947 appointed the Drafting Committee with Dr. B.R. Ambedkar as the Chairman to scrutinize the draft of the text of the constitution of India prepared by the Constitutional Adviser (B.N. Rau) giving effect to the decisions taken in the assembly.

The Draft Constitution of India prepared by the Drafting Committee was submitted to the President of the assembly on 21 February 1948. A large number of comments, criticisms and suggestions for the amendment of the Draft Constitution were received. The Drafting Committee considered all these.

A special committee was constituted to go through them along with the recommendations of the Drafting Committee thereon. The suggestions made by the Special Committee were again considered by the Drafting Committee and certain amendments were picked up for incorporation. To facilitate reference to such amendments the Drafting Committee decided to issue a reprint of the Draft Constitution which was submitted to the President of the assembly on 26 October 1948.

While introducing the Draft Constitution in the assembly for consideration on 4 November 1948, Dr. Ambedkar replied to some common criticisms of the Draft, particularly the criticism in regard to there being very little in it that could claim originality.

He observed: One likes to ask whether there can be anything new in a constitution framed at this hour in the history of the world. More than hundred years have rolled over when the first written constitution was drafted. It has been followed by many countries reducing their constitutions to writing. What the scope of a constitution should be has long been settled. Similarly what are the fundamentals of a constitution are recognised all over the world.

Given these facts, all constitutions in their main provisions must look similar. The only new things, if there can be any, in a constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country.

The charge of producing a blind copy of the constitutions of other countries is based, I am sure, on an inadequate study of the constitution. As to the accusation that the Draft Constitution has produced a good part of the provisions of the Government of India Act, 1935, I make no apologies. There is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody holds any patent rights in the fundamental ideas of a constitution.

The clause by clause consideration of the Draft Constitution was completed during 15 November 1948-17 October 1949. The Preamble was the last to be adopted. The Drafting Committee,

thereafter, carried the consequential or necessary amendments, prepared the final draft and placed it before the assembly.

The Second Reading of the constitution was completed on 16 November 1949 and on the next day the Assembly took up the Third Reading of the constitution, with a motion by Dr. Ambedkar "that the constitution as settled by the assembly be passed". The motion was adopted on 26 November 1949 and thus on that day, the people of India in the Constituent Assembly adopted, enacted and gave to themselves the Constitution of the Sovereign Democratic Republic of India.

Adoption of the Constitution was, however, not the journey's end. The Chairman of the Drafting Committee, Dr. Ambedkar, and the President of the Assembly, Dr. Rajendra Prasad, speaking on 25 and 26 November 1949 sounded words of warning and wisdom. Dr. Ambedkar said: I feel, however good a constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot.

However bad a constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a constitution does not depend wholly upon the nature of the constitution. The constitution can provide only the organs of State such as the legislature, the executive and the judiciary.

The factors on which the working of those organs of State depends are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their parties will behave?

In addition to our old enemies in the form of castes and creeds we are going to have many political parties with diverse and opposing political creeds. Will Indians place the country above their creed or will they place creed above country? I do not know.

But this much is certain that if the parties place creed above country, our independence will be put in jeopardy a second time and probably be lost forever. This eventuality we must all resolutely guard against. We must be determined to defend our independence with the last drop of our blood. Dr. Rajendra Prasad in his concluding speech observed that they had been able, on the whole, to draft a good constitution which he trusted would serve the country well. But, he

added :If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective constitution.

If they are lacking in these, the constitution cannot help the country. After all, a constitution like a machine is a lifeless thing. It acquires life because of men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them. There is a fissiparous tendency arising out of various elements in our life.

We have communal differences, caste differences, language differences, provincial differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance.

The Constitution was finally signed by members of the Constituent Assembly on 24 January 1950-the last day of the assembly.

Besides framing the Constitution, the Constituent Assembly performed several other important functions like passing certain statutes of a constituent nature, adopting the national flag, declaring the national anthem, ratifying the decision in regard to the membership of the Commonwealth and election of the first President of the Republic.

It was no mean achievement that within a period of less than three years, the founding fathers succeeded in evolving a Constitution acceptable throughout the length and breadth of this vast and populous country and one capable of salvaging and strengthening the threads of national unity in the midst of the multiplicity of religions, races, languages and all the variants of diversity.

Our founding fathers were some of the most distinguished and the wisest of men and women-great jurists, patriots and freedom fighters. It is difficult to imagine any better or more representative results at that time even if the Constituent Assembly was directly elected by the people on the basis of universal adult franchise.

The Constitution of India evolved an integrated method of resolving conflicts by incorporating provisions catering to the needs of the different identities and ideologies and balancing the

proportion and priority of rights. By adopting a democratic form of government, the polity created choices and accommodated various pluralities. The fundamental right to speech and conscience became the platform to air grievances and maintain their identity without demolishing the structure of the polity.

3. Supremacy of Constitution

The constitutional format in respect of human rights is remarkable as a significant and unique attempt at conflict resolution for the delicate balance it sought to achieve between political and civil rights on the one hand and social and economic rights on the other or between the individual rights and the social needs. The philosophy behind this is the dialogue between individualism and social control and the belief that civil, political, economic and social rights are equally important and not contradictory.

The Constitution was the result of a great deal of mutual accommodation, compromise and wide ranging consensus. The makers of the Constitution realized that it was necessary to grapple with multiple pulls and pressures of various ethnic diversities, to transcend conflicts or to subsume them under the overall Indian national, identity. Where they failed to arrive at an acceptable consensus, they agreed to postpone the problem as in the case of the language issue where English was allowed to continue. The institutions continued by us after Independence and or embodied in the Constitution were those which had grown and developed on the Indian soil itself.

The Founding Fathers chose to build further on the foundations of the old, on the institutions which they had already known, become familiar with and worked, despite all the limitations and fetters. The Constitution rejected British rule, but not the institutions that had developed during the period of British rule. Thus the Constitution did not represent a complete break with the colonial past.

Also, constitution-making and institution-building being a living, growing, dynamic process, it did not come to a stop on 26 November 1949 when the people of India in their Constituent Assembly, were said to have" adopted, enacted and given to themselves" the Constitution. Even after its commencement on 26 January 1950, the Constitution of India was being further made through its actual working, judicial interpretations and constitutional amendments. The

Constitution kept growing for better or worse and acquired newer and newer meanings by the manner in which and the men by whom it was worked from time to time. The story continues. For the Constitution, there is no journey's end. We have to keep abreast of the times and remain prepared for necessary reforms from time to time while retaining the fundamentals of our polity.

Chapter 2: Preamble- Reflection of Constitution

Topics for study:

1. ***Significance of Preamble***
2. ***Source, aim and objective of Preamble***
3. ***Amendment relating to preamble***

1. Significance of Preamble

The constituent Assembly first met in 9'th Dec. 1946 & soon on 13th Dec. with the objective, Resolution declaring & defining the aims & purposes of the constitution.

Ernest Barker:

Principle of Social & Political Theory 1961

The preamble of Indian constitution embodies the lofty principle in a charming lucid manner.

The people of India should begin their independent life by subscribing to the principles of a political tradition, which are something more than western countries.

Importance of the Preamble:

It is not compulsory or customary to have a Preamble to the Constitution. However, the framers of the Indian Constitution felt that to reflect the basic principles and philosophy of the Constitution, it is necessary to have a preamble.

The Preamble to the Indian Constitution is modeled on the Constitution of the United State. The preamble aims at a social order where the people are sovereign, the government is representative and accountable to people.

The importance and utility of the preamble has been stated in several decisions of our Supreme Court.

It is regarded as the basic philosophy of the Constitution and a key to unravel the minds of the framers of the Constitution. Though it is not enforceable in a court of law, the preamble to a written Constitution serves three important purposes c about the Constitution.

First, it clearly states the source of authority that is people of India. "We the people of India" - The opening words of the preamble 'We the people of India' show that the authority of the Government of India is derived from the people.

The powers, which are given to the government of India and the states, have not been given by any particular body but by the people of India.

We have earlier seen that the Constitution of India has been framed by the people of India through their representatives and the same can be modified by them according to the procedure laid down in the Constitution. Secondly, it contains the aspirations of the people and the ideals on the basis of which those aspirations to be achieved. India is declared as a Sovereign, Socialist, Secular, Democratic, Republic but these objectives are to be achieved with the values of justice, liberty, equality, fraternity and unity and integrity of the nation. Lastly, it also contains the enactment clause that is when the Constitution was enacted.[1]

2. Source, aim and objective of Preamble

Preamble

WE, THE PEOPLE OF INDIA having solemnly resolved to constitute India into –

SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC REPUBLIC and to secure to all its citizens,

JUSTICE, social, economical & political,

LIBERTY of thought, expression, belief, faith & worship;

EQUALITY of promote among then all

FRATERNITY assuring the dignity of the individual and the unity & Integrity of the Nation.

[1] www.manupatra.com

IN OUR CONSTITUENT ASSEMBLY this twenty sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

***Importance of Preamble :**

1. In Golaknath v. State of Punjab 1967

The Supreme court – It contains in a nutshell the ideals & aspirations of the Indian people.

2. In re Berubari Union 1960 Supreme court - It is the key to open the mind of the constitution makers.

Thus it states the object, which the constitution makers seek to establish & promote, and also aids the legal interpretation of the constitution. It serves two main purposes.

(i) It indicates the source of authority of the constitution.

(ii) It defines object which constitution seeks to establish and promote. *Preamble whether part of the constitution? It is generally not regarded as part of the constitution though it considered as a key to the meaning of a state.

(iii) *Berubari case 1960 As a part of the constitution .

(iv) *K' Bharati 1973 Supreme court – It is part of the constitution because it was separately passed after the enacting provision had been passed. Whether preamble provides aid to interpretation? Yes, but following propositions must take into consideration. I. It is not a source of power – Power must be founded on a specific provision. II.

(v) In * Raghunath Rao v. Union of India 1993 the SC held that Preamble can't be regarded as a source of prohibition or limitation upon powers of legislation. III.
Where the terms of an Art. Are ambiguous or capable of two meanings, in arriving the true meaning some assistance may be sought in the object enshrined in the preamble. This is held in Keshavananda Bharati's Case

(vi) Meaning of the words in preamble:
We, the people of India. – It signifies that the constitution of India is ordained by the people of India through their representatives assembles in a sovereign constituent Assembly.

Thus it declares that the ultimate sovereign lies with the people of India.

It also indicate India is a republican polity – it shall have no hereditary ruler & the people shall elect their government.

The republican tradition has not been foreign to our country from beginning of the history we have known republic Bhagwan Buddha belonged to the Republic of Kapilvastu.

Sovereign.

It refers to independence of the country in all its external & internal matters.

It recognizes no controls or Limitations. The Republic created by the constitution is sovereign & there is no authority above it . It is free within & outside the country.

Synthetics v. State of Uttar Pradesh 1990 Supreme court – The word sovereign means that the state has power to legislate on any subject in conformity with constitutional limitations.

****Charan Lal Sahu v. Union of India*** **1990** Supreme court – The doctrine of parent's patriac can be invoked by reason of sovereign.

****Maganbhai Ishwaribhai Patel v. Union of India 1970*** Supreme court – being a sovereign state, India is free from any type of external control.

It can acquire foreign territory & if necessary cede a part of the territory in favour of foreign state subject to constitutional requirement.

Democratic

*Meaning of Democracy Abraham Lincoln: (Gettysburg speech) – It means government of the people, by the people, for the people. Viz – Representative Democracy.

But the democracy is more than that it is not only political but also having social & Economic angles.

Dr. B. R. Ambedkar – The democracy means representative government, which brings revolutionary changes in the social & economical life of the people without bloodshed.

***Characteristics of Democracy**

1. The core of democracy is choice.

2. Democratic society is always open to ideas & view therefore it is incompatible to any one form of idea i.e. socialism, collectivism or capitalism.

3. In Democracy groups with different ideas or view come together to find some conclusion agreeable to all or most of groups.

4. It entertains plurality of ideas & arrives at an agreed line of action by comparing them, ironing at the difference & forming a composition.

5. Process of selecting objective for state.

6. Every citizen has right to take part in government of country.

7. Universal suffrage & ministerial responsibility to the elected House.

8. Equality among all citizens & government official & single Electoral Roll. Is an evidence of Democracy in India.

Republic All offices including highest offices are open to be elected to all citizens. Source of all authority under the constitution are the people & not hereditary ruler. Thus it refers to the election of the Head of State. Socialist Inserted by 42nd Amendment (1976), it intends to give a positive direction to the government in formulating its policies.

This word initially not there because the constitution doesn't commit the country to any particular form of economic structure.

Though it's many of the tenets were included as the Directive Principles of State Policy. By avoiding this world the constitution makers wants to refrain from committing the country to any particular form of economical order & must allow future government to evolve such economic policies as may be considered suitable for them.

But, even though after such Amendment the government reversed its economic policy. Instead of state ownership it adopted privatization. The public ownership & controls of means of production and distribution were to be discontinued. The public sector was discontinued.

The public sector was put on the private enterprise. All those who take oath to bear full faith & allegiance to the constitution have disregarded a part of the constitution have disregarded a part of the constitution.

They start their day by breaching the oath. It was not prudent to disregard the wise precedent set up by the framers of the constitution therefore the constitution is not proper place for incorporation of party slogans.

**Excel wear v. Union of India. 1979* Supreme Court – The word socialist reference with Art 14 & 16 enabled the court to deduce a fundamental right to equal pay for Equal work.

****Dharwad Employees v. State of Karnataka 1990*** Supreme Court – when it references with Art 14 it enables the court to strike down a 10 statute, which failed to achieve the socialistic goal to the fullest extent.

3. Amendment relating to Preamble:

The word "Secular" inserted by 42nd Amendment (1976).

i) There is no official religion of India.

ii) State will not favour any particular religion.

iii) Equality of all person irrespective of Religion (U/A 14) iv) No discrimination (U/A 15/16)

iv) Freedom of religion is fundamental Right (25 to 28)

v) Cultural Rights of minorities fundamental Right (29, 30)

*Bommai case B. P. Jeewan Reddy observe – expression socialist & secular aren't capable of precise definition.

***Meaning of Secularism** :

Webster's Dictionary – It is rational approach to life and it refuses to give plea for religion.

*St. Xavier's college v. State of Gujarat 1974 Supreme Court – It eliminates God from the matter of state and ensures that no one shall be discriminated against on the ground of religion.

*Atheist Society of India v. Government of Andra Pradesh 1992 Supreme Court – person associated with the state function have to be taken, as performing ceremonies in their personal or individual capacity & performance of ceremonies could not be prohibited, as it would be violative to Art 25 of constitution.

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Criticism

1) Political parties define their own version of secularism.

2) Parties think that it is the duty of the state to conceal truth if community dislikes it.

3) Some gives a sort of veto to minorities - Whatever do minorities not approve is not secular.

4) Hostility to religion as the secular creed.

Types of Justices :

Social, Economical & political. Social – Greatest good of the greatest number (Bahujana Hitaya, bahujan sukhaya) without putting restriction on the rights lean in favour of the weaker section of society. E.g. Art 17 & 18 Art 46. Economical – No economic inequalities. These inequalities can't be wiped out so the state endeavors to lessen them. E.g. Land reformation, Labour Legislation

Income – Tax contributes at different rates for different slabs of income. Political – Right to participate in the election process. E.g. right to vote, appoint or elect to higher offices. Provision of Art 14 to 18 forms the base for political justice. Art 18, 39, 39A, 41 & 46 in part IV providing content to the abstract notion of justice.

Liberty Taken from U.S. Declaration 1787 – Liberty, Equality & Fraternity. There are numerous heads of Liberty. E.g. Political, Civil & Economic. Civil – personal freedom, security of person & property, thought expression trade & industry, employment, assembly & association, conscience & worship.

Thus it includes freedom of physical activity as well as freedom of mind. E.g. Art 19, 25 to 28.

Equality Right to treat equally with others in matters of –

I) Justice,
II) Taxation,
III) Public Office &
IV) Employment.

All Laws shall be applicable equally e.g. Art 14 to 18. Making all discrimination by the state is illegal. Fraternity Barker – It is principle of Co-operation, the feeling of brotherhood, which gives rise to a fellow felling that we must help each other and that together we can better our lives.

The preamble links fraternity with two things :

I) assuring dignity of individuals &

II) II) the unity & integrity of the nation. Views of Constitution makers As the sons of same soil the citizens are all brothers who must stay with each other through thick & thin. As brothers they stand & fall together. The brothers constitute a nation.
There must be emotional bond with territory, its culture, tradition & common ancestor.
It is the feeling of Nationalism that is the unifying force that keeps the citizens as one therefore claiming more than one Nation in India does wrong.

*LIC v. Consumer Center AIR 1995 SC 1811 Supreme Court – Right to dignity is fundamental right.

E.g. 1) Art 17 – Ablution of untouchability.

2) Art 18 Hereditary titles & offices are prohibited.

3) There must have adequate means of livelihood or human condition of work therefore Art 39 (a), 42 & 43.

Chapter 3: Fundamental Rights and Directive Principles

Topics for study:

1. ***Right to equality***
2. ***Equality and social justice***
3. ***Equality and rule of law***
4. ***Protective discrimination***
5. ***Special protection to SC/ST***

1. Right to equality:

Equality before the law or Equal protection of the laws: Article 14 of the Constitution enunciates the fundamental right of every person not to be denied "equality before the law" or the "equal protection of the laws" within the territory of India. Here the protection provided by the article is not limited to citizens only but is applicable to all persons.

It embodies the principle contained in the Universal Declaration of Human Rights that" All are equal before the law and are entitled without discrimination to equal protection of the law". The two expressions" equality before the law" and "equal protection of the laws" used in our Constitution, in fact, embody the concepts of the rule of law and of equal justice.

'Law' in singular in the term 'equality before the law' means what Dicey meant by rule of law or the concept of law or of justice including the principle that no one is above law, that there is absolute supremacy of law as opposed to arbitrary power of Government and that there is one system of law and Courts for all.

The word 'laws' in plural in the term' equal protection of the laws', on the other hand, clearly refers to statute law and the provision thereby enjoins the State to ensure that the laws that are made should provide equal protection to all without any distinction i.e. the laws passed by the legislature and their implementation by the executive should lead to non-discriminatory and equal protection to all. However, there has been no occasion for the Supreme Court to enunciate or appreciate any such distinction. In fact, it has been observed by Patanjali Sastri, Chief Justice,

that the second expression is really a corollary of the first and it is difficult to imagine a situation in which the violation of the equal protection of the laws will not be the violation of the equality before the law.

2. Equality and social justice:

It is quite conceivable that there are laws which violate the' rule of law' or 'equality before law' principles. The founding fathers had not obviously forgotten what Gandhi meant by 'lawless laws',[2] The guiding principle underlying article 14 is that all persons and things similarly circumstanced shall be treated alike both .

In ***State of West Bengal v. Anwar Ali Sarkar***,[3] privileges conferred and liabilities imposed. Laws should be applied to all in the same condition.

Not only should the laws be nondiscriminatory for persons in the same condition but the processes of implementation by the administrative agencies should also not discriminate between them.[4] The Supreme Court has held that the varying needs of different classes of persons often require separate treatment.

Those who are not equal are not only allowed to be treated unequally but they have got to be so treated.[5] The maxim of equality before the law therefore leads to the inevitability of classification. For, article 14 applies where equals are treated differently without any reasonable basis. Where equals and unequals are treated differently, it does not apply.

It thus forbids only class legislation but not reasonable classification. But it is necessary that the classification must not be "arbitrary, artificial or evasive" and should be based on some real and substantive distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation.[6] It can be based on the basis of geography or other objects or occupation.[7]

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[2] State of West Bengal v. Anwar Ali Sarkar, AIR 1952 se 75.
[3] State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.
[4] Indian Express Newspapers v. Union of India, AIR 1986 se 319;
Iron and Metal Traders v. Jaskiel, AIR 1984 se 629; G.J. Fernandez v. State of Karnataka, AIR 1990 se 958.
[5] St. Stephens' v. University of Delhi, (1992) 1 sec 558;
Chiranjit Lal v. Union of India, AIR 1951 se 41, as per Das J.
[6] R.K. Garg v. Union of India, AIR 1981 SC 2138;

Permissible classification, to be valid, must in fact fulfill two conditions, namely, (i) the classification must be founded on an intelligent differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) the differentia must have a rational relation to the object sought to be achieved by the statute in question.[8]

The test was followed in several cases like

B.C. & Co. v. Union of India, AIR 1973 SC 106. Indian Express Newspapers v. Union of India, AIR 1986 SC 319; Iron and Metal Traders v. Jaskiel, AIR 1984 SC 629; G.J. Fernandez v. State of Karnataka, AIR 1990 sc 958. St. Stephens' v. University of Delhi, (1992) 1 SCC 558; Chiranjit Lal v. Union of India, AIR 1951 , R.K. Garg v. Union of India, AIR 1981 SC 2138; Prabhakar Rao v. State of Andhra Pradesh, AIR 1986 SC 210. Shashi Mohan v. State of West Bengal, AIR 1958 SC 194.as well as in State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.

In ***E.P Royappa v. State of Tamil Nadu*** [9] the traditional concept of equality was challenged and a new approach to the right of equality under article 14 was propounded when Justice Chandrachud, and Justice Krishna Iyer observed:

Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, 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. Where an act is arbitrary, it is implicit that it is unequal both according to political logic and constitutional law and is therefore violation of article 14. Justice PN. Bhagwati, concurring with this approach, speaking for himself and Justice Krishna Iyer observed:

3. Equality and rule of law:

Article 14 enunciates a vital principle which lies at the core of our republicanism and shines like a beacon light towards the goal of classless egalitarian socio-economic order which we promised

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[7] Shashi Mohan v. State of West Bengal, AIR 1958 SC 194.

[8] ibid

[9] E.P Royappa v. State of Tamil Nadu (AIR 1974 se 555)

to build for ourselves when we made a tryst with' destiny on that fateful day when we adopted our Constitution. If we have to choose between fanatical devotion to this great principle of equality and feeble allegiance to it, we would unhesitatingly prefer to err on the side of the former as against the latter.

He went on to say:

What the equality clause is intended to strike at are real and substantial disparities and arbitrary and capricious actions of the executive and it would be contrary to the object and intendment of the equality clause to exalt delicate distinctions, shades of harshness and theoretical possibilities of prejudice into legislative inequality or executive discrimination[10].

In later judgments[11] Justice Bhagwati became more forthright in his approach to article 14

which received unanimous approval of a Constitution Bench of the Court in the following words:

It must…now be taken to be well settled that what article 14 strikes at is arbitrariness because an 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 referred to above, (of

(i) intelligible differentia and

(ii) rational relationship between the differentia and the object sought) the impugned legislation 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 of the legislative or of the executive or of an 'authority' under article 12, article 14 immediately springs into action and strikes down such State action," (AIR 1981 SC 487).

[10] M. Chhaganlal v. Greater Bombay Municipality, AIR 1974 SC 2009, 2029 and 2039)

[11] Maneka Gandhi v. Union of India, AIR 1978 SC 597;
Ajay Hasia v. Khalid Mujib, AIR 1981 SC 487.

Thus, the approach propounded by the Supreme Court has widened the scope of application of article 14.[12] It is clear that an arbitrary. or unreasonable action-any act which is so arbitrary or unreasonable that no fair minded authority could ever have made it-would be per se discriminatory and violative of article 14.[13]

Non- discrimination on grounds of religion, race, caste, sex or place of birth. While article 14 covers all persons and proclaims the general principle of equality before the law and equal protection of the laws, the subsequent articles 15 to 18 specify some areas for application of the general principle mostly in regard to the citizens of India.[14]

Article 15 is available only to citizens and enjoins the state not to discriminate against any

Citizen on grounds only of religion, caste, race, sex, place of birth or any of them. The use of the word" only" is significant. A discrimination based on one or more of these grounds and also on other ground or grounds would not be affected by the article,nor would discrimination based on residence be invalidated.[15]

Clause (2) of the article provides for special application of the injunction which declares

that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subjected to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment, or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. The prohibition obviously covers actions both on the part of the State as well as the citizens at large. Clauses (3), (4) and (5) of article 15 embody exceptions to the general principles of non discrimination. They respectively empower the State to make special provisions for women and children and for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.

[12] A.L. Kalra v. Project and Equipment Corporation, (1984) 3 see 316, 328.

[13] Shri Sita Ram Sugar Co. Ltd. v. Union of India, AIR 1990 se 1277.

[14] State of Sikkim v. S.P. Sharma, JT (1994) 3Se 372.

[15] D.P. Joshi v. State of Madhya Bharat, AIR 1955 SC 334.

The 93rd constitutional amendment assented to by the President on [16] January 2006 - added the new clause (5) which empowers Parliament to make special provisions by law for socially and

educationally backward classes and for Scheduled Castes and Scheduled Tribes in regard to admission to educational institutions including private aided or unaided institutions other than minority institutions.

The pronouncements of the Supreme Court on the validity of certain measures for protection of these sections of the society amply bear out the need and justification for these exceptions.[17]

4. Protective discrimination

However, in ***Dattatraya v. State of Bombay,*** [18] In spite of these special provisions, it has been held that the general prohibition under article 14 would nevertheless apply to such cases also; the special provisions which the State makes should not be arbitrary or unreasonable.[19]

The biggest problem raised by article 15(4) and (5) is regarding determination of who constitute the "socially and educationally backwardclasses". The Constitution does not define the term.

Various factors would naturally come into play in evolving proper criteria for such determination. As held by the Supreme Court, the caste of a person cannot be the sole test for ascertaining whether a particular class is a backward class or not.

In Chitralekha v. Mysore [20](AIR 1964 SC 1823) it ruled that though caste may be a relevant circumstance in ascertaining the backwardness of a class, there is nothing to preclude the authority concerned from determining the special backwardness of a group of citizens if it can do so without reference to caste.

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[16] Yusuf Abdul Aziz v. State of Bombay, AIR 1954 SC 321;

[17] State of A.P. v, Balram, AIR 1972 SC 1375;
Jayashree v. State of Kerala, AIR 1976 SC 2381.

[18] Dattatraya v. State of Bombay, AIR 1953 Bom 311.
[19] State of Sikkim v. S.P. Sharma, JT (1994) 3SC 372;
[20] Chitralekha v. Mysore (AIR 1964 SC 1823)

In another case the Supreme Court held that "caste and poverty may be both relevant for determining the backwardness. But neither caste alone nor poverty alone could be the determining test".

Reservations for OBCs The question of reservations on grounds of social and educational back wardness has assumed great significance and received considerable political attention in recent years. Intense pressure has been exerted for providing reservations for various classes and groups besides the Scheduled Castes and Scheduled Tribes. It is important to remember that while in the cases of the Scheduled Castes and the Scheduled Tribes, reservation is provided in legislative seats also, the reservations for OBCs as at present are intended to be confined to Government jobs and admission to educational institutions.

It must be acknowledged that basically any reservation would be discriminatory for it would violate the principle of equality and give a lower priority to merit, thus causing frustration to many a deserving candidate. The validity of any reservation could therefore be tested on whether it was based on any rational and relevant criteria.

From time to time, the Supreme Court has indicated the types of classification which would be discriminatory. The Uttar Pradesh Government had made reservation of seats for admission to Medical Colleges in the State in favour of candidates hailing from the rural areas, Hill and Uttarakhand areas.

The Supreme Court in State of ***U.P. v. Pradeep Tandon***[21] held that while

reservation for candidates coming from rural areas was unconstitutional, for those coming from the Hill and Uttarakhand areas was valid. It observed that these areas were instances of socially and educationally backward-class citizens. It held that reservation for 80 per cent of the State's population which was in 'rural areas' could not be a homogenous class by itself. Likewise, the Supreme Court declared the fixation of districtwise quota on the ratio of district population to the total population of the State as discriminatory.

In the Chandhala [22]case, however, university-wise allocation of seats for admission to Medical Colleges in the State of Kerala was held to be valid. Since then it has been decided to cover

[21] U.P. v. Pradeep Tandon AIR 1975 SC 563

certain castes under the expression "socially and educationally backward classes" and provide reservations to them subject to total reservations not exceeding 50 per cent. In fact, in some states this quota is allowed to exceed 50 per cent by legislation e.g. in Tamil Nadu and Karnataka. From time to time, the Supreme Court has indicated the types of classification which would be discriminatory.

5. Special Protection to SC/ST

In ***P.A .lnamdar and others v. State of Maharashtra***[23] the Supreme Court in its judgment of August 2005 abolished state quotas in private unaided professional colleges. This was followed by the government bringing forth before Parliament a Bill to amend the Constitution and the Constitution was amended for the 93rd time.

Taking advantage of the constitutional amendment, the Union Government brought forth a legislation for reservation of seats not exceeding 50% in all for the socially and educationally backward classes and Scheduled Castes and Scheduled Tribes in institutions of higher learning and professional institutes like IIMs, IITs and Medical colleges including private ones whether aided or unaided.

However, provision of reservation was not to apply to minority institutions.

The legislation generated a great deal of controversy, tension and protests particularly from the medical colleges, IITs, Management Institutes and other professional institutions. It is to be noted that the 93rd Amendment - article 15(5) - does not specifically provide for 'reservation' as such. It is only an enabling provision which empowers the legislature to lay down by law 'special provisions' in the matter of admission to 'educational institutions'.

There is no particular mention of institutions of higher learning, universities or professional institutions as such. Educational institutions could also mean primary and secondary schools. Also, the special measures' could mean several measures other than reservation. In fact, article

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[22] Chandhala Bewa vs Madhab Panda And Ors.AIR1961ORI100

[23] P.A.lnamdar and others v. State of Maharashtra2005 (5) BomCR 52,

15(4) already provided for' any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes'. Article 15(5) practically reproduces this provision with the addition of a specific reference to admission to educational institutions aided or unaided - and to pointedly exclude minority institutions from the effect of the special provision.

On 10 April 2008, the Supreme Court delivering its judgment in Ashok Thakur v. Union

of India, put its stamp of approval on 27% reservations for OBCs in educational institutions

subject to exclusion of creamy layer and a review of the quota every five years.

Equality of Opportunity in Public Employment

Under clauses (1) and (2) of article 16, all citizens of India are guaranteed equality of opportunity in matters relating to employment or appointment to any office under the State and no citizen can be discriminated against or be ineligible for any employment or office under the State on grounds only of religion, race, caste, sex, descent, place of birth or residence. The subsequent clauses

(3), (4), (4A), (4B) and (5) however provide for situations when departures can be made from the general rule of equality of opportunity for, in effect, implementing the essence' of the principle of equality of opportunity. Thus, under clause (3), Parliament has been empowered to regulate the extent to which it would be permissible for a State or Union Territory to depart from or expand or supplement the general principles enunciated in clauses (1) and (2). By virtue of this power, Parliament passed the Public Employment (Requirement as to residence) Act, 1957 which while repealing all the laws in force prescribing any requirement as to residence within a State or Union Territory for any public employment, provided that no one will be disqualified on the ground that one is not the resident of a particular State. The Act, however, made an exception in the case of Himachal Pradesh, Manipur, Tripura and the Telengana Area of Andhra Pradesh where residential qualifications were prescribed for a limited period not exceeding five years on grounds of the backwardness of the areas.

In ***Narasimha Rao v. Andhra Pradesh***[24] , however, the Supreme Court declared part of the Act unconstitutional expressing the view that Parliament could impose a residential qualification in the whole State and not a part of it.

The basic principle in article 16 is that of equality of opportunity and non-discrimination in

public employment. Clauses (1) and (2) state this principle. But, clauses that follow contain provisions allowing special advantages to certain sections of the people. The question is how to reconcile these opposites.

In several cases upto the ***Devadasan v. UoI***.[25], the Supreme Court treated Clause (4), for example, as an exception to the general principle in Clauses (1) and (2) but subsequently in

State of Kerala v. Thomas[26] and Indra Sawhney v. U.O.I.[27] (Mandal) Cases, the Supreme Court found that article 16 (4) was actually supportive of article 16 (1) and (2) or that itwas only an extension or expansion of the general principle of equality and non-discrimination. It has however to be borne in mind that there are limits to the extent to which historical wrongs can be righted or compensated by the present generation. The need is to look forward and not backwards.

Any policy that seeks to ameliorate the conditions of the backward classes in our society and make them, as early as a possible, worthy of competing with the others on terms of equality and non-discrimination, is unexceptionable and deserves to be appreciated as forward looking. On the other hand, any effort at compensating for past wrongs in perpetuity is bound to generate a vested interest in backwardness and smacks of an approach of looking backward and not forward. It seems governed not so much by any constitutional principles as by demands of vote bank politics.

Clause 4 as the second exception in article 16 empowers the State to make special provision for the reservation of appointments or posts in favour of any "backward class of citizens" which in the opinion of the State are not adequately represented in the services under the State. The clause

[24] Narasimha Rao v. Andhra Pradesh (AIR 1970 SC 422),
[25] Devadasan v. UOI AIR1964SC179
[26] Stateof Kerala v. Thomas1968SC185
[27] Indra Sawhney v. U.O.I1992(3)SCC217

however is only an enabling provision and no right or duty can be read into it. But as held in the N.M. Thomas case (AIR 1976 SC 490), it is not an exception to the general principle in article 16(1) but an emphatic statement of equality of opportunity guaranteed under clause (1) which means equality between members of the same class of employees and not equality between members of separate and independent classes.

Thus, in the case of the Scheduled Castes and Scheduled Tribes who suffer from socio-economic backwardness, the fundamental right to equality of opportunity justifies separate categorisation for the purpose of "adequate representation in State services". The courts, however held that article 16 (4) has to be read with article 335 inasmuch as the latter stated that while considering SC & ST claims maintenance of efficiency of administration must be kept in view. Since then a proviso has been added to article 335 by the 82nd Amendment to clarify that it would be in order to provide for reducing the standards of evaluation and requirement of minimum marks for filling by promotion vacancies reserved for SC & ST in the services of the Union and the States.

The only condition for the exercise of the powers conferred by article 16(4) is that the State

must be satisfied that any backward class of citizens is not adequately represented in the services. And, this condition may refer not only to the numerical inadequacy of representation in the services but also the qualitative one. In other words, the powers could be exercised not only to provide for reservation of appointments but also to provide for representation in selection posts as well as posts filled by promotion. However, reservation should not be excessive and could not be taken to the extent of effacing the guarantee contained in article 16(1).

In ***Devadasan v. Union of India***[28] the Supreme Court when called upon to

pronounce on the constitutionality of the "carry forward rule", held the rule ultra vires by a majority of four to one on the ground that the power vested in the State Government under article 16(4) could not be so exercised as to deny reasonable equality of opportunity in matters of public employment to members of classes other than backward. It declared that more than 50 per cent reservation of posts in a single year would be unconstitutional as it per se destroyed article 16(1).

The Mandal Commission had in its report recommended 27 per cent reservation for backward

[28] Devadasan v. Union of India (AIR 1964 SC 179)

classes in view of the limit of 50 per cent imposed by the Supreme Court. In its judgment in what has come to be known as the Mandal case, the Supreme Court decided on 16 November, 1992 by a 6 to 3 majority that 27 per cent reservation of posts for the socially and educationally backward classes were in order provided that the advanced amongst themlithe creamy layer"-were excluded from the list of beneficiaries, reservations were restricted to initial employment alone as article 16(4) did not permit any reservation in promotions, and the total reserved quota did not exceed 50 per cent except in some extraordinary situations. The court held that any reservation in promotions was invalid as "this would be a serious and unacceptable inroad into the rule of equality of opportunity" and would not be in the interest of efficiency of administration.

To meet the situation, article 16(4)(A) added by the seventy-seventh Constitution

Amendment Act provided that in matters of promotion in services under the State in any category or categories, the State can make reservations for the Scheduled Castes and Scheduled Tribes. By adding a new clause (4B) to article 16, the Eighty-first Constitution Amendment

Act (2000) however clarified that the unfilled reserved vacancies are to be treated as a separate class and are not to be included under the General Manager S. Rly. v. Rangachari, AIR 1962 se 36; Comptroller and Auditor-General of India v. KS. Jagannath, (1986) 2 see 679. prescribed ceiling of fifty percent reservation of vacancies of the year. The Eighty-fifth Constitution Amendment (2001) further clarified that the employees so promoted shall also be entitled to consequential seniority. The Eighty-fifth Amendment came into operation w.e.f. 17 June 1995.

The term "backward class of citizens" has not been defined by the Constitution. But, since the

emphasis in article 16(4) is on social and not economic backwardness, backward class cannot be

identified only and exclusively with reference to economic criteria. The Court, therefore, struck

down the notification which sought to reserve another 10 per cent posts for the economically

backward sections not covered by any existing schemes of reservation. On the other hand, the

Court held that a caste could quite often be a social class. "If it is socially backward, it would be a backward class for the purpose of article 16(4)".

Also, several socially backward occupational groups, sects and denominations among the non-Hindus would also be covered by article 16(4). It would be incorrect therefore to say that the backward classes under article 16(4) were the same as the socially and educationally backward classes under article 15(4). Even though caste is mentioned in articles 15(2) and 16(2) as a prohibited ground of discrimination and the word used in articles 15(4) and 16(4) is "class", the majority judgment held that "identification of the backward classes can certainly be done with reference to castes among, and along with, other occupation groups, classes and sections of people". It, however, said that it may not be advisable to provide for reservations in certain areas, e.g. in technical posts, research and development organisations, in specialties and super specialties in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and connected establishments.

Reservations may also not be advisable in higher posts like those of professors in education, pilots in airlines, scientists and technicians in nuclear and space application etc.33 In Kartar Singh v. the State of M.P. (1999) the Supreme Court disallowed lowering of qualifications for admission to super speciality medical course in favour of the reserved category candidates. In Tamil Nadu, the total number of positions in the reservation quota far exceeded 50 percent. It was as much as 69 per cent. On the insistence of the Tamil Nadu government the Union Parliament had to pass the 76th Constitution Amendment to place the relevant Tamil Nadu law in the Ninth Schedule to the Constitution so that it became an entrenched law beyond judicial purview. Other States like Bihar, Orissa, U.P. and Karnataka were also proposing higher reservation quotas.

Another exception to the general rule of equality of opportunity in public employment is contained in clause 5 of article 16 which provides that a law may prescribe that the incumbent of an office in connection with the affairs of a religious or denominational institution, or a member of the governing body thereof shall belong to the particular religion or denomination.

Abolition of untouchability: Article 17 abolishes "untouchability" and forbids its practice in any form. If practised, it shall be treated as an offence punishable in accordance with law. The objective of the article was to end the inhuman practice of treating certain fellow human beings as dirty and untouchable by reason of their birth in certain castes.34 The Supreme Court has held that the fundamental right against untouchability guaranteed in this article is available against

private individuals and it is the constitutional duty of the State to take necessary steps to see that this right is not violated. Most importantly, it is the bounden duty of every citizen to ensure that untouchability is not practiced in any form. The Untouchability (Offences) Act, 1955 later modified to read as the Protection of Civil Rights Act, 1976 provided for punishment of offenders.

Abolition of Titles Article 18 prohibits the State to confer titles on anybody, whether an Indian citizen or a foreign national. An exemption has however been made in the case of Military and academic distinctions. Under clause (2) of the article, a citizen of India has also been prohibited from accepting any title from a foreign State. Clause (3) provides that a foreigner holding any office of profit or trust under the State cannot accept any title from a foreign State without the permission of the President.

And under clause (4) no person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, employment, or office of any kind from or under any foreign State. A question had arisen whether the Bharat Ratna, Padma Vibhushan, Padma Bhushan and Padma Shri civilian Awards conferred by the President on Republic Day for outstanding meritorious service were violative of article 18 of the Constitution. Under stay orders from the Supreme Court, no awards were announced for several years. Awards have since been resumed.

The Supreme Court has held that these awards are not titles within the meaning of article 18 and that if any awardee uses the award as a title by suffixing or prefixing it with his or her name, he should forfeit the award.

Chapter 4: Freedoms and social control

Topics for study:

1. ***Speech and expression***
2. ***Freedom of assembly, association, movement, to reside and settle profession and business***
3. ***Constrains on these freedoms***

1. Introduction:

Article 19 of the Constitution specifically guarantees to the citizens of India six basic

freedoms, viz. of speech and expression, of 'peaceable assembly, without arms', 'to form associations', of 'movement throughout the territory of India', of 'residing and settling in any part of India', and of 'practicing any profession and carrying on any occupation, trade or business'.

As observed by J. Das, in ***State of West Bengal v. Subodh Gopal Bose,*** [29].

These freedoms are recognised as the 'natural rights inherent in the status of a citizen'. This enumeration of the freedoms has however been held to be not exhaustive by the courts for the full enjoyment of the democratic values of a free citizen.

In their decisions, like in

Maneka Gandhi v. Union of India,[30] the courts have held several other freedoms also as necessary concomitants for a democratic polity even though they are not specifically mentioned in article 19,as for example, the freedom to live, to vote and contest election, freedom of the Press, the Government servants' right to continue in employment, the right to strike, the right to know.

The right to the protection of the six freedoms against State action is available to all citizens. Not being citizens, corporations cannot invoke the article.45 But the shareholders who are citizens have rights.46 Article 19 does not confer an absolute or unlimited right.

[29] State of West Bengal v. Subodh Gopal Bose, AIR 1954 SC 92, 95.
[30] Maneka Gandhi v. Union of India, AIR 1978 SC 597

"social interest in individual liberty may well have to be subordinated to other greater social interests". Thus, clauses 2 to 6 of article' 19 empower the State to impose "reasonable" restrictions on the exercise of this right by enacting proper legislation "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". It is necessary that the restrictions imposed by law must be reasonable and not arbitrary or of excessive nature and the onus of proving it to the satisfaction of the court lies with the State.

The harsher the restriction, the heavier the onus to prove the reasonableness Since the Constitution does not define the expression "reasonable restrictions", each case has to be judged on its own merits. The test could be the underlying purpose of the restrictions imposed, the extent, urgency and proportion of the evils sought to be remedied thereby, the prevailing conditions at the time and the duration of the restrictions. The standard is really an elastic one and varies with time, space and condition from case to case.

The reasonableness of restrictions has to be determined not on abstract considerations but in an objective manner and from the point of view of persons upon whom the restrictions are imposed.

It is the effect of a law which really constitutes the test of its reasonableness; its object, whether good or bad is immaterial for this purpose. And, not only substantive but the "procedural provisions of a statute also enter the verdict of i reasonableness". The restrictions must strike a proper balance between the freedoms guaranteed under article 19(1) and the social control permitted by clauses' (2) to (6) of article 19.54 The restrictions imposed in carrying out the Directive Principles of State Policy have been held to be in favour of their reasonableness.

Freedom of Speech and Expression

Freedom of speech and expression is a sine qua non of the functioning of a democratic polity.

Democracy means a government by persuasion and unless there is freedom for discussion of political as well as other matters, the polity could not be termed democracy. And, as a natural corollary, the term includes freedom of the press as well. Its import has been succintly brought out by Justice Patanjali Sastri in the following words: Freedom of speech and of the press lay at

the foundation of all democratic organisations, for without free p6litical discussion no public education, so essential for the proper functioning of the process of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected with Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, that it is better to leave a few of its noxious branches to their luxuriant growth than by pruning them away, to injure the vigour of those yielding the proper fruits.

Article 19(1)(a) guarantees to every Indian citizen the right to freedom of speech and expression. Though it does not specifically refer to the freedom of the press, this right has been held to be included in the right to freedom of speech and expression.

Freedom of the Press is the heart of social and political intercourse. It is the primary duty of the courts to uphold the freedom of the press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate".

This means that every citizen is free to express his views, beliefs and convictions freely and without inhibitions by word of mouth, through writing, printing, picturising or in any other manner.

Thus, imposition of free censorship on a newspaper or prohibiting it from publishing its own views or those of its correspondents on a burning topic of the day would constitute a violation of the right to freedom of speech and expression.

The right is enjoyed by the citizens not only within the territory of India but also beyond its borders. Freedom of the Press is regarded as the "mother of all liberties" in a democratic society but it is not absolute and unfettered. An unrestricted freedom of speech and expression would amount to an uncontrolled license and could lead to disorder and anarchy. The freedom is not to be misunderstood by the press so as to disregard its duty to be responsible.

If a newspaper publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by Court of Law. Some restrictions are, therefore essential even for preservation of the freedom o the Press itself.

The National Commission to Review the working of the Constitution (2002) recommended that freedom of the press be specifically included under article 19(1)(a).

Telephone tapping unless it comes within the grounds of restrictions under article 19(2) would infringe article 19 (1) (a) of the Constitution.62 A government employee cannot seek the protection of article 19(1) against his dismissal on account of misconduct in publicly making allegations against head of his organisation.

Reasonable limits or restrictions can be imposed on the exercise of the right to freedom of speech under article 19(2) in the interests or on the grounds of:

Security of the State,

(i) Friendly relations with foreign countries,
(ii) Public Order,
(iii) Decency or morality,
(iv) Contempt of court,
(v) Defamation,
(vi) Incitement to offence, and
(vii) Sovereignty and integrity of India.

Right to Information: Article 19(1)(a) has been construed to include the right to know or to seek information. The Right to Information Act 2005 specifically confers on all citizens the right to access information and makes it obligatory for all public authorities to disclose official information only subject to certain essential restrictions. The Act aims at promoting openness, transparency and accountability in administration. Security of the State: Security of the State refers only to "serious and aggravated forms of public disorder". In other words, rebellion, waging war against the State, insurrection etc. are most likely to threaten the security of the State. Thus, expression of views or making of speeches which tend to incite or encourage the people to commit violent crimes like murder, would constitute reasonable grounds for imposition of restrictions under article 19(2).

Making a speech which tends to overthrow the State can be made punishable.65 Though 'public order' was added as a ground for imposing restrictions through the 1951 Constitution Amendment, ordinary breaches thereof like unlawful assembly, riot etc. would remain outside the purview of clause (2).

Friendly relations with foreign countries: This ground for imposing restrictions on freedom of speech and expression was brought in by the Constitution (First Amendment) Act, 1951 with a view to avoiding embarrassment to India through persistent and malicious propaganda.

The ground, however has been criticized for being susceptible of supporting regulation curbing even criticism of the Government's foreign policy.

Public Order: This ground too was added by the 1951 Amendment to overcome the situation arising out of the Supreme Court judgment in

Romesh Thapar v. State of Madras [31]wherein it was held that ordinary or local breaches of public order were no grounds for imposing restrictions on the freedom of speech and expression, observing that "public order" was an expression of wide connotation and signified "that state of tranquility which prevails among the members of political society as a result of internal regulations enforced by the Government which they have established"

1. Speech and expression

Decency or Morality: With no clear meanings and the perceptions changing in regard thereto from time to time, these terms have obviously been included as grounds for imposing restrictions on the freedom of speech and expression mainly to safeguard the society from depraved and corrupt actions or behaviour.

Sections 292-294 of the Indian Penal Code which indicate the scope of indecency or obscenity were upheld because "the law against obscenity seeks no more than to promote public ,decency and morality." The Supreme Court in the instant case had followed the test laid down in the English case of ***R. v. Hicklin***[32], holding Lady Chatterley's Lover as

[31] Romesh Thapar v. State of Madras [31](AIR 1950 SC 124)
[32] R. v. Hicklin(LR 3 QB 360)

an obscene book, as it had the tendency to corrupt the mind of those who read it. The term 'morality' in clause (2) has to be given a wider meaning to include not only 'public morality' but 'morality as understood by the people as a whole'.

Contempt of Court: The underlying idea for this ground for imposing restrictions is to preserve the authority of courts in punishing for their contempt. In ***Parashuram v. King***[33] it was observed that contempt power is a power which the court must, of necessity, possess but its usefulness depends upon the wisdom and restraint with which it is used. The power of courts to punish for their own contempt has been considerably modified in U.K., U.S.A. and other countries. The Phillimore Committee in U.K. recommended that truth in public benefit should be admissible as a defence in a charge of contempt. In U.S.A. contempt plea is admissible only in cases of 'clear and present danger to administration of justice.' [34]

Articles 129 and 215 of our Constitution empowered the Supreme Court and the High Courts respectively to punish for their respective contempt.

The Contempt of Courts Act 1971 seeks to codify the Indian Law of Contempt of Court. The Supreme Court has upheld the law of contempt under article 129 as reasonable under article 19(2).

Since contempt jurisdiction is exercised in certain cases contrary to the dictum that no one should be a judge in his own case, judges have to be careful. Public' criticism of a judgment cannot be stifled so long as it is fair, reasonable and legitimate. The conduct of a judge in his judicial capacity can also be subject of a fair and proper comment. Path of justice is not strewn with roses and Justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and be respectful, even though outspoken, comments of ordinary men.

In ***E.M.S. Namboodiripad v. T.N. Nambiar*** [35] the Court observed that freedom of speech shall always prevail except where contempt of court is manifest, mischievous or substantial. Justice Krishna Iyer laid down the principle in ***Barada Kant v. Registrar Orissa High Court***[36] thus:

[33] Parashuram v. King (1945 AC 264)
[34] Mainsci.gov.in
[35] E.M.S. Namboodiripad v. T.N. Nambiar (AIR 1970 SC 2015)
[36] Barada Kant v. Registrar Orissa High Court (AIR 1974 SC 710)

The cornerstone of the contempt law is the accommodation of two constitutional values - the

right to free speech and the right to independent justice. The ignition of contempt action should be substantial and malafide interference with fearless judicial action, not fair comment or trivial reflections on the judicial process and personnel.

In ***re Mulgaonkar*** [37]

Justice Iyer asserted that the keynote was to be 'justice' and not 'judge' and that activist efforts at

judicial reforms should not be stalled under contempt action. The Supreme Court also suggested

some guidelines for action under the contempt of court law. The Court took a liberal view of the law of contempt in

M.R. Parashar v. Farooq Abdullah[38] also and said:

Bona fide criticism of any system or institution is aimed at inducing the administration of that system or institution to look inwards and improve its public image. Courts do not like to assume the posture that they are above criticism and that their functioning needs no improvement.

The National Commission to Review the Working of the Constitution (2002) found that

under the law of contempt as it stood and as it was interpreted (e.g. in Dr. Saxena case) even truth could not be pleaded as a defence to a charge of contempt of court. The Commission recommended that a proviso be added to article 19(2) to say that in matters of contempt it shall be open to the court to permit a defence of justification by truth on satisfaction as to the bona fides of the plea and it being in public interest.

Since then the contempt of Courts Act, 1971 has been amended (2006) to allow truth as a defense against contempt charges. It is, however doubtful whether, in the absence of a constitutional amendment as recommended by the Constitution Commission, the law would be deemed binding on the Supreme Court and the High Courts.

[37] re Mulgaonkar AIR (1978 SC 72)

[38] M.R. Parashar v. Farooq Abdullah[38] (AIR 1984 SC 615)

Defamation: The right to free speech and expression does not entitle a citizen to defame a person. The constitutional validity of Section 499 of the Indian Penal Code which defines the law of defamation as exposing a man to hatred, ridicule or contempt has been upheld by the courts. The press is also subject to the defamation law.

Incitement to an offence: This ground for restricting freedom of speech and expression was also added in 1951. The Supreme Court has taken the view that incitement to murder or other violent crimes would generally endanger the security of the State. Hence a restriction imposed on this ground would be valid under article 19(2).

Sovereignty and integrity of India: This ground for imposing restrictions on the right to freedom of speech and expression was added by the Sixteenth Amendment in 1963 so as not to permit anyone to challenge the integrity or sovereignty of India or to preach cession of any part of the territory of India.

Freedom to Assemble Meetings, processions and demonstrations are inevitable corollaries of a democratic system.

The people can be informed, educated or persuaded only through such exercises. Article 19(1)(b)

secures to all citizens bf India the right "to assemble peaceably and without arms". This consequentially leads to the conferment of the right to hold public meetings and demonstrations and take out processions peacefully. The two inherent restrictions for any assembly are of remaining peaceful and to be unarmed. In addition, under clause (3), reasonable restrictions can be imposed on the right by the State by law “in the interests of the sovereignty and integrity of India or public order” as may be deemed necessary from time to time. Thus, an assembly declared unlawful can be validly banned and the people thereof ordered to be dispersed.

2. Freedom of assembly, association, movement, to reside and settle profession and business

Freedom of Association :

Article 19(1)(c) guarantees to all citizens the right to form associations and unions for

pursuing lawful purposes. Under clause 4 of the article, however, reasonable restrictions can be imposed by the State “in the interests of the sovereignty and integrity of India or public order or morality". The associations so formed would include political parties, societies, clubs, companies, organisations, partnership firms, trade unions and indeed any body of persons. There is complete liberty to form associations for lawful purposes subject to reasonable restrictions. The Supreme Court has held that even a liberal interpretation of article 19(1)(c) cannot mean that the trade unions have a guaranteed right to strike.

The right to strike can be controlled by appropriate industrial legislation. Similarly, nobody can be compelled to become a member of a Government sponsored union.

Freedom of Movement and Residence

The right of every citizen of India “to move freely throughout the territory of India” and his right “to reside and settle in any part of the territory of India" guaranteed under clauses (d) and (e) respectively of article 19(1) are really interlinked. Both the rights lay stress on the oneness of the territory of India. Any citizen can travel to or reside in any part of IndiaClause 5 of article 19 however, provides for imposition of reasonable restrictions on the exercise of either of them by law "in the interests of the general public or for the protection of the interests of any Scheduled Tribe".

Both the rights get affected whenever restrictions are placed on the movement or residence of a citizen. Generally, the protection afforded by these rights is invoked to challenge the validity of externment or deportation orders which go to curtail the two freedoms.

In ***N.B. Khare v. State of Delhi*** [39], the Supreme Court held that the mere fact that the externment order depended on the subjective satisfaction of the Executive, and there was no provision for judicial review in the impugned Act, did not render it invalid. In another case the court ruled that a law which subjected a citizen to the extreme penalty of a virtual forfeiture of his citizenship upon conviction for a mere breach of the permit regulations (under the Influx from Pakistan (Control) Act, 1949) or upon a reasonable suspicion of having committed such breach could

[39] N.B. Khare v. State of Delhi (AIR 1950 SC 211),

hardly be justified upon the ground that it impos ed a reasonable restriction in the interests of the general public.

Restrictions to protect the interests of the Scheduled Tribes have been provided keeping in view mostly the aboriginal tribes which have their own distinct culture, language and customs. Unrestricted entry of outsiders in the areas inhabited by the tribal people might jeopardize their interests.

Restrictions imposed on prostitutes to carryon their trade within a specified area and to reside in or move from particular areas have been held to be valid. Likewise, restrictions on residence imposed on habitual offenders have been upheld by the courts as being reasonable Restrictions on the movements of persons afflicted by AIDS have been held by the Bombay High Court to be valid.

Freedom of Profession and Trade and reasonable restriction in the interests of the general public.

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Freedom of Profession and Trade :

Under article 19(1)(g) every citizen of India has the right to practice any profession or to carryon any occupation, trade or business. The right to carry on a business includes the right to close it any time the owner likes.

Thus no citizen can be compelled to carryon business against his will.

In ***Excel Wear v. Union of India***[40] the court held that refusal or approval for closure of a business was invalid when the owner could not pay even the minimum wages to his employees.

3. Constrains on freedom:

As in the case of the various rights to freedom, right to trade and profession is also not absolute and the State can impose reasonable restrictions on the exercise of this right too "in the interests of the general public". For example, there could be no fundamental right to carry on trade or business in noxious, hazardous or dangerous goods like intoxicating drugs or liquors, adulterated foods etc. or to indulge in trafficking in women or children.

Under clause 6 of article 19, the State has also been empowered to prescribe professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, as well as for enabling the State to carryon any trade or business to the exclusion of citizens wholly or partially. In fact, the State is competent to nationalize any trade or business wholly or partially to the exclusion of all citizens.

In the Excel Wear case the court held that while there may be greater emphasis on nationalization and State ownership of industries, private ownership of industries is recognised and private enterprise forms an overwhelmingly large proportion of India's economic structure. Limited companies having shareholders own a large number of industries. There are creditors and depositors and various other persons having dealings with the undertakings. Socialism cannot go to the extent of ignoring the interests of all such persons.

Nevertheless, the State is not required to justify its trade monopoly as a 'reasonable' restriction or as being in the interests of the general public.84 In fact, no objection can be taken under article 19(1)(g) if the State carries on a business either as a monopoly, complete or partial, to the exclusion of all or some citizens only, or in competition with any citizen.

[40] Excel Wear v. Union of India (AIR 1979 SC 25)

Chapter 5: Personal Liberty

Topics for study:

1. ***Right to life and personal liberty***
2. ***Due process of law***
3. ***Art.21- ocen of rights***

Right to life and personal liberty:

Article 21 of the Constitution guarantees that no person shall be deprived of his life or personal liberty “except according to procedure established by law". This right is available to the citizens as well as non-citizens.[41]

Due process of law

In the famous Gopalan case, 'personal liberty' was held to mean

only liberty relating to or concerning the person or body of the individual. Also, it covered protection only against arbitrary executive action.

But, later on, its ambit was widened to say that the 'procedure established by law' had to be just fair and reasonable. It must include protection against legislative action also and to cover within itself all the varieties of rights which go to make up the personal liberty of man, other than those provided in article 19(1).

In ***Maneka Gandhi v. Union of India***[42] the Supreme Court in fact over ruled the Gopalan's case expressing the view that the attempt of the Court should be to expand the reach and ambit of the

[41] www.indiakanoon.com
[42] Maneka Gandhi v. Union of India (AIR 1978 SC 597),

Fundamental Rights rather than to attenuate their meaning and context by a process of judicial construction.

It held that the right to 'live' is not merely confined to physical existence but it includes within its ambit the right to live with human dignity .

Elaborating this view in Francis Coralie v. Union Territory of Delhi [43](the Court said that the right to live is not

restricted to mere animal existence. The Court further held that non-payment of minimum wages to the workers amounted to denial of their right to live with basic human dignity and violated article 21.

Art.21- Ocean of rights

1. In the case popularly known as the Pavement Dwellers' case, the Supreme Court observed that the word 'life' in article 21 included the 'right to livelihood'. It said that if the right to livelihood was not treated as a part of the constitutional right to life the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood There-fore, right to livelihood is an integral facet of the right to life.
2. In the various cases which came up before the Supreme Court, this liberal outlook and thinking has been all along sustained. Thus, it has been held:
3. ***In folly George Verghese v. Bank of Cochin,[44]*** that imprisonment of a poor person for non-payment of debts amounted to deprivation of his personal liberty .
4. ***In Neerja Choudhari v. State of M.P.[45],***

[43]Francis Coralie v. Union Territory of Delhi AIR 1981 SC 746
[44] folly George Verghese v. Bank of Cochin AIR 1980 SC 470
[45] Neerja Choudhari v. State of M.P., AIR 1984 SC 1099;

It was held that, Bonded Labour System (Abolition) Act, 1976 it is not enough merely to identify and release bonded labourers but it is more important that they should be suitably rehabilitated to meet the plainest requirement of article 21

5. ***In P. Rathinam N. Patnaik v. Union of India,***[46] *it was held* that section 309 I P C is ultra vires the Constitution as a person cannot be forced to enjoy the right to life to his detriment .

6. ***In Kharak Singh v. State of U.P, AIR 1963 SC 1295;*** it was held that the expression 'life' is not limited to bodily restraint or confinement to prison but something more than mere animal existence .

7. In People's Union of Civil Liberties v. Union of India, AIR 1997 SC 568

It was held that the 'right to privacy'-by itself-has not been identified under the Constitution but the right to converse on telephone without interference cij-n certainly be claimed as "right to privacy". Telephone tapping would infract article 21 unless permitted by law .

8***. In Govind v. State of M.P, AIR 1975 SC 1379);***

It was held that right to privacy would have to go through a process of case by case development (this right is available even to a woman of easy virtue, and no one can invade her privacy

9. In ***State of Maharashtrav. MadhulkarNarain, AIR 1991 SC 207;*** it was held that handcuffing is permissible only in extraordinary circumstances

10. In ***Sunil v. State of M.P, (1990) 2 SC 409;*** it was held the police and the jail authorities on their own shall have no authority to direct the handcuffing of any inmate of a jail in the country or during transport and in case of extraordinary circums tances necessitating handcuffing special orders of the Magistrate must be obtained .

11. In ***Citizens for Democracy v. State of Assam, AIR 1996 SC 2193;***

It was held that public hanging of a convict is violative of article 21.

12. In ***Attorney-General v. Lachma Devi, AIR 1986 SC 467;***

[46] P. Rathinam N. Patnaik v. Union of India, JT (1994) 3SC 392

It was held that so long as surveillance by police officers is for the purposes of preventing crimes and confined to the limits prescribed by law, a person cannot complain against the inclusion of his name in the surveillance register but if it is excessive and goes beyond the prescribed limits, its validity may be challenged as infringing the right of privacy of a citizen as his fundamental right to personal liberty under article 21 and 'freedom of movement under article 19(1)(d).

13. In ***Malak Singh v. State of Punjab, AIR 1981 SC 760 it*** was held that persons kept in jail without being charged or tried must be released.

14. In ***Mathews v. State of Bihar AIR 1984 SC 1854; and Kamladevi v. State of Punjab, AIR 1984 SC 1895;***

It was held that an undertrial prisoner already in jail for a period more than the maximum awardable for the offence he is chargeq. of must be released .

15. In ***Hussainara v. State of Bihar, AIR 1979 SC*** 1369***, 1377, 1819; and***

RD. Ram v. State of Bihar, AIR 1987 SC 1333 it was held that refusal to grant bail in a murder case without reasonable ground would amount to deprivation of personal liberty under article 21

16. In ***Babu Singh v. State of U.P., AIR 1978 SC 527***;
It was held that protection of article 21 is available even to convicts in jails and the prisoners cannot be subjected to torture etc.

17. *In* ***D.B.M. Patnaik v. State of AP., AIR 1974 SC 2092 And***

Javed v. State of Maharashtra, AIR 1985 SC 231; Sher Singh v. State of Punjab, AIR 1983 SC 465;

It was held that arrestee subjected to inhuman treatment during police custody should be paid compensation by the State, the quantum of compensation depending upon the facts in each case .

18. In ***D.K. Basu v. State of WB., AIR 1997 SC 610); And***

Sunil Batra v. Delhi Administration, AIR 1978 SC 1675; AIR 1980 SC 1579;

It was held that if by imposing solitary confinement there is total deprivation of camaraderie amongst co-prisoners, coming and talking and being talked to, it would offend article 21

19. In ***Kartar Singh v. State of Punjab, IT(1994) 2 SC 423;***

It was held that speedy trial is a component of personal liberty .

20. In ***State of Maharashtra v. Prabhakar Pandurang, AIR 1986 SC 424;***

It was held that a detenu can be subjected only to such restrictions on his personal liberty as are authorised by or under the law of preventive detention; imposition of any unauthorised restriction will violate article 21 .

21. In ***Satwant Singh v. Assistant Passport Officer, AIR 1967 SC 1836 and***

Maneka Gandhi v. Union of India, AIR 1978 SC 597

It was that the 'right to travel abroad' is part of a person's 'personal liberty' which is a comprehensive term and a citizen's passport cannot be impounded for an indefinite period of time.

22.In ***Parmanand Katara v. Union of India, AIR 1989 SC 2039*** it was held that it is the professional obligation of all doctors, whether government or private, to extend medical aid to the injured immediately to preserve life without waiting for legal formalities to be complied with by the police under Cr. P.C.

23. In ***Paschim Banga Khet Mazdoor Samity v. State of West Bengal,AIR, 1996, SC 2426);***

It was held that failure to give timely medical treatment to a seriously injured person is violation of his right to life .

23. In ***Ramsharan Autrynuprasi v. Union of India, AIR 1989 SC 549 and 552 i***t was held that when one seeks relief for breach of Article 21, one must confine oneself to some direct, overt and tangible act which threatens the fullness of life or the lives of others in the community ;

24. In ***Subhash v. State of Bihar, AIR 1991 SC 420***

It was held that right to pollution free air falls within article 21 .

25**.** In ***Sankar Banerji v. Durgapur Project Ltd., AIR 1988 Cal. 136***

It was held that compelling a person to live in sub-human conditions also amounts to the taking away of his life, not by execution of a death sentence but by a slow and gradual process by robbing him of all his human qualities and graces, a process which is much more cruel than sending a man to the gallows

26**.** In ***Vineet Narain v. Union of India, AIR 1998 SC 889***

It was held that the requirement of a public hearing in a court of law for a fair trial is subject to the need of proceeding being held in camera to the extent necessary in public interest and to avoid prejudice to the accused .

In its judgment in ***Mohini Jain v. State of Karnataka (AIR 1992 SC 1858),*** the Supreme Court

extended the scope of article 21 further to include under the right to life, 'right to education' also. In fact, the Court declared even higher education in professional fields like medicine as a fundamental right.

Later, however the Court overruled its decision in the Mohini Jain case and decided that under article 21, there is no fundamental right to education for a professional degree. Three of the five judges, however thought that early education up to the age of 14 could be a fundamental right of the citizens.

In several judgments, the Supreme Court reiterated that right to life under article 21 included

the right to livelihood because no person can live without the means of living. If the right to

livelihood is not treated as a part of the right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood.105

Right to Education :

Article 21A added as a new article by the Constitution (86th Amendment) Act 2002 provides

for free and compulsory education for all children between the age of 6 to 14 years. [47]

Protection Against Arrest and Detention Detention of persons without trial was a

common feature of the colonial rule and a major issue during the straggle for freedom. Article 22 in clauses 1 and 2 lays down that no person who is arrested shall be detained without being informed of the grounds of arrest, he shall not be denied the right to consult and be defended by a lawyer and he shall be produced before the nearest magistrate within 24 hours.

The Supreme Court has held that the communication of the grounds of arrest to the detenu, allowing consultation with and defence by a counsel and production before the nearest magistrate are mandatory requirements under the article.

The Supreme Court has also clarified that arrest under the orders of the Court, deportation of an alien and arrest on a civil cause are not covered under article 22(1) and (2).

Also, clauses 1 and 2 do not apply to an alien or to cases of preventive detention.

Clauses (3) to (7) of article 22 cover cases of preventive detention under a law. Preventive

detention is, by definition, for preventing an illegal act and not for punishing a person for any illegal act. Article 22 authorizes Parliament to make a law providing for preventive detention, laying down the circumstances, the Classes of cases, the maximum period of detention, establishing an Advisory Board and its procedure. It has been held that the State Government may, if satisfied with respect to any bootlegger or drug offender (or forest offender) or goonda or immoral traffic offender or slum grabber that with a view to prevent him from acting in any manner prejudicial to the maintenance of public order it is necessary to do so to make an order directing that such person be detained.

As a protection against possible misuse of power of preventive detention, certain safeguards have been provided. Thus, preventive detention cannot be authorized by law to exceed 3 months unless an advisory board finds sufficient cause. In every case of preventive detention the grounds thereof shall be conveyed to the detenu who would also be afforded an opportunity to make a representation.

[47] www.rteact.in

Courts have taken a very serious view of detention without trial except in the bona fide cases of

Chapter 6: Judiciary under the Constitution

Topics for study:

1. ***Judicial process***
2. ***Independence of Judiciary***
3. ***Judicial activism***
4. ***Judicial accountability***

1. Judicial process:

We have accepted democracy as our form of government. Democracy is a Government of the people, by the people and for the people. Democracy is not merely an external set-up. In a democratic faith, power of word or speech has great importance.

The greatest thinker and social reformer Vinoba Bhave found in democratic process a spiritual content. He says, when we treat every citizen as a competent voter and every voter has the same power to vote, indirectly we are acting on a fundamental faith that every person has the same human soul and every human soul has the same value.

This fundamental faith is the foundation of the democracy. The capacity of a human soul cannot be measured on capacity — more or less — of the human being. All human souls are endowed with the same capacity. This is the basic faith in Indian philosophy to be found in the *Vedant*. And, indirectly, this is the basis of democracy. In democracy, therefore, the power of word or speech has greater value than the power of army and money.

In democratic processes of which judicial process is one, it is necessary that issues or controversies should be decided by discussion and exchange of views and not by resorting to the use of the police or the army. The elected bodies in a democracy adopt the process of debate or discussion on public issues of importance for making laws and solving problems of the people. This power of speech and discussion should be nurtured and continued unabated. In this process,

resort to the army and the police should be minimum and only in the event of some unavoidable emergency. Unfortunately, the situation is otherwise. If we have accepted non-violent processes as conducive to the functioning of the democracy, gradually we should eliminate the power of arms and weapons. We should not be satisfied with merely outward and formal structure of democracy. To strengthen the democracy, we have to increase the power of words and speech. In other words, this requires increase in power of mutual trust. The judiciary is one organ in which we can find non-violent democratic process in action.

Constitutional democracy

A constitutional democracy is one where the Constitution is supreme and no organ of the Government — the legislature, the executive or the judiciary — is above the Constitution. All the three organs have to function to achieve the aims of the Constitution and in doing so not to infringe the constitutional rights of the people.

When we say that in constitutional democracy, the Constitution is supreme, indirectly we are accepting the supremacy and sovereignty of the people who have taken part in framing the Constitution and accepting the same as the highest law governing themselves. In a constitutional democracy, the judiciary is a touchstone to ascertain the genuineness and the truthfulness of the actions of other organs and authorities.

The judiciary when approached confirms whether the actions of other wings of the Government are in accordance with law and the Constitution or not. The judiciary is a body of legal and constitutional experts. They are called upon to decide contentious issues between the parties strictly in accordance with law and the Constitution. It is a neutral force between the Government and the governed. The judiciary has no other power except the power given to them by the people by reposing faith and trust in its independence and impartiality.

The people have given the judiciary that responsibility because it is thought that exercise of power has to be controlled so that in the hands of any organ of the State, there should not be destruction of the very values which it intends to promote. The judiciary ensures that the executive is more loyal to the existing Constitution and to the constitutional arrangements. The judiciary, thus, is meant to uphold the constitutional values and protect the citizens against

encroachment on their constitutional rights. Sometimes, a tension between the executive and the judiciary comes to the surface but such tensions arising out of each being watchful of encroachment into the province of the other is the best guarantee that the citizens can have against the abuse of power.

In constitutional democracy, one has never to forget that all power, in fact, belongs to the people. It is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order. A sceptical and ever-watchful public opinion is the best guarantee of the quality of our democratic processes. The importance of the judiciary is that it maintains the Constitution. It is unelected and therefore, has allegiance only to law and the Constitution and not to any section of the society, community, region, relationship, sect, philosophy, thought or opinion.

Expectation of the common man and role of Judges

In this judicial process, in a constitutional democracy, the Judges have a great responsibility and obligation towards the people. Being a Judge is a difficult and responsible job making intellectual and moral demands unlike most others. The Judges are the unelected elite of professional *experts*. They exercise the authority of the State in public, in issues of intense importance of the parties and often to the community at large. They decide these issues according to law, it is not the same thing as their personal preferences or current public opinion. Indeed, they have to set public opinion aside and when the case requires, protect minorities against it. They do not and should not seek popularity. They do their work in a formal environment within a framework of procedure which is designed to secure justice. This sometimes make the Judges vulnerable to charges of being remote and out of touch. It goes with its territories. The judicial branch, therefore, does not represent any sections of the society as do the legislature and the executive. There are great expectations of the common man from the courts.

"A sense of confidence in the courts is essential to maintain a fabric of order and liberty for a free people. Three things would destroy that confidence and do incalculable damage to the society; that people come to believe that inefficiency and delay will drain even a just judgment of

its value; that people who had long been exploited in the small transactions of daily life come to believe that courts cannot vindicate their legal rights against fraud and overreaching; that people come to believe that the law — in the larger sense cannot fulfil its primary function to protect them and their families in their homes, at their work and on the public streets.

Separation of power:

Indian state represents a contemporary approach in constitutionalising the doctrine of separation of powers. Essentially, there is no strict separation of powers under constitution, both in principle and practice.

In India, there are three distinct activities in the Government through which the will of the people are expressed. The legislative organ of the state makes laws, the executive forces them and the judiciary applies them to the specific cases arising out of the breach of law.

Each organ while performing its activities tends to interfere in the sphere of working of another functionary because a strict demarcation of functions is not possible in their dealings with the general public. Thus, even when acting in ambit of their own power, overlapping functions tend to appear amongst these organs.

The question which is important here is that what should be the relation among these three organs of the state, i.e. whether there should be complete separation of powers or there should be coordination among them.

"So far as the courts are concerned, the application of the doctrine (the theory of separation of powers) may involve two propositions: namely,

a) that none of the three organs of Government, Legislative Executive and Judicial, can exercise any power which properly belongs to either of the other two;

b) that the legislature cannot delegate its powers."

Constitutional Position

Separation of Powers

The Constitution of India embraces the idea of separation of powers in an implied manner. Despite there being no express provision recognizing the doctrine of separation of powers in its absolute form, the Constitution does make the provisions for a reasonable separation of functions and powers between the three organs of Government.

By looking into the various provisions of the Constitution, it is evident that the Constitution intends that the powers of legislation shall be exercised exclusively by the legislature.

Similarly, the judicial powers can be said to vest with the judiciary. The judiciary is independent in its field and there can be no interference with its judicial functions either by the Executive or by the Legislature. Also, the executive powers of the Union and the State are vested in the President and the Governor respectively.

The Constitution of India lays down a functional separation of the organs of the State in the following manner:

- **Article 50**: State shall take steps to separate the judiciary from the executive. This is for the purpose of ensuring the independence of judiciary.
- **Article 122 and 212**: validity of proceedings in Parliament and the Legislatures cannot be called into question in any Court. This ensures the separation and immunity of the legislatures from judicial intervention on the allegation of procedural irregularity.

Functional overlap

- The legislature besides exercising law-making powers exercises judicial powers in cases of breach of its privilege, impeachment of the President and the removal of the judges.
- The executive may further affect the functioning of the judiciary by making appointments to the office of Chief Justice and other judges.

- Legislature exercising judicial powers in the case of amending a law declared ultra vires by the Court and revalidating it.
- While discharging the function of disqualifying its members and impeachment of the judges, the legislature discharges the functions of the judiciary.
- Legislature can impose punishment for exceeding freedom of speech in the Parliament; this comes under the powers and privileges of the parliament. But while exercising such power it is always necessary that it should be in conformity with due process.
- The heads of each governmental ministry is a member of the legislature, thus making the executive an integral part of the legislature.
- The council of ministers on whose advice the President and the Governor acts are elected members of the legislature.
- Legislative power that is being vested with the legislature in certain circumstances can be exercised by the executive. If the President or the Governor, when the legislature or is not in session and is satisfied that circumstances exist that necessitate immediate action may promulgate ordinance which has the same force of the Act made by the Parliament or the State legislature.
- The Constitution permits, through Article 118 and Article 208, the Legislature at the Centre and in the States respectively, the authority to make rules for regulating their respective procedure and conduct of business subject to the provisions of this Constitution. The executive also exercises law making power under delegated legislation.
- The tribunals and other quasi-judicial bodies which are a part of the executive also discharge judicial functions. Administrative tribunals which are a part of the executive also discharge judicial functions.
- Higher administrative tribunals should always have a member of the judiciary. The higher judiciary is conferred with the power of supervising the functioning of subordinate courts. It also acts as a legislature while making laws regulating its conduct and rules regarding disposal of cases.

Besides the functional overlapping, the Indian system also lacks the separation of personnel amongst the three departments.

Applying the doctrines of constitutional limitation and trust in the Indian scenario, a system is created where none of the organs can usurp the functions or powers which are assigned to another organ by express or necessary provision, neither can they divest themselves of essential functions which belong to them as under the Constitution.

Further, the Constitution of India expressly provides for a system of checks and balances in order to prevent the arbitrary or capricious use of power derived from the said supreme document. Though such a system appears dilatory of the doctrine of separation of powers, it is essential in order to enable the just and equitable functioning of such a constitutional system.

By giving such powers, a mechanism for the control over the exercise of constitutional powers by the respective organs is established. This clearly indicates that the Indian Constitution in its plan does not provide for a strict separation of powers.

Meaning of Judicial Independence:

Generally, judicial independence means the freedom of judges to exercise judicial powers without any interference or influence. The traditional meaning of judicial independence is the collective and individual independence of judges from the political branches of the government. It requires that judges should not be subject to control by the political branches of government and that they should enjoy protection from any threats, interference, or manipulation which may either force them to unjustly favour the government or subject themselves to punishment for not doing so. However, the contemporary concept of judicial independence envisaged in numerous international instruments requires as well that judges should be free to decide cases impartially, without any restrictions, influences, inducements, pressures, threat or interference, direct or indirect, from any quarter or for any reason.

2. Independence of Judiciary

The USA has adopted a system of separation of powers to ensure the independence of the judiciary. But in constitutional systems based on the concept of Parliamentary sovereignty, the

adoption of separation of powers is ruled out. This is the case in England. This is also partly the case in India, for in India the doctrines of Parliamentary and constitutional sovereignty are blended together. The meaning of independence of the judiciary is the independence of the exercise of the functions by the judges in an unbiased manner i.e. free from any external force.

Two foundations of judicial independence and made the following pronouncements, that:-

(a) That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law, without any improper influences, inducements or pressures, direct or indirect from any quarter or for any person, and

(b) That the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature.

In exercising their judicial functions individual judges need to be impartial and free from any direct or indirect control, interference or influence. However, impartiality and freedom of individual judges is meaningless without the institutional independence of the judiciary including the powers and facilities' that are required to perform judicial functions.

Constitutional Provisions Ensuring Judicial Independence The members of the Constituent Assembly were very much concerned with the question of independence of the Judiciary and, accordingly, made several provisions to ensure this end. a) Separation of Executive from Judiciary Separating the executive from then judiciary had been a demand of the Congress Party and others from before independence. The same individual acting as prosecutor, judge, and jury—as did the _Collector'(of revenue and as civil executive) and the Magistrate in district governments under the British—was unacceptable, a remnant of arbitrary, colonial rule.

Article 50 of the Indian Constitution specifically directs the state ―to separate the judiciary from the executive in the public services of the State.

‖The Supreme Court has used this article in support of separation between the judiciary and the other two branches of the state at all levels, from the lowest court to the Supreme Court. In justifying the primacy of the Chief Justice of India in the appointment of the Supreme Court and High Court Judges and in the transfer of the latter, the court has relied on this article.

The unitary character of the judiciary is not an accident but rather a conscious and deliberate act of the Constitution makers for whom a single integrated judiciary and uniformity of law were essential for the maintenance of the unity of the country and of uniform standards of judicial behaviour and independence.

Supreme Court of India

The Judges are appointed by the President under Article 124(2)[on the recommendation of judicial collegium consisting of five senior most judges of the Supreme Court .The collegiums is head by the Chief Justice of India.

i. ii. Security of tenure is guaranteed to every judge. A judge of the Supreme Court or of a High Court can be removed only on the ground of proved misbehaviour or incapacity of the judge by an order of the President passed after a majority of the total membership and a majority of not less than two-thirds of the members present and voting in each House of Parliament present an address to the President in the same session for such removal. The President can remove a judge only when an address has been presented against him by each House of Parliament.

ii. Only a citizen of India who has been a judge of one or more High Courts for at least five years, or has been an advocate of one or more High Courts for at least ten years, or is a distinguished jurist in the opinion of the President, can be a judge of the Supreme Court.

iii. Every judge is entitled to salary and other allowances and privileges specified in the Constitution, subject to upward, but not downward, revision by Parliament.

iv. Officers and servants of the Court are appointed by the Chief Justice of India and are subject to any law made by Parliament, and their service conditions are regulated by the Chief Justice as well.

3. Judicial Activism

Introduction under the Indian Constitution, the State is under the prime responsibility to ensure justice, liberty, equality and fraternity in the country.

State is under the obligation to protect the individuals' fundamental rights and implement the Directive Principles of State Policy. In order to restrain the State from escaping its

responsibilities, the Indian Constitution has conferred inherent powers, of reviewing the State's action, on the courts. In this context, the Indian judiciary has been considered as the guardian and protector of the Indian Constitution. Considering its constitutional duty, the Indian judiciary has played an active role, whenever required, in protecting the individuals' fundamental rights against the State's unjust, unreasonable and unfair actions/inactions.

Black's Law Dictionary defines judicial activism as: "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent". Constitutional powers of the Supreme Court and High Courts in India Judicial activism happens when the courts have power to review the State action.

Article 13 read with Articles 32 and 226 of the Indian Constitution gives the power of judicial review to the higher judiciary to declare, any legislative, executive or administrative action, void if it is in contravention with the Constitution.

The power of judicial review is a basic structure of the Indian Constitution the Supreme Court has interpreted Article 32 in a very liberal manner in many cases in order to enforce fundamental rights even against the private entities performing public functions.

Article 226 of the Indian Constitution gives power to the High Courts to issue any appropriate order or writ for the enforcement of fundamental right and other legal rights. In this context, the jurisdiction of High Court under Article 226 seems wider than the jurisdiction of Supreme Court under Article 32. Both Articles 32 and 226 are basic structure of the Indian Constitution.

Article 227 further gives power of supervisory control to the High Court over the subordinate courts, special courts and tribunals. Furthermore, the Supreme Court has power to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed by any court or tribunal under Article 136 of the Indian Constitution confers special power on. The Supreme Court exercises its special power in those cases where gross injustice happens or substantial question of law is involved.

In ***Vishaka v. State of Rajasthan***[48], the Supreme Court held that in the "absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by this Court under Article 141 of the Constitution.

Judicial activism and shift from locus standi to public interest litigation:

Access to justice is a fundamental aspect of rule of law. If the justice is not accessible to all, establishment of the rule of law is not possible. The individuals fail to reach justice system due to various reasons including lack of basic necessities, illiteracy, poverty, discrimination, privacy, poor infrastructure of the justice system, etc. The Supreme Court of India has recognised in many landmark judgments that access to justice is a fundamental right.

Indian Judiciary has played an active role in ensuring access to justice for the indigent persons, members belonging to socially and educationally backward classes, victims of human trafficking or victims of beggar, transgender, etc. Since Independence, the Courts in India have been adopting innovative ways for redressing the grievances of the disadvantaged persons. In many cases, the Supreme Court exercised its epistolary jurisdiction.

In ***Fertilizer Corporation Kamgar Union v. Union of India, 1981*** the court held that public interest litigation is part of the participative justice. Furthermore,

the Supreme Court in ***Bandhua Mukti Morcha v. Union of India***[49] 1984 has justified the public interest litigation on the basis of "vast areas in our population of illiteracy and poverty, of social and economic backwardness, and of an insufficient awareness and appreciation of individual and collective rights.

[48] Vishaka v. State of RajasthanAIR1997SCC3011
[49] Bandhua Mukti Morcha v. Union of India **1984** AIR 802

4. Judicial Accountability:

Judicial accountability in India:

There are three wings of the Indian government – Legislature, Executive and Judiciary. They perform three vital functions of making rules, application of rules and adjudication of rules respectively.

The main principle behind such dividation of functions is "Separation of Powers" which brings accountability and keeps the government restrained and thus our rights and liberties are safeguarded. The main theme behind this is 'Power corrupts man and absolute power corrupts absolutely'. As described by Montesquieu, "Constant experience has shown us that every man invested with power is apt to abuse it, and to carry his authority until he is confronted with limits'. In short absolute power without accountability leads to corruption.

In India, corruption has always been in limelight. Mr. Kofi Annan, the then Secretary General of the United Nations, in his foreword to the UN Convention against Corruption wrote, "Corruption is an insidious plague that has a wide range of corrosive effects on society.

It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and it allows organized crime, terrorism and other threats to human security to flourish."

However recently what drew our attention is the corruption charges levied against judges; for examples, Judge Soumitra Sen, being a Calcutta High Court guilty of misappropriating large sums of money and making false statements regarding it and P D Dinakaran, Chief Justice of Karnataka High Court, alleged for land grabbing and corruption.

These instances give rise to one question 'who is judging the judges?' The principle of separation or balance of power works with one more principle i.e., checks and balances. The theory of checks and balances simply put that no organ should be given unchecked powers.

A balance is secured by putting the power of one organ checked and restrained by the other two. After all 'power alone can be the antidote to power'. So we find in India that how the executive is individually and collectively responsible to the legislature, although here the accountability

has decreased because of anti-defection law, whereby if there is any amount of dissent from the legislator, he is threatened with removal which can cost his constituency being unrepresented. Thus all decisions of party leaders are now just rubberstamped by parliament.

The laws passed by the legislature are tested by the judiciary, if it violets the constitution the court declares it null and void. In addition, the legislature is accountable to the people at large who elect them. Thus, it becomes clear that the judiciary is the guardian of the constitution and protector of fundamental rights. Recently some of the examples showed the lack of accountability in the institution. This is important because in the preamble we give to ourselves JUSTICE- Social, Economic and Political. In democracy, any authority having some amount of public power must be responsible to the people. The fact is that in a 'Democratic republic', power with accountability of the individuals is essential to avert disaster for any democratic system. It is pertinent to note that judicial accountability and judicial independence has to be studied together in order to understand the concept in whole.

Meaning:

Judicial accountability is a corollary fact of the independence of the judiciary. Simply put, accountability means taking responsibilities for your actions and decisions. Generally it means being responsible to any external body; some insist accountability to principles or to oneself rather than to any authority with the power of correction or punishment. Since accountability is one of the aspect of independence which the constitution provided in Article 235.

The 'control' of the High Court over the subordinate judiciary clearly indicates the provision of an effective mechanism to enforce accountability. Thus entrustment of power over subordinate judiciary to the High Court maintains independence as it is neither accountable to the executive or the legislature. The provision of the difficult process of impeachment is also directed towards this goal.

Except for extreme cases, the absence of any mechanism for the higher judiciary is because the framers of the constitution thought that 'settled norms' and 'peer pressure' would act as adequate checks. However it didn't happen completely in that manner because the judiciary is neither democratically accountable to the people nor to the other two organs. The Hon'ble Supreme

Court rightly asserted that “A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system.”

This brings us to think that why do we need accountability. A campaign issued by the people’s convention on Judicial Accountability and Reforms had mentioned, “ The judicial system of the country far from being an instrument for protecting the rights of the weak and the oppressed has become an instrument of harassment of the common people of the country…. The system remains dysfunctional for the weak and the poor… (and has been) displaying their elitist bias.”

Three promotions done by judicial accountability:

1. It promotes the rule of law by deterring conduct that might compromise judicial independence, integrity and impartiality.

2. It promotes public confidence in judges and judiciary.

3. It promotes institutional responsibility by rendering the judiciary responsive to the needs of the public it serves as a separate branch of the government. The process of accountability facilitates transparency. It can be best achieved when one is accountable to law. The existing system of accountability is failed, and therefore growing corruption is eating away the vitals of this branch of democracy

Chapter 7 : Jammu and Kashmir

Topics for study:

1. ***Special status under the constitution***
2. ***Legislative history of Art. 370***
3. ***Special privilege of permanent residents***

Special status under the constitution

According to Article 1 of the Constitution of India the State of Jammu and Kashmir forms a part of the territory of India.

Presently, the State of Jammu and Kashmir is the fifteenth State included in the First Schedule of the Constitution of India. Previously the State of Jammu and Kashmir was specified under the First Schedule as a Part B State but by the passing of the States Reorganization Act 1956, Part B of the First Schedule was abolished and by the Constitution (7th Amendment) Act 1956, the State of Jammu and Kashmir was transferred with some other States of Part B to Part A of the First Schedule of the Constitution of India. Thereafter only one category of states was included in the First Schedule of the Constitution of India. By virtue of Article 2 of the Constitution of India, 1950, Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit. The words "as it thinks fit" gives a discretion to the Parliament to confer a special status on a State since there is no "theory of equality of status" in India. After the debates of the Constituent Assembly held mainly on 17th October 1949, where Mr. N. Gopalaswamy Ayyangar enumerated the special conditions prevailing in Jammu and Kashmir4 special status was granted to the State.

By virtue of Article 3 of the Constitution of India, 1950, Parliament may by law form new States and alter the areas, boundaries or names of existing States.

1. Power of Parliament to diminish the area of any State under Article 3(c) means the power to take a part of a State and add it to another State but by no means includes the

power to take a part of a State and add it to a foreign country. Parliament can even cut away the entire area of a State to form a new State or to increase the area of another State.

2. There is no Constitutional guarantee to continue a State existing at the commencement of the Constitution.
3. It should be noted that under Article 3(c) Parliament has absolutely no power to make any law ceding Indian Territory to a foreign State. The area diminished from any State under Article 3(c) should and must continue to be a part of the territory of India.

Hence no Indian State, including the State of Jammu and Kashmir, can be ceded to a foreign State. The State of Jammu and Kashmir is further safeguarded by a proviso to Article 3, which read as follows: "Provided further that no bill providing for the increasing or diminishing the area of the state of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State.

Jammu and Kashmir is no doubt a part of the territory of India. But it would be possible for the Parliament of India to increase or diminish the area of Jammu and Kashmir or to alter its name or boundaries in the manner provided in Article 3-4 only if the legislature of Jammu and Kashmir consents. Herein the status of Jammu and Kashmir differs from that of other States. In the case of other States, only the views of their legislatures are ascertained by the President before recommending the introduction of a bill relating to these matters [Proviso to Art. 3], but in the case of Jammu and Kashmir no such bill shall be introduced in Parliament unless the legislature of that State consents

Kashmir enjoys a special position within the Indian Dominion by virtue of Article 3 70 of the Indian Constitution. The position, guaranteed by Article 370 was not even changed when the State was transferred to Part A from Part B of Schedule 1 of the Indian Constitution. The special constitutional position Jammu and Kashmir enjoyed under Article 306A of the original Constitution has been maintained. Hence, all the provisions of the Constitution of India relating to the States in the First Schedule are not applicable to Jammu and Kashmir even though it is one of the States specified in that Schedule

Legislative history of Art. 370:

British rule in India came to an end on and from 15th August 1947. The main object of the Indian Independence Act 1947 was to set up two independent Dominions in India known as

India and Pakistan and after 15th August 1947, His Majesty's Government in the United Kingdom was to have no responsibility over the Government of India or Pakistan. From that date onwards, the paramount of the British Crown over the Indian States was to lapse also. The Indian Independence Act 1947, received Royal assent on 18th July 1947 and came into force on 15th August 194 7. The Constituent Assembly set up in 1946 according to the Cabinet Mission Plan was not a Sovereign body. The Indian Independence Act 1947, established the sovereign character of the Constituent Assembly, which became free of all limitations.

It functioned as a sovereign body unfettered by any restrictions on its powers, for it had to frame a Constitution for India alone.

After. India became independent on 15th August 1947, it fell upon the Constituent Assembly to take up the tremendous task of drafting a Constitution for the country. On 29th August 1947 the Constituent Assembly appointed a Drafting Committee to prepare the Draft of the Constitution. The Draft Constitution as settled by the Drafting Committee was introduced in the Constituent Assembly on 4th November 1948.

B. R Ambedkar, the Chairman of the Drafting Committee, moved for its consideration on the same and in his speech stated that, - " No constitution is perfect and the Drafting Committee itself is suggesting certain amendments to improve the Draft Constitution. But the debates in the Provincial Assemblies give me courage to say that the constitution as settled by the Drafting Committee is good enough to make this country start with. I feel that it is workable, it is flexible and it is strong enough to hold the country together both in peace time and war time. Indeed, if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is, that Man was vile".

The Drafting Committee prepared a Draft Constitution containing 315 Articles and 8 Schedules that was considered at great length at the Second reading stage and underwent several amendments. The Draft Constitution was finalized by the Constituent Assembly on 26th November 1949 and came into force on 26th January 1950. It took the Constituent Assembly about three years to frame the Indian Constitution which is the Worlds longest Constitution.

The Indian Independence Act 1947, gave birth to the two independent dominions of India and Pakistan and over 560 odd Indian Princely States obtained sovereignty and became absolutely independent. All (roughly about 562) Indian States but three States (Junagad, Hyderabad and Kashmir) acceded to either Dominion.

The Indian States entered the Constituent Assembly of India on the basis that they would accede to the Union of India by suitable instruments, and that the internal Constitutions of these States would be framed by their own Constituent Assemblies.

It was however soon realized that, if each Indian State or Union of Indian States was to frame its own Constitution without any guidance from the Centre, there might be such large differences among them as to result in a veritable jigsaw puzzle. A committee with B. N. Rao as chairman was appointed to prepare a model Constitution to serve as a guide in framing the Constitution for the respective States.

However it was ultimately decided that the Constitutions of the States should also be framed by the Constituent Assembly of India and should form an integral part of the Constitution .of India; and that an appropriate procedure should be decided upon for the ratification of the whole Constitution of India by the States and Unions along with the part relating to the internal Constitutions of the States.]

However, when the Drafting Committee began its work the problem of Federation with the Native States had ceased to exist, as the Native States which acceded with India merged in India, their former rulers retaining only their titular dignity and certain personal privileges.

Regarding the State of Jammu and Kashmir venous difficulties arose, which the Government of India had to consider carefully. Maharaja Hari Singh wanted that the accession of the State should be in respect of three subjects: Defence, Foreign affairs and Communications. The Drafting Committee pointed out that under the provisions of the Draft Constitution all States in Part III would accept List I, List II, all provisions relating to fundamental rights and the provisions relating to High Courts and Supreme Court. However, with regard to the State of Jammu and Kashmir the Government of India decided that the accession of the State should continue on the existing basis until the State could be brought at par with other States.

For this purpose a special provision was made in respect of the State of Jammu and Kashmir. The Ministry of States suggested for consideration of the Drafting Committee the following approach to this Question:

(1) Jammu and Kashmir State may be treated as a part of Indian territory and shown in States specified in Part III of Schedule I.

(2) A special provision may be made in the Constitution to the effect that until Parliament provides by law that all the provisions of the Constitution applicable to the States specified in

Part III will apply to this State, the power of Parliament to make laws for the State will be limited to the items specified in the Schedule to the Instrument of Accession governing the accession of this State to the Dominion of India or to the corresponding entries in List I of the new Constitution.

Not only in the announcement of the Honourable Minister for States, but also in the address of Lord Mountbatten to the Princes, it had been made clear that accession on three subjects did not imply any financial liability on the part of the States and that there was no intention either to encroach on the internal autonomy or the sovereignty of the States or to fetter their discretion in respect of the new Constitution. It was against these commitments that the State Ministry had to approach the Rulers for the integration of their States.

In the case of Sayee vs Ameer Ruler Sadiq Mohammad Abbari Bhawalpur2 it has been held that the effect of the Instrument of Accession was not to make any State a part of the Dominion.

RELATIONSHIP OF THE STATE OF JAMMU AND KASHMIR WITH THE UNION OF INDIA :

The relationship of the State of Jammu and Kashmir with India after the signing of the Instrument of Accession was determined by various provisions of the Constitution of India, which came into force on 26th January 1950.

Article 1 of the Constitution of India 1950, which deals with the name and territory of the Union clearly includes the State of Jammu and Kashmir as a part of the Indian territory and the name of the State is also included in the First Schedule of the Constitution.

Article 370 of the Constitution of India 1950, further clarifies the relationship of Kashmir with India by enumerating the heads in which the Indian Parliament would have power to make laws for the State of Jammu and Kashmir.

As by the Instrument of Accession only Defense, External Affairs and Communications were acceded to India, Article 370 of the Constitution of India 1950, provided Parliament with power only to make laws for the State of Jammu and Kashmir with regards to Defense, External Affairs and Communications. Article 370 of the Constitution of India 1950 further provided the State of Jammu and Kashmir with the right to form a Constituent Assembly to draft a Constitution for the State. On 26th January 1957 the Constitution of Jammu and Kashmir 1957, was enacted and under Section 3 of the said Constitution, the relationship of the State with the Union of India was

further clarified wherein it is clearly stated that the State of Jammu and Kashmir is an integral part of the Constitution of India.

370. Temporary provisions with respect to the State of Jammu and Kashmir-

(I) Notwithstanding anything in this Constitution,-

(a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to-

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for the State; and

(ii) such other matters in the said list as, with the concurrence of the Government of the State, the President may by order specify. Explanation- For the purposes of this article, the Government of the State means the person for the time being recognized by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the 5th day of March, 1948

(c) the provisions of article 1 and of this article shall apply in relation to that State; (d) such of the other provisions of this Constitution shall apply in relation to that State subject to the exceptions and . modifications as the President may by order, specify; Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of subclause(b) shall be issued except in consultation with the Government of the State Provided further that no such order which relates to the matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of Clause (1) or in the proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article 61 shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify; Provided, that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall

be necessary before the President issues such a notification. Under Article 370(1) of the Constitution of India the power of Parliament to make laws for the State of Jammu and Kashmir was limited only to matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession of the State to the Dominion of India.

Article 370(1) of the Constitution of India clarified the subjects mentioned in the Instrument of Accession over which the Indian Government would have jurisdiction with regard to the State of Jammu and Kashmir.

This was further clarified by the Delhi Agreement in 1952 according to which sovereignty in all matters other than those specified in the Instrument of Accession continues to reside in the State. It was also agreed by the Government of India that the residuary powers of legislature would vest in the State of Jammu and Kashmir, unlike the case of other States where the residuary legislative power vested in the Union.

The provisions of Article 370 were further ratified by the Constitution (Application to Jammu and Kashmir) Order 1954, which wasadopted in February 1954. Hence, on reading the Instrument of Accession 194 7, Article 3 70 of the Constitution of India 1950, the Delhi Agreement 1952 and the Constitution (Application to Jammu and Kashmir) Order 1954, it may be said that the matters with respect the Dominion Legislature may make laws for the State were,

A. Defence,

B. External Affairs,

C, Communications and

D. Ancillary

Under Article 370(2) of the Constitution of India the State was given power to form a Constituent Assembly for the purpose of drafting a Constitution for the State. The said Constituent Assembly came into existence on 31st October 1951. The Constituent Assembly set up a Drafting Committee for the purpose of drafting a Constitution for the State. Surprisingly, the question of Accession was still left open to the Constituent Assembly and alternatives like accession to Pakistan and independence of Kashmir were kept open for consideration of the Constituent Assembly.

The Constituent Assembly of Jammu and Kashmir ratified the terms and conditions of the Instrument of Accession and the Delhi Agreement. In order to implement the Delhi Agreement

as ratified by the Constituent Assembly the Constitution (Application to Jammu and Kashmir) Order, 1954, was passed by the President in consultation with the State Government. The order deals with the entire constitutional position of the State within the framework of the Constitution of India, excepting only the internal constitution of the State Government, which was to be framed by the Constituent Assembly of the State.

The first official act of the Constituent Assembly was to put an end to Monarchy by forcing Maharaja Hari Singh to abdicate in June 1949. However, his son Yuvaraj Karan Singh was elected as the Sadar-I-Riyasat (or Governor) of the State. By October 1956 the Drafting Committee completed the Draft Constitution, which was ultimately adopted on 17th November 1956 and came into force form 26th January 1957. The State of Jammu and Kashmir thus acquired the distinction of having a separate Constitution for the administration of the State, in place of the provisions of Part VI of the Constitution of India, which govern all the other State's of the Union.

The Constitution of Jammu and Kashmir, 1957, also helps determine the relationship of the State with the Union of India. The Preamble of the Constitution of Jammu and Kashmir, 1957, inter alia, states that the object of the Constitution is to "further define the existing relationship of the State with the Union of India as an integral part thereof." 1 The relationship of the State with the Union of India is dealt with in Section 3 of the Constitution of Jammu and Kashmir 1957~ which reads as follows:- Section 3 - Relationship of the State with the Union of India - The State of Jammu and Kashmir is and shall be an integral part of the Union of India.

Section 4 - Territory of the State - The territory of the State shall comprise of all the territories which on the 15th day of August, 194 7, were under the sovereignty of suzerainty of the Ruler of the State.

Special privilege of permanent residents

The people of Jammu and Kashmir, better known as Koshurs, are also referred to as Mulkis, State Subjects or Permanent Residents. They enjoy a special status within the Indian Union compared to the residents of the other States. This special status acts as a legal and social barrier between the people of the State of Jammu and Kashmir and the people of the rest of India.

The special status of the Permanent Residents of Kashmir is one of the reasons for which the complete integration of Kashmir with India has not been possible and is one of the causes for resentment in the minds of the rest of the Indian population in general. Though this special status was guaranteed to the. people of the State due to various sociopolitical factors embedded in the State's history, its existence some how contradicts the observation made by the Supreme Court of India in Indra Sawhany's case, where a Constitution Bench of the Apex Court was pleased to observe that, 'India has one common citizenship and every citizen should feel that he is Indian first irrespective of any other basis' .

A similar view has also been expressed by the Supreme Court of India ***in Raghunathrao Ganapatrao v. Union of India,1994*** where the Supreme Court was pleased to observe that in a country like ours with so many disruptive forces of regionalism, communalism and linguism, the unity and integrity of India can be preserved only by a spirit of brotherhood.

India has one common citizenship and every citizen should feel that he is Indian first irrespective of any other basis.

The division between the people of the State of Jammu and Kashmir and the rest e>f India is artificial and since time immemorial the State of Jammu and Kashmir been considered to be an integral part of India. It has been said that the "Country which lies to the South of the Himalayas and North to the Ocean is called Bharat and the Bharatiyas are the people of this country"

Sections 6 to 10 contained in Part III of the Constitution of Jammu and Kashmir, l95i separately deals with the Permanent Residents. The Sections are set out below:

Section 6: Permanent Residents:

(1) Every person who is, or is deemed to be, a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of May 1954: - (a) he was a State Subject of Class I or the Class II; or (b) having lawfully acquired immoveable in the State, he has been ordinarily resident in the State for not less than ten years prior to the date.

(2) Any person who, before the fourteenth day of May, 1954, was a State Subject of Class I or of Class II and who having migrated after the first day of March 1947, to the territory now included in Pakistan returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State legislature shall on such return be a permanent resident of the State.

(3) in this section, the expression "State Subject of Class I or of Class II" shall have the same meaning as the [State Notification No. I-L/84 dated the twentieth April, 1927, read with State Notification No. 13L dated the twenty-seventh June, 1932}.

Terrorism in Kashmir:

Terrorism in India is primarily confined to J & K and the North East, however of late terrorist activities have increased in other parts of the country as well. In December 2001, the heart of Indian democracy, the Parliament was a target of terrorist attack and Mumbai in November 2008. The arc of terrorism is spreading to the other parts of the country as well. In a large pluralist country like India, the problems of internal security management are enormous. Relatively minor incidents can snowball into major conflagrations. India is a multireligious, multiethnic, and multicultural society with a history of communal and ethnic violence among various groups. It is not difficult to stir up trouble by pitting one group against the other. The rise of contentious politics between different groups based on confessional, ethnic, racial, linguistic, and other divisive criteria is the root cause of many secessionist movement now flourishing in India. One of the notable features of terrorism in India is that the country's neighbour, Pakistan, has been assisting every terrorist group in India. Pakistan's involvement in sponsoring and supporting terrorism in India is both overt and covert. Pakistan has become the biggest center for spreading international terrorism. Sponsoring terrorism in India has become an essential component of Pakistan's Internal and external policies.

First treating terrorism as a minor law and order problem, and then reacting in panic when the situation showed signs of deterioration, both the central and state governments in India have responded to terrorism in an inconsistent manner. At times, their in-consistent response, driven more by the compulsions of electoral politics, has been counterproductive. Terrorist movements actually gained public support whenever government overreacted or under- reacted. It was a mistake to treat terrorism in the initial stages as a mere law, order problem, and leave it to the law enforcement agencies to handle it on their own. This mistake was committed in Punjab and then repeated in Jammu and Kashmir. If terrorism had been tackled more comprehensively before it took root, maybe the situation in both Punjab and Jammu and Kashmir would not have taken such an ugly turn. Both the central and the state governments underestimated the problem far too long and then overreacted, which was also a mistake. Under the Indian Constitution,

powers are divided between the central and state governments. India has a federal system of government. 'Law and order is a state subject.'

Therefore, law enforcement agencies are under the control of the state governments. While the responsibility for terrorism primary rests with state governments, the central government also provides assistance to the states in tackling terrorism. The armed forces are under the control of the central government.

Response capability is the inherent capability of an organisation to respond to a given situation/threat prevailing within its domain. Management of resources is an important aspect in any crisis situation. Depending upon the level of threat, India has been dealing with terrorist crisis by appropriate response capabilities and well coined strategy.

Response mechanism, implies the existing mechanisms available at various levels to respond to different intensities of threat emanating anywhere in the country.

Various levels of threat and appropriate response mechanism to deal each level of terrorist threat may have been appropriate earlier but in the charged up terrorist scenario, terrorist activities continue unabated signaling review of response mechanism.

1. **Heightened Law and Order**: In case of heightened law and order situation, the inherent security agencies within the state are adequate to keep the situation under control and ensure normalcy in the state. The SFs usually deployed in this scenario are state police, Armed Police of the State, State Police Organisation(SPO), Village Defence Committee(VDC) and Home Guard.

- **Low.** If the threat level is low in nature and if it is felt that the situation is beyond the control of the state's inherent SF, CPOs such as Indo Tibetian Border Police(ITBP), Central Industrial Security Force(CISF) and PMFs such as Assam Rifles(AR), Rashtriya Rifles(RR) are called in to tackle the situation.

• **Significant:** When the threat level is significant, in addition to the BSF and CPOs, the army is tasked to deal with situations wherein RR being specific to J&K and AR for NE.

• **High:** The high level of threat can be of two kinds as follows : -

1. General. If the threat level is high but it pertains to an extended area and is of a general nature, then the army is called in to restore normalcy in the state.

2. Specific: If the threat level is high and pertains to a small area or specific sensitive location like a religious place etc, is under terrorist threat then the National Security Guard (NSG) is requisitioned to eliminate the threat and restore normalcy with minimum collateral damage.

• **Severe Threat:** If the threat level is severe and extends over a large area, then the armed forces are employed by the centre to stabilize the situation and restore normalcy. The Indian Army has been playing a key role in containing the terrorism in India.

The Army can only exert pressure on the terrorists and take the situation to a level which enables the Government to negotiate a settlement from a position of strength. In view of the changing dynamics of terrorism, there is a need to examine the efficacy of counter-terrorism mechanism with a view to analyse the drawbacks thereby facilitating in evolving a model for countering terrorism for India.

Measures to combat terrorism in Kashmir

Civil society provides alternative appropriate language to public officials and the media in addressing issues of terrorism and security and facilitates in establishing a constructive relationship with the media in order to provide reliable information, challenge negative or unbalanced portrayals of parts of the community and initiate public debate on issues of public security. Thus, both civil society and media significantly contribute in combating the menace of terrorism thereby strengthening the pillars of democracy.

Role of Civil Society in Combating Terrorism India has been witness to acts of terrorism in some form or the other since the beginning of the 1990s. Particularly in the last six to seven years, the geographical reach, as well as the number of victims of terrorism have increased manifold. The attack and hostage situation of 26/11 was only the latest in this series. 26/11 attack on Mumbai has highlighted two important issues — the accountability of the state and the role of civil society in countering terrorism. Consequent to 26/11, the response of civil society in India during this period has been very encouraging. In September 2006, the UN unanimously adopted the UN Global Counter-Terrorism Strategy. It is the first UN document on counterterrorism to include a role for civil society organizations combating terrorism. India is facing a 'new terrorism', which is more virulent, sophisticated and religiously motivated. However, to combat this menace, India lacks a robust and comprehensive counter terrorism strategy. The existing mechanism is mired by various systemic inadequacies and does not take into account the role of civil society in fighting terrorism. Therefore, the role of civil society is to be factored in India's strategy to

combat terrorism. Civil society can play a significant role in the fight against terrorism in many ways as it strengthens democracy, ensures responsiveness, enhances transparency, denounces violence, prevents communalisation of terrorism, avoids polarisation of Communities, minimises ill effects arising out of discrimination and ensures preparedness for combating terrorism. Civil society is the manifestation of a healthy democratic process. Democracy and civil society reinforce each other. 11 If democracy is the antidote to terrorism then this democracy can be ushered in and sustained only through the efforts of the civil society. In the words of Ernest Gellner, "no civil society, no democracy. Therefore, a vibrant civil society can ensure that the Government responds efficiently and effectively to combating terrorism. Civil society approach is not without its problems primarily because different states have different types of societies and cultural specificities. Civil society has achieved a lot and can do much more to address the problem of terrorism. In any counter-terrorism strategy, conflict resolution and removing the causes of terrorism are always more important than military action against terrorist violence. Civil society enables us to reach the core of the conflicts in spreading awareness, ending foreign influence and supporting area development. It plays an important role in facilitating dialogue and providing policy advice. Civil society engaged in such work helps dry up the wells of extremism from which violence springs. Punjab in this regard is one of our best examples. Role of Media in Combating Terrorism Terrorism and violence have always been part and parcel of human society and will continue to be so in the future also. However, it is only in the recent times that terrorism has confronted modern civilisation with its unprecedented affiliation and in posing a real threat to the established political and social system, it is causing much destruction of life and property and is creating an acute sense of insecurity among people all over the world. Terrorism is a form of warfare that relies principally upon fear to deliver its message. The media influences public opinion. Terrorism is a "strategy" of unlawful violence calculated to inspire terror in the general public, or significant segments thereof, in order to achieve a power outcome or to propagandise a particular claim or grievance. Miguel Rodrigo has linked the relationship of the media to terrorism. He opines that the media detects the presence of the problems of terrorism and underlying socio – political problems. Social, economic, and political problems of a particular region or regions are highlighted by the media, thus, contributing to shaping government policy. The challenge for the government is to explore mechanisms that can increase Government-Media cooperation in such a manner that the interests of both are served. In fact, cooperation between

the government and media would be an important element in an strategy to prevent the success of terrorist causes and strategies. The government can use the media as a tool in arousing world opinion against terrorism and terrorist organizations. The media can also be used to mobilize public opinion in other countries to bring pressure on government to take or reject actions against terrorists and the organizations indulging in terrorism. The media can be used as a tool for counter terrorism however exercise in self restraint, self censorship or self discipline need to be carried out by the media while reporting the incidents of terrorism.

Chapter 8: Secularism

Topics for study:

1. ***Freedom of religion in India***
2. ***Uniform Civil Code, Personal laws and Minority Rights***

1. Freedom of religion in India

India became a secular state in the post- era, i.e. after becoming independent in 1947. However, the constitution that came in to force with effect from 26 the January, 1950 did not use the word secularism. In other words, India became a secular state more in spirit than in terms of political ideology. The word "secular" was added during emergency through an amendment. Thus, today our constitution is a secular constitution. Secularism in India context was never clearly defined by either our constitutional experts or political ideology.

There are several problems in defining secularism in the Indian context. Both during colonial and post -colonial period, the Indian society has been a traditional society dominated by various customs and tradition with deep religious orientation.

For the liberal and progressive intellectuals, on the other hand, secularism meant total exclusion of religion from political arena. India The development of the idea of; secularism' has been of a differed pattern in India. The idea has not been the product of a process of actual secularization of life, and second philosophical development had been different lines. Like other ideas of democracy, socialism and the likes, if developed as a response to the actual historic need of Indian society.

Origin of Indian Secularism Indian secularism, in the sense of equal reverence for all religions, was not born on January 26, 1950 its history did not begin on January 26, 1950. It predates the Constitution, the freedom movement, the Moghuls, the Turks, the Maury as and the Asoka's. It predates the known and written history of India.

It is part of the spiritual conviction of this country as expressed in the Vedas and Upanishads whose dates are speculated even today. Theology and not theocracy is the Hindu tradition. No king other than Ashoka the Great declared a State religion in this country.

But Ashoka is still regarded as the model for peace and tolerance.

The constitutional provisions on freedom of worship and injunction against the Indian state promoting or subsidizing any religion are not the creation of the Constitution but the product of centuries of Concept of Secularism: An Indian Scenario harmonious functioning of the Indian mind which is essentially and largely the Hindu genius.

The Constitution of India merely recorded the timeless faith and conviction of the Hindus that every religion is sacred and there is no need for selection or elimination of any faith or religion. Even a non-believer's soul is as sacred as that of the faithful. This is based on the Hindu view that every living being is sacred. So it is the Hindu psyche that guarantees equality to all faiths and not the provisions of the Constitution of India. How did the Hindu psyche react to the other faiths that came to India seeking refuge against extermination by the invading Islam and Christianity in their lands? The instances of Parsis and the Jews are highly instructive of the core of the Hindu psyche. India is a pot-pourri of diverse religions, races and cultures. From antiquity, she has been receptive to different beliefs and nurtured both the native Dravidians and the invading Aryans.

Even the Tatars, the Turks, the mogals and the Europeans left their imprint in the land by intermarrying with the locals. The blending of culture of natives and foreign elements led to development of composite culture and not any religious culture hence there has been a sort of unity with multiple diversities. The geographical location of the sub-continent has also acted as catalytic agent to promote unity.

The people of India, from heterogeneous groups had obviously little in common to forge a homogeneous identity. They differed in physique as well as in ideology and culture! The social order founded on caste system forced them to live in caste-compartment. Each temple, mosque, church, gurudwara, and vihar had its own place of inspire its believers. Sometimes, the religious texts of each denomination shared certain values but very often differed. This resulted in conflict, isolation and subjugation of certain groups.

This gave rise to classes, castes and class wars and caste conflicts.

Before the dictum of Karl Marx that 'religion is opium for people', the whole world was under the dominance of different religions. To some of the people of India religion was and now also is sacred and above all other things. "Religion has been aptly described by Herbert Spencer as, "the weft which everywhere crosses the warp of history."

This is true of every society. But religion has not only crossed everywhere Concept of Secularism: An Indian Scenario the warp of Indian history it forms the warp and woof of the Hindu mind Not only Hindus but others also have had sacred codes laying down the social relation between man and man as well as man and God. There is no disagreement about the positive aspects of different religions. "But with all the good they have done, they have also tried to imprison truth in set forms and dogmas and encouraged ceremonials and practices which soon lose all their original meaning and become mere routine. While impressing upon man the awe and mystery of the unknown that surrounds him (human being), on all sides, they have discouraged him from trying to understand not only the unknown what might come in the way of social error. Instead of encouraging curiosity and thought, they have preached a philosophy of submission to nature, to established churches, to the prevailing social order, and to everything that is.

The belief in a supernatural agency which ordains everything has led to certain irresponsibility on the social plane, and emotion and sentimentality have taken the place of reasoned thought and inquiry."

Religion in this sub-continent has also laid down a solid foundation for irrational, superstitious society, closing the doors for science and development, superstitious society, closing the doors for science and development, logic and reason in violation of one of the fundamental duties of every citizen of India, that is, 'to develop the scientific temper, humanism and the spirit of inquiry and reform.

India has been the product of historic consequence of a series of events, never existed prior to the commencement of the Constitution of India. The new born State, India i.e., Bharat joined the family of sovereign republics on 26th January 1950. On independence the people of India

constituting Hindus, Muslims, Christians, Sikhs, Buddhists, Janis, Parsees and others agreed to unite in nation-building in spite of their historical differences.

The contents of the constitution of India are largely founded on the past. The Constitutional Ideal of Secularism The historical and cultural ethos of India, its plural society, and the social turmoil and political upheaval accompanying independence formed the backdrop for the adoption of secularism as the cornerstone of the Constitutional setup.

Making of a Secular Constitution:

After the independence of India on August 15, 1947, the Drafting Committee was appointed by the Constituent Assembly on August 29, 1947. It was charged with the duty of preparing a Constitution in accordance with the decisions of the Constituent Assembly. The Government of India Act of 1935 supplied a large part of the basic framework to work out the new Constitution. However, important principles and constitutional provisions were adopted mostly from the constitutional systems of Great Britain and United States.

Part III of the Indian Constitution which deals with fundamental rights, including the provisions dealing with the Indian form of secularism as given in articles 25 to 28 have been adopted mostly from the secular provisions of the of United States Constitution.

However, at the time of drafting of the Constitution and during the debates which took place in the Constituent Assembly, the members of the Constituent Assembly refused to add the terms “secular” or “secularism” either in the Preamble of Concept of Secularism: An Indian Scenario 91 the Constitution or in the articles dealing with the secular provisions of the Constitution. At that time these terms had a compelling sense of atheistic connotation, especially as it was in usage in the Western countries. Therefore, the Constituent Assembly omitted their usage in the Constitution. This calls for explanation. We provide it in the following sections.

The Omission of the 'Secular 'in the Constitution On December l3, l946, Mr. Jawaharlal Nehru moved the Objectives Resolution in the Constituent Assembly, which was passed on January 22, l947. The Objectives Resolution gave expression to the ideals and aspirations of the people of India. Its principles were to guide the Constituent Assembly in its deliberations in making the Constitution.

The principles embodied in the Objectives Resolution were incorporated into the Preamble of the Constitution of India. Some of the provisions of the Objectives Resolution read:

(l) This Constituent Assembly declares in its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and draw up for her future governance a Constitution

(2) Wherein all power and authority of the sovereign Independent India, its constituent parts and organs of Government, are derived from the people; and

(3) Wherein shall be guaranteed and secured to all the people of India, justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(4) Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(5) Whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea and air according to justice and the law of civilized nations, and

(6) This ancient land attains its rightful and honored place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of the mankind.89 It is surprising to note that the Objectives Resolution did not mention the terms ‘secular state’ or ‘secularism’ even though clause (5) of the Resolution wasdefinitely secular in character. The terms did not occur in the long speech Mr. Jawaharlal Nehru delivered at the time of moving the Resolution in the Constituent Assembly.

They were also not referred to by Dr. B. R. Ambedkar, the Chairman of the Drafting Committee, in his speech given at the time of introducing the Draft Constitution in which he highlighted the salient features of the Draft.

The terms, moreover, did not find a place in any part of the Constitution. The omission of the words ‘secular’ and ‘secularism’ are not accidental, but deliberate. The reasons for the omission would become clear when we access the debate on secularism, which took place in the Constituent Assembly.

The Constitutional Assembly Debate on Secularism An analysis of the provisions of the constitution which reflect its secular character is presented in this topic in the back drop of the Constituent Assembly Debate.

The concept of secularism as expounded in the constitution. Constituent Assembly declares its firm and solemn resolve to proclaim India as an independent sovereign Republic wherein shall be guaranteed and secured to all the people of India,

• Justice, social, economic and political;

• Equality of status, of opportunity and before the law;

• Freedom of thought, expression, belief, faith, worship, vocation, association and action subject to law and morality;

• Adequate safeguards for minorities backward classes and tribal area and depressed and other backward classes…..This was before the Constitution of India was finalised and the provision in the Constitution relating to Fundamental Rights given final shape.

Thought the secular character of the Constitution was emphasized, yet the Constitution of India, A perusal of the Constituent Assembly debates clearly reveals the general understanding amongst members of the Assembly that India was to be a secular State. They repeatedly emphasized the secular foundation of the Indian State. The observation of Dr. P.B. Gajendragadkar, the former Chief Justice of India, seems to resonate with the mind of the makers of the Constitution.

He commented: The omission of the word 'secular' or 'secularism' is not accidental, but was deliberate. It seems to me that the Constitution-makers were apprehensive that if the words 'secular' and 'secularism' were used in suitable places in the Constitution, they might unnecessarily introduce, by implication, the anti-religious overtones associated with the doctrine of secularism as it had developed in Christian countries

…making religion almost irrelevant… That is why the Constitution makers deliberately avoidedhe use of the word 'secular' or 'secularism' in the relevant provisions of the Constitution.

The Inclusion of the Term 'Secular' in the Preamble The secular nature of the State in India is obvious from the aims and objectives of the Constitution as spelt out in the preamble. However, as we have seen, to avoid possible anti-religious impression that the term ‘secular’ might connote, it was omitted from the Preamble and other parts of the Constitution. The test of the original Preamble reads "We, the people of India, have solemnly resolved to constitute India into a sovereign democratic republic…" This word was introduced in the Preamble by the Constitution (Forty-Second Amendment) Act 1976 which came into force on 3 January 1977. The Indian Constitution enacted in the year 1950 did not, before the 42nd Amendment, contain the word “secular” or “God” in it. The word “God” is to be found only in the Third Schedule of the constitution .

By the 42nd Amendment, the opening words were replaced by the following: “We, the people of India, have solemnly resolved to constitute India into a sovereign socialist secular democratic republic.” The word "socialists as added to emphasize the existing constitutional commitment to the goal of socio- economic justice. The intention of the "socialist" was not setup a vibrant throbbing welfare state.

The Constitution as enacted did not contain the word "secularism" at all. It only spoke of freedom of religious faith and of the State of India immunized from religion.

It was Mrs. Indira Gandhi who introduced the word "secularism" in the preamble of the Constitution in the year 1976.The word "secular "was also added the same Amendment Act. This word high lights that the state has no religion of its own and all person s shall have the right s to profess, practice and propagate religion of their own.

This right has been further guaranteed by the fundamental Rights in Artical25-28. The expression also signifies that constitution does not recognize does not permit mixing of religion and state power. Both must be kept apart.

This is constitutional injection. The both constitutional Amendment Act.1993 was enacted for separation the religion from politics. Secularism is not the absence of \religion as defined by Webster Dictionaries. Secularism is more than passive attitude of religious tolerance. It is a positive concept of equal treatment to all religions.

It is true that the word 'secular' did not first occur either in Article 25 or 26 or in any other Article or Preamble of the Constitution. By the Constitution (42nd Amendment) Act, 1976, the Preamble was amended and for the words 'Sovereign Democratic Republic' the words 'Sovereign, socialist, secular, Democratic Republic' were substituted. The Forty-Second Amendment was the most comprehensive and most controversial amendment made in the Constitution.

The statement of objectives and reasons given in the Bill for the Forty- Second Amendment Act 1976 indicated that the said amendment was required inter alia "to spell out expressly the high ideals of Socialism and Secularism."95 When the Bill was moved for discussion in both Houses of the Parliament, the members questioned the Parliament's power to amend the Preamble of the Constitution. However, no one was opposed to the inclusion of the term "Secular" in the Preamble.

The word "secularism" used in the preamble of the Constitution is reflected in provisions contained in Articles 25 to 30 and Part IVA added to the Constitution containing Article 51A prescribing fundamental duties of the citizens.

It has to be understood on the basis of more than 66 years experience of the working of the Constitution. The complete neutrality towards religion and apathy for all kinds of religious teachings in institutions of the State have not helped in removing mutual misunderstanding and intolerance inter se between sections of people of different religions, faiths and beliefs. 'Secularism,' therefore, is susceptible to a positive meaning that is developing understanding and respect towards different religions.

The essence of secularism is non-discrimination of people by the State on the basis of religious differences. 'Secularism' can be practiced by adopting a complete neutral approach towards religions or by a positive approach by making one section of religious people to understand and respect religion and faith of another section of people.

Based on such mutual understanding and respect for each other's religious faith, mutual distrust and intolerance can gradually be eliminated. Study of religions, therefore, in school education cannot be held to be an attempt against the secular philosophy of the Constitution Various provisions of Indian Constitution contemplate the secular nature of India.

Article 25-28, 29 -30, to 14, 15, 16, and 17 as well as to art .44and 51A.These provision s promote the idea of secularism and by implication prohibit the establishment of a theocratic state. The state is under an obligation to accord equal treatment to all religions and religious sects and denomination

Secularism in India	**Secularism in the US**
Follows the concept of 'neutrality' and 'positive role' towards the religion.	Follows the principle of 'non-interference' in the matters of religion.
The State can introduce religious reforms, protect minority and formulate policies on religious matters.	The State cannot take any action in religious matters.

articles 25 to 28 in the Constitution of India provide the right to freedom of religion.

Article 25	Article 26	Article 27	Article 28
It imparts freedom of conscience and free profession, practice and propagation of religion.	It gives freedom to manage religious affairs.	It sets freedom as to payment of taxes for promotion of any particular religion.	It gives freedom as to attendance at religious instruction or religious worship in certain educational institutions.
It is available to persons.	It is available to religious denominations.	It is available to a person against religious denomination(s).	It is applicable to educational institutions. A person can invoke it.

Article 25

In ***Ratilal Panachand Gandhi v. State of Bombay***[50], the Supreme Court stated that Article 25 guarantees every person (not only citizens) the freedom of conscience and right to freely profess, practise and propagate religion imposed with certain restrictions by the State. These restrictions are:

1. Public order, morality and health and other provisions of the Constitution (Clause 1 of Article 25).
2. Laws relating to or restricting any economic, financial, political, or other secular activities associated with religious practices. (Clause 2(a) of Article 25).
3. Social welfare and reform that might interfere with religious practices.

Is it necessary that freedom of conscience is always related to religion?

No, freedom of conscience need not necessarily be connected with any particular religion or faith in God. It includes that the right of a person shall not be converted into another man's religion or belief in any religion at all.

What does profess, practice and propagate mean?

The court in ***Stainislaus Rev v. State of MP***[51] explained that freedom of 'profession' means the right of the believer to state his creed in public whereas freedom of 'practice' means his right to give expression in forms of private and public worship. The court also explained that the right to propagate one's religion means the right to communicate a person's beliefs to another person or to expose the tenets of that faith, but shall not include the right to 'convert' another person to the former's faith. In ***the Commissioner Hindu Religious Endowments Madras v. Sri L T Swamiar of Sri Shriur Matt, 1954,t***he Court held that '*profess'* means '*right to freely declare of one's faith*".

Does Article 25 protect the performance of every religious practice?

[50] Ratilal Panachand Gandhi v. State of Bombay1919] (I.L.R 33 Bom. 122)
[51] Stainislaus Rev v. State of MP1977 SCR (2) 611

No, Article 25 only protect those practices which are integral parts of a religion. It is the duty of the court to decide whether a practice is an essential practice or not depending on the evidence formulated by the conscience of the community and the tenets of the religion.

- Some of the religious practices which were held essential by the Court:

1. In ***Mohd. Hanif Quareshi v. State of Bihar***[52]**:** In Hinduism, worshipping of an image or idol.
2. In ***Sarwar Husain v. Addl. Judge***: Muslims offering prayers at a public mosque.

- Some of the religious practices which were held not essential by the Court:

1. In ***Mohd. Hanif Quareshi v. State of Bihar***[53]***:*** The sacrifice of a cow in the Muslim religion.
2. In ***Sarup Singh Sardar v. State of Punjab***[54]: The right to elect members to a committee for the administration of a Gurudwara property amongst Sikhs.
3. In ***Lily Thomas v. Union of India***[55]**:** A Hindu male marrying a second wife after conversion while first spouse living.
4. In ***Nirmal Kumar Sikdar v. Chief Electroal Officer:***[56] Prohibiting photographs of a woman to be taken for electoral purposes in Islam.

Article 26

Article 26 guarantees the following rights to a religious denomination with subject to public order, morality, and health:

1. To establish and maintain institutions for religious and charitable purposes.
2. To manage its own affairs in matters of religion.

[52] Mohd. Hanif Quareshi v. State of Bihar1958 AIR 731
[53] Mohd. Hanif Quareshi v. State of Bihar1958 AIR 731
[54] Sarup Singh Sardar v. State of Punjab[1958] S.C.R. 895,
[55] Lily Thomas v. Union of India 2000(6) SCC624
[56] Nirmal Kumar Sikdar v. Chief Electroal Officer,AIR1961 Cal 289.

3. To own, acquire and administer both movable and immovable property in accordance with law.

Major judicial pronouncements on Freedom of Religion

- ***Bijoe Emmanuel and Ors. v. State of Kerala***[57]

In this case, three children of Jehovah's Witnesses sect were suspended from the school as they refused to sing the national anthem claiming that it is against the tenets of their faith. The court held that expulsion is violative of fundamental rights and the right to freedom of religion.

- ***Acharya Jagdishwaranand v. Commissioner of Police, Calcutta***[58]

The Court held that Ananda Marga is not a separate religion but a religious denomination. And, the performance of Tandava on public streets is not an essential practice of Ananda Marga.

- ***M. Ismail Faruqui v. Union of India***

The apex court held that the mosque is not an essential practice of Islam and a Muslim can offer namaz (prayer) anywhere even in the open.

- ***Ramji Lal Modi v. State of UP***

Petitioner challenged the validity of Section 295 of IPC which penalized the act or attempt of insult of a religion or religious beliefs of a class of citizens. The Court held that Section 295 is consistent with Article 25 and held it to be constitutional.

- ***Raja Birakishore v. State of Orissa***[59]

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[57] Bijoe Emmanuel and Ors. v. State of Kerala, 1987 AIR 748, 1986 SCR (3) 518

[58] Acharya Jagdishwaranand v. Commissioner of Police, Calcuttaair1984SC512

The validity of the Jagannath Temple Act, 1954 was challenged as it enacted provisions to manage the affairs of Puri temple on the grounds that it is being violative of Article 26. The court held that the Act only regulated the secular aspect of seva puja, therefore, it is not being violative of Article 26.

- ***The Durgah Committee Ajmer v. Syed Hussain Ali and Others***

The petitioners contended that Durgah Khwaja Saheb Act, 1955 violated Article 25 and 26 which provided for the appointment of Hanafi Muslims as members of Committee none of them belonging to the Chishti sect. The Court held that the Chishti sect is a religious denomination but the act does not violate the right to freedom of religion as Chishti Sufis never had the right to manage the Durgah endowment.

Sabarimala Verdict and Freedom of Religion

In 2017, a PIL was filed under Article 32 by the petitioners challenging the practice followed in Sabarimala temple which did not allow the entry of women from the age group of 10-50 years. A constitutional bench was set up in 2018 which held that the practice was unconstitutional and uplifted the ban on entry of women stating that followers of Ayyappa do not form a separate religious denomination but are Hindus only and, such a ban is not an essential practice of the religion.

Currently, in India, the restriction of morality which was earlier of societal morality has changed into Constitutional Morality. But, this term is nowhere mentioned in the constitution.
'Constitutional Morality' is a judiciary invented term which gives too much power in the hands of the judiciary. Already, the doctrine of basic structure has left too much power in the hands of the judiciary to interpret the constitution and decide anything as basic structure according to their discretion as there is no strict formula for deciding the same. If all the past decided cases applying constitutional morality are analyzed, it can be inferred that it is trying to adapt the

[59] Raja Birakishore v. State of Orissa1964 AIR 1501

country to the present norms giving supremacy to 'live with dignity'. Whether its declaration of Section 377 of IPC as unconstitutional or Sabarimala Judgment striking down the old practice of not allowing woman, constitutional morality is trying to uplift the society. The fact still remains the same that the court has a huge discretion of power in deciding cases. It is said: "*Power corrupts and absolute power corrupts absolutely*." It would be interesting to note how the court is going to exercise the power it has got under Constitutional Morality'.

3. Uniform Civil Code and Minority Rights:

Soon after independence the question of the position of personal laws got entangled into the whirlpool of national politics. On the floor of the Constituent Assembly, for about two years, the issue suffered convulsions caused by the utterances of progressive legislators, dissenting voices of their so called conservative brethren, apprehensions echoed by the spokesmen of the minorities, and bricks and buckets thrown from outside by laymen and law-men The Constituent Assembly Debates in the constitution making process revealed that the constitution makers debated the concept, relevance and utility of the Uniform Civil Code.

The Muslim members of the Constituent Assembly opposed the move with all possible intensity at their command. In this background, the arguments for and a quest for the objective evaluation of the Uniform Civil Code, will not be out of place in India which is known for its religious, cultural and lingual diversities.

The Constituent Assembly had its first meeting in December 1946. However just after the freedom of India from the grip of British imperialist, the place and shape of personal laws in the future legal order in the country got much entangled into the whirlpool of national politics. Framers of the constitution envisage to estabhsh a Sovereign, Democratic, Republic - ideas based on the ideas of justice, liberty, equality and fraternity. Later on, in 1976, words 'secularism' and 'socialism' were added to the Preamble. Fundamental rights especially regarding the right of freedom to religion was designed in our Constitution before its commencement in 1950.

Since then, in the Constituent Assembly as well as on every platform, a great deal of discussion on personal laws has taken place repeatedly.

Even prior to the commencement of the Constitution much was debated in the Constituent Assembly for and against the personal laws.

The attitude of the antagonists The Constituent Assembly debated the Uniform Civil Code under Article 35. Mohammad Ismail from Madras moved the

Uniform Civil Code and The Constitution of India following proviso for addition to Article 33 which provided that 'any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law'. He advocated that the right to adhere to ones own personal laws was one of the fundamental rights.

He asserted that personal laws were a part of the way of life of the people. In his evaluation, personal laws were the part and parcel of religion and culture.

Any interference with the personal laws, in his view would tantamount to interference with the very way of life of those who had been observing such laws from generation to generation. He elucidated that India was emerging as a secular state and it must not do anything which hinder the religious and cultural ethoes of the people.

To strenghten his argument, he cited precedents of Yugoslavia, the Kingdom of Serbs, Croats and Slovenes which were obliged under treaty obligations to guarantee to Muslims being in minority in the matter of family laws and personal status : "The Serbs, Croats and Slovene States agree to grant to Mussalmans in the matter of family law and personal status, provisions suitable for regulating these matters in accordance with Mussalman usage." To enrich his arguments, he named similar protective clauses of other European constitutions which dealt with the minorities.

However, he pointed out that such clauses were narrow in scope as they dealt with any group, section or community of the people .

Uniform Civil Code and Tlie Constitution of India and not confined to minorities only. His proposed amendments read : "That any group, section or community of the people shall not be obliged to give up its personal law in case it has such a law." His proposed amendments sought to secure the rights of people in respect of their existing personal laws. He contended that in favour of the Uniform Civil Code was counter productive and the discontentment and faithfulness would be the natural result. By following their own persnal laws, people of different caste and communities would not be in conflict with each other."

resentment, they could not succeed.

They only got some assurance from Dr. B.R. Ambedkar. (ii) The attitude of protagonists Many members of the Hindu community expressed their opinions contrary to the views of Muslim members. K.M. Munshi expressed the following views.

(A) Even in the absence of Article 35 it would be lawful for Parliament to enact a uniform civil code, since the article guaranteeing religious freedom gave to the state power to regulate secular activities associated with religion.

(B) In some Muslims countries, for example, Turkey and Egypt personal laws of religious minorities were not protected;

(C) Certain communities amongst Muslims, for example, Khojas and Memons did not want to follow the Shariat, but they were made to so under the Shariat Act, 1937;

(D) European countries had uniform laws applied even to minorities;

(E) Religion should be divorced from personal law; The Hindu Code Bill did not conform in its provisions to the precepts of Manu and Yajnavalkya;

(F) Personal laws discriminated between person and person on the basis of sex which was not permitted by the Constitution;

Uniforn Civil Code and Constitution of India :

(G) People should outgrow the notion given by the British that personal law was part of religion." Conclusively, he beseeched to divorce religion from personal laws.

"We want to divorce regions from personal laws from what may be called social relations or from the rights of the parties as regards inheritance or succession. What have these things got to do with religion, we really fail to understand." He advised Muslim brethren in these words.

"I want my Muslim friends to realise this that the sooner we forget this isolationist outlook on life, it will be better for the country.

Religion must be restricted to spheres which legitimately appertain to rehgion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible into a strong and consolidated nation."

Chapter 9: Emerging regime of new rights and remedies

Topics for study:

1. ***Compensatory jurisprudence***
2. ***Right to education***
3. ***Reservation for women***

1. Compensatory jurisprudence:

Various Reports of Law Commission of India as well of Committees on Reforms of Criminal Justice administration have played a pivotal role in developing compensatory jurisprudence in India. The Law commission of India in its hitherto submitted Reports on the Indian Penal Code,1860 (IPC)and the Code of Criminal Procedure,1898 and of 1973 has deliberated upon the issue of justice to victims of crime and has also suggested some proposals for reform. The Malimath Committee (2003) on Reforms of Criminal Justice System in India has also laid emphasis on the participation of victims in the criminal justice processes and has advocated for compensation and restitution of the victims.

Compensation under Indian Penal Code, 1860 In India, criminal law does not provide for payment of compensation to victim of crime for any 'loss' or 'injury' — physical, mental or psychological caused to him by the offender. With a view to give prominence in the Indian Penal Code, 1860 to the payment of compensation out of fine imposed and to give a substantive power to the trial Court to this effect, Law Commission of India in its 42nd report (1971) suggested the insertion of Section 62 in the Penal CodeThe Parliament did not pay attention to the recommendations of the Law Commission.

But, the existing provision relating to compensation was inserted in the Code of Criminal Procedure through amendment and its application was expanded.It was provided in the modified Section 357 (545 of old Code) of Criminal Procedure Code,1973 that, in every case where the

new Section 62 of the Penal Code is attracted, but the Court decides not to make an order for payment of compensation out of the fine, it should record its reasons. However, Justice R. L. Narasimham, member of the Law Commission opined that Section 357 (Section 545 of Criminal Procedure Code, 1898) is wholly unsatisfactory because of some reason.

Firstly, under Section 545, Cr. P.C. (357 New Code) compensation can be given only in money, to the injured party. There is no provision for direct reparation for the harm caused.

Secondly, the procedure involved in the section is circuitous, dilatory, expensive and caused much harassment to the injured complainant. Besides, it does not cover cases of those accused persons who are unable to pay the fine.

The evil effect of short term imprisonment persists and the complainant also may not be able to derive any advantage as far as reparation is concerned. Accordingly Justice R. L. Narasimham recommended deletion of Section 545 (Section 357 New Code) from the Criminal Procedure Code and insertion of a new section in Indian Penal Code to make improvements in the law concerning payment of compensation by the offender.

Basically it gave emphasis to compensation by a convict out of the fine imposed upon him for committing an offence against the human body, property, defamation or abetment of or criminal conspiracy to commit such offence. Secondly, the provision favored compensation to the victim by pleading for imposition of a statutory duty on offenders to re compensate monetarily or otherwise, the victim. The second approach not only shows equal concern to victim of crime but also visualizes a real and reasonable compensation of victim. Unfortunately, whole of the recommendations of the Law Commission did not find a place in the provision of the Indian Penal Code, 1860. 156th Report of Law Commission, 1997 In 1997, The 14th Law Commission, in its 156th Report on the IPC recalling its earlier recommendations made in 1994 in its 152nd Report and in its 154th Report 1996, on the Cr.P.C. for framing a 'Victim Compensation Scheme' by State governments and realizing that the payment of compensation as an 'additional punishment' not only requires an inquiry into a variety of circumstances but also a few cases may not warrant compensation by way of punishment, opined that it would be 'not appropriate' to include order of payment of compensation by way of punishment.

226th Report of Law Commission, July 2009, Recommendation Regarding Compensation under Indian Penal Code, 1860 The law commission submitted its report to the Hon'ble Supreme Court of India for its consideration in the pending proceedings filed by one Laxmi in W.P. (Crl.) No. 129 of 2006 on "The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a law for Compensation for Victims of Crime" Law commission recommended that a separate Act should be proposed for dealing with compensation to victims of acid attacks, rape, sexual assault, kidnapping etc. It suggested a broader legislation so that it can deal with the problems of victims of different crimes who need rehabilitation and compensation for survival.

Malimath Committee Report11, 2003 In March 2003, the Malimath committee in its Report on reforms on the Criminal Justice System in India, has, among other things also delved into 'justice to victims' and urged the compensation under this section may be directed to be paid—

(a) to any person who has incurred expenses in prosecution for defraying expenses properly incurred;

(b) to any person for any loss or injury caused by the offence, when compensation is in the opinion of the Court, recoverable by such person in a civil Court;

(c) in the case of conviction of any offence for having caused the death of another person or of having abetted the Commission of such offence, to the person who are, under the Fatal Accident Act. 1855, entitled to recover damages to the person sentenced, for the loss resulting to them from such death; or

(d) In the case of a conviction for any offence which includes, theft, criminal misappropriation, criminal breach of trust, or cheating or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, to any bona fide purchaser of such property for the loss of the same, if such property is restored to the possession of the person entitled.

Legislative Provisions Regarding Compensation There is neither a comprehensive legislation nor a well designed statutory scheme or a public policy in India either allowing a victim of crime to seek compensation from the offender and/or state or to participate, as a matter of right, in the criminal justice process. However, a careful reading of provisions of Code of Criminal

Procedure, 1973 as amended on date and that of Probation of Offender's Act, 1958 reveals that a few sections contained therein can be invoked to provide justice and compensation to the victims of crime. Provisions in India There is no comprehensive legislation providing for compensation by the State or by the offender to the victims of crime. The Criminal Procedure Code is the first and may be the oldest legislation in India to deal with the subject of compensation to the victims of crime. The provisions of Criminal Procedure Code concerning victim compensation occupy a prominent place in the progressive development of the law relating to victim compensation through judicial approach.

2. Right to Education :

Article 21A added as a new article by the Constitution (86th Amendment) Act 2002 provides

for free and compulsory education for all children between the age of 6 to 14 years.

Article 21A (1) states that the State shall provide free and compulsory education to all Citizens of the age of six to fourteen years" . The Directive Principles of State Policy enumerated in our constitution lay down that the state shall provide free and compulsory education to all Children up to the age of 14 years" . During the formation of the Constitution, the assembly had only included it among the Directive Principles of State policy and it found no room in Part III of the Constitution.

The right to education up to fourteen years as a fundamental right is only a recent occurrence. tHowever it has been quite different from that of the other constitutional social rights, the main reason being that Article 45 of the directive principles gave a very different promise than the other provisions within the Constitution as it imposed a time-limit of ten years to implement the right to free and compulsory primary education.

Article 45 is the only article among all the articles in Part IV of the Constitution, which speaks of a time-limit within which this right should be made justifiable. The framers of the Indian Constitution were aware that for the realization of a person's capabilities and for full protection, Right to education was an important tool.

In addition to Article 45, the right to education has been referred in Articles 41 and 46 of the directive principles as well. The theory of the complementary nature of rights declared in Part III

and Part IV, and the harmonious interpretation of these rights has been the foundation for the realization of primary education being declared a fundamental right today in India. The Constitutional 86th Amendment Act was passed in 2002 and inserted in the Constitution as Article 21A.

This Amendment Act, 2002, made three specific provisions in the Constitution to facilitate the realization to provide free and compulsory education to children between the age of six and 14 years as a fundamental right. While adding Article 21A in Part –III of the fundamental rights and slightly modifying Article 45, it also added a new clause (k) under Article 51A of the fundamental duties and it stated that the parent or guardian is responsible for providing opportunities for education to their children between six and 14 years.

Right to Education under Article 41 of the constitution lays down that the state shall, within the limits of its economic capacity and development" make effective provision for securing the right to education. Article 45 of the Constitution provides that the State shall provide early childhood care and provide compulsory education for all children until they complete the age of six years" .

The obligation of the state to provide education to all children till the age of fourteen years would still depend upon the economic capacity and development of the state. Similarly, Article 46 of the Constitution requires the State to promote with special care the educational and economic interests of the weaker sections of the people, especially of the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and all forms of exploitation" .

Moreover, Articles 29 and 30 which are incorporated in the part III of the Constitution as fundamental rights, also lay down the following provision in regard to right of education:

No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on the grounds only of religion, race, caste, language or any of them"

Right to Education and Judicial Contribution.

The Indian Constitution is known to be a document committed to social justice.

The Indian Constitution has recognized education as the essence of social transformation, as is evident from its education specific Articles.

The right to education up to the age of fourteen years has been raised by the decision of the Supreme Court in the Unni Krishnan case where it was held by the court that right to education for the children of the age of 6 to 14 is a fundamental right. The Constitution (86th) Amendment Act, 2002, has added new Article 21 A after Article 21 and has made education for all children of the age of 6 to 14 a fundamental right" .

The judicial decision from which the right to education emanated as a fundamental right was from the one rendered by the Supreme Court in the case of Mohini Jain v. State of Karnataka. It was held that the right to education is a fundamental right guaranteed under article 21 of the Constitution and that dignity of individuals cannot be assured unless accompanied by the Right to Education and that charging of capitation fee for admission to educational institutions would amount to denial of citizens' right to education and is violative of article 14 of the Constitution" .

The declaration of the right to education as a fundamental right has been further upheld by the eleven-judge Constitutional Bench of the Supreme Court in ***T. M. A. Pai Foundation v. State of Karnataka[60]"*** the court held that governments and universities cannot regulate the admission policy of unaided educational institutions run by linguistic and religious minorities, but state governments and universities can specify academic qualifications for students and make rules and regulations for maintaining academic standards. The same principle applies in the appointment of teachers and other staff. An unaided minority educational institution would be free to hire as it pleased as long as some essential qualifications were adhered to. Minority educational institutions would have to comply with conditions laid down by universities or boards to get recognition or affiliation.

While charging of capitation fees was held illegal and categorically in the case of ***Mohini Jain v. State of Karnataka[61]*** , the Supreme Court held that right to education flows directly from the right to life as the right to life and dignity of an individual cannot be assured unless it is

[60] T. M. A. Pai Foundation v. State of Karnataka(1993)1SCC645
[61] Mohini Jain v. State of Karnataka1992AIR1848

accompanied by the right to education and the fundamental rights guaranteed under Part III of the constitution of India, including the right to freedom of speech and expression and other rights under article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity. In the Islamic Academy v. State of Karnataka"case, the court held that the state can fix the quota for admission to these educational Institutions but it cannot fix fee and also admissions can be done on the basis of common admission test and on the basis of merit.

In the case of ***P. A. Inamdar v. State of Maharashtra***" [62] , the court has ruled with reference to the Islamic Academy stating to the effect that the state could fix the quota for admissions to private professional Educational institutions. Similarly, the Right to education is interpreted in the right to development as a human right.

The Supreme Court held that the right to development is also considered to be a basic human right".

In another case, ***Institute Commission of India v. St. Mary's School***"[63] , the court held the desire to acquire more qualification is an inherent human right. The chief secretary of Delhi Administration indicated that it would take about two years for filling up the 5302 vacancies of trained graduates" .

The Supreme Court held that there cannot be any justification for such inordinate delay. Right of children to free and compulsory education is now a fundamental right under article 21A, which has been infringed due to acute shortage of teachers which is affecting their studies and administration of school. Therefore, the children have right to basic necessity for their education and quality education, without any dissemination on the ground of their economic, social and cultural background"

The Right to Education includes safe education because "the condition of not permitting new school within radius of 5 kms of existing school is not mandatory" .

[62] P. A. Inamdar v. State of Maharashtra(2003)6SCC697
[63] Institute Commission of India v. St. Mary's School(2008)2SCC390

In the same vein, the Supreme Court held that the right to education includes right to safe education. While granting recognition to a new school they need to follow certain criteria such as the condition of not permitting a new school within the radius of five kms of existing school provides relaxation so it has be constructed liberally" . In the case dealing with the plight of prostitutes, the Supreme Court placed emphasis on the need to provide prostitutes opportunities for education and training so as to facilitate their rehabilitation" .

Basic education is a constitutional obligation on the state, as well as, societies running educational institutions. The Supreme Court held that the provision of free and compulsory education of satisfactory quality to children from the disadvantaged and weaker section is not merely the responsibility of schools run or supported by the appropriate government, but also of schools which are not dependent on government funds" The Supreme Court held that the condition cannot be strictly constructed as an absolute mandate without any exception" .

However, restraining the members of Schedule Castes and Scheduled Tribes from availing education loan from banks shall be wholly unreasonable and unjustified and violative of the right to education enshrined under article 21A of the constitution" .

The right to admission to an educational institution is a right which cannot be denied on the grounds of religion, race, caste, language or any of them. An educational institution receiving aid out of state funds cannot refuse admission to the children belonging to a particular community. Since minorities have rights to establish and administer educational institutions of their choice, they can be permitted to reserve 50% of the seats for members of their own community in the educational institutions so established by them" .

All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice" . It also prohibits the State (while granting aid to educational institutions) from discriminating against any educational institution on the ground that it is under the management of a minority, whether based on religion or language" .

Besides, since the minorities which are based on religion or language are entitled to establish and administer educational institution of their choice, this serves two purposes; namely, the purpose of conserving their religions, language or culture, and also the purpose of granting general education to their children in their own language" .

The Indian Constitution deals with the right to establish educational institutions but it does not carry with it the right to receive recognition and affiliation. Though there is no fundamental right to recognition or affiliation, they cannot deny affiliation or recognition to minority institutions except under certain terms and conditions" . Therefore, the minority institutions receiving aid out of State Fund cannot deny admissions to the members of other backward communities.

3. Reservation for women:

1.Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat (Article 243 D(3))

2. Not less than one- third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for women (Article 243 D (4))

3. Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality (Article 243 T (3))

4. Reservation of offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and women in such manner as the legislature of a State may by law provide (Article 243 T (4))

Bibliography

1. Constituent Assembly Debates vol. 1 to 12 (1989)

2. H M Seervai, Constitution of India vol. 1-3 (1992), Tripathi, Bombay

3. G. Austin, History of Democratic constitution, the Indian Expenditure (2000), Oxford.

4. G. Austin, Indian constitution: cornerstone of a Natio (1972)

5. M. Galanter, competing equalities – law and the backward classes in India (1984), Oxford.

6 .D.D. Basu, Shorted constitution of India (1996), Prentice Hall of India Delhi.

7. www.infibnet.com