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Some Reflections on 'Rights' and Directive Principles in the Constitution of India*

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*[**Abstract:** The Indian Constitution received, as widely acknowledged, Euro-American theory of human rights. However, it also innovates the received theory. It contemplates a progressive state and polity that is not just organized power but also the civil society as a potent source for promotion and protection of human nights. Yet the Indian Constitution elaborates a conception of regulated rights, which involves simultaneous disempowerment and re-empowerment of state in ways that complicates governance and politics and Constitutional development. This paper is not an attempt to summarize or to survey the Constitutional development of last Seventy five years. I will merely attempt to highlight some of the most significant Constitutional problems, and how they have been talked, in their socio-economic context. I will also try to evaluate, to what extent the original intent of constituent assembly of removing the dichotomy between fundamental rights and directives, has been achieved by the state and judiciary.]*

General:

The Indian Constitution is not a mere framework of Government. It is a forward-looking document, which visualizes profound social and economic change. The Constitution emphasizes that such change must come through Constitutional methods and without the sacrifice of dignity and liberty of the individual.[1] The chapters on fundamental rights and directive principles of state policy contain an enumeration of basic values and aspirations of the Indian society for which it has fought for centuries. "It is a fallacy to regard fundamental rights as gift from the state to its citizens. Individual possess basic human rights independently of any Constitution by reason of the basic fact that they are members of human race. These fundamental rights are important, as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of minorities and officials and to establish them as legal principles to be applied by the courts".[2]

The Indian Constitution received, as widely acknowledged, Euro-American theory of human rights. However, it also innovates the received theory. It contemplates a progressive state and polity that is not just organized power but also the civil society as a potent source for promotion and protection of human nights. It thus outlaws practice of 'untouchability.'[3] It enunciates a fundamental right against exploitation[4]- the Constitution outlaws bonded and slave labour, traffic in human

*Faced with complexity and dichotomy of "rights text" in the constitution, and phases of variation in the judicial and state interpretation of these "texts", the paper is necessarily selective, in the treatment of 'rights'.

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[1] In This Paper, 'Rights' unless prefixed by "fundamental', includes 'directives principles' as well.

[2] *M. Nagraj* v. *Union of India* A.I.R. 2007 S.C. 71.

[3] Article 17, the Constitution of India, 1950.

[4] Article-23-24, the Constitution of India, 1950.

beings. Certainly, the Constitution 'dichotomies' 'rights' into justifiable (fundamental, civil and political rights- Part III) and non justifiable, livelihood, (socio-economic rights called directives-part-IV)[5], and unlike the first amendment of the American Constitution, there exist no near-absolute rights in the Indian Constitution. Almost all rights have their limitations spelt and in the Constitutional provision itself. This entails that Indian Constitution elaborates a conception of regulated rights, which involves simultaneous disempowerment and re-empowerment of state in ways that complicates governance and politics and Constitutional development. This paper is not an attempt to summarize or to survey the Constitutional development of last Seventy five years. I will merely attempt to highlight some of the most significant Constitutional problems, and how they have been talked, in their socio-economic context. I will also try to evaluate, to what extent the original intent of constituent assembly of removing the dichotomy between fundamental rights and directives, has been achieved by the state and judiciary.[6]

The Inaugural confrontation:

Article 14 of part III contains the principle of equality. It declares that state shall not deny to any person equality before the law or the equal protection of laws within the territory of India. Conceptions of 'equality before the law' and 'equal potation of laws', is one of the dominant principle of the Constitution, which began their long and tumultuous journey soon after the adoption of the Constitution. The first amendment, hardly before the ink on the Constitution dried, reprogrammed the Constitutional conception of right to equality. It enshrined basic right of affirmative action for millennially deprived people. Thus, unlike the United State's constitutionalism, affirmative action in India is not a pre-eminent gift of judicial policy making which is subject to manifold vagaries.[7]

In 1950, Madras Government issued an order allotting seats in the state medical colleges, community wise. The order was in pursuance of article 46 (a directive) of the Constitution laying down that state shall promote with special care, the educational and economic interests of the weaker suctions of the peoples and in particular of the scheduled caste and scheduled tribes and shall protect them from social injustice and all forms of exploitation. A seven-judge Bench of Supreme court struck down the classification as being based on caste, race and religion for the purpose of admission to educational institutions on the ground that article 15 did not contain a clause such as article 16(4). The court held that-'the directive principles of state policy have to confirm and run as subsidiary to the chapter of fundamental rights'.[8] In another case, a government order requisitioning land for construction of a colony for *harijans* was held to be discriminatory under article 15(1) because the facilities were being given to them as a community as such when the other members of the public were equally in need of similar facilities.[9]

The parliament, to tide over these difficulties created by above decisions, in the way of helping backward classes by making discriminatory provisions in their favour, added Art 15(4), by way of first amendment Act 1951. Article 15(4) says that the state is not prevented from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the scheduled caste and scheduled tribes.

The fact that the addition of article 15(4) is regarded as original along with article 16(4), which enshrines positive obligation on the pat of state for socio-economic change, the Constitution visualises and predates the *Rawlsian difference principle*[10] of social justice. Such principles[11] of social change give the state (government and parliament) plenary powers of reasonable regulation of fundamental rights. However, legislator's power of reasonable regulation is not unbound. In the subsequent discourse of constitutional development through judicial review; the courts have evolved the theory of *guided power*. According to which, every discretionary power is not discriminatory. Equality is not violated by mere conferment of

[5] Reasons for dichotomy *see* B.N. Rau's Notes on fundamental rights. The two reasons he offered were the difficulty arising out of uncertain judicial interpretation, of the being , the nature of socio-economic rights widely postulates positive action on the part of state which depend on the capacity (economic or otherwise) of state. Interestingly no debate occurred in the assembly as to who/or the mechanism which would decide this capacity.

[6] Courts are not included into the definition of state either in Article-12 or 36 of the Constitution of India, 1950..

[7] Upendra Baxi, RULE OF LAW IN INDIA: THEORY AND PRACTICE" *in* Randall Peerenboom (ed.) " ASIAN DISCOURSES OF RULE OF LAW: THEORICAL AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES", 329 (2004).

[8] *State of Madras* v. *Champakam Dorairajan*, A.I.R. 1951 S.C. 226.

[9] *Jugwant Kaur* v. *state of maharastra*, A.I.R. 1952 Bom.461.

[10] John Rawls, A THEORY OF JUSTICE, 75 (1971).

[11] *See*, for example, Clauses-2-5 of Article 19; Article 23, the Constitution of Indian, 1950.

discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This theory is based on the assumption that in the event of arbitrary exercise, it would be corrected by courts.

Equality principle:

Article 14 says that the state shall not deny any person equality before the law and equal protection of laws within the territory of India. Articles 15, 16 and 29 forbid discrimination on grounds such as religion, caste, race etc. Articles 325 and 326 guarantee the right to vote to every citizen of adult age and forbid discrimination on grounds of religion, race, caste or sex in respect of those rights. Article 335 obliges the state to maintain efficiency of administration while taking into account the claims of scheduled caste and scheduled tribes (weaker stations broadly). Although these provisions fall outside part III, they supplement the guarantee of equality contained in that part.

It is said that article 14 contains the British as well as American concept of equality[12]. Dicey considered equality before law as an important aspect of the rule of law. The phrase "equality before the law" has been used to import the British concept. The Words "equal protection of laws" denotes the inclusion of American concept embodied in the fourteenth amendment. The Indian provision is, however, much more extensive and comprehensive than either of those concepts.[13] Equality before law as understood in British constitutional law means the subjection of all private citizens as well as government official to the ordinary law and ordinary courts. Further, it also means the absence of discretionary authority in the executive officials. Article 14 does not merely provide for equality between government officials and citizens but also between one citizen and another (substantive equality concept). While the British concept of equality is contemplated against the actions of the executive alone, article 14 addresses itself to the legislature also. It also forbids the legislature from giving uncontrolled discretionary authority to the executive. The fourteenth amendment of the American Constitution originally was binding only on the state governments and not on the federal government. It was because of the interpretation of the supreme court of the United States that it came to be applied to the federal government. Article 14 of the Indian Constitution is binding on parliament, the state legislature and all local and other authorities within the territory of India or under the control of the government of India.[14] Further, the specific guarantees contained in articles 15, 16, 17 and 29(2) rules out the possibility of any discrimination on the grounds of religion, race, sex etc. It is well known that in the absence of such specific guarantees, the equal protection clause could not protect the Negroes in the United States against discrimination for long time until the Supreme Court interpreted some provisions and congress enacted suitable legislations.[15]

The interpretative discourse of article 14 has seen the liberal importation from American Constitutional law. Article 14 does not require that all persons, irrespective of their natural differences, should be treated as equal.[16] A law is bad if it arbitrarily selects some persons for differential treatment. But if a law provides differential treatment to a class of people, it is not valid unless the classification is reasonable. For this, *nexus test* was devised which reigned the judicial floor until late 1970s.[17] A classification is reasonable if-

1. It is founded on an intelligible differentia which distinguishes those that are grouped together from others, and
2. Such a differentia has rational relation to the object of the act. This test is known as nexus test.

The principle that a law is not violative of equal protection if it is based on reasonable classification is recognized in the United States as well as in India. This principle was broad enough to accommodate various situations, which call for a differential treatment. However the courts in India has unnecessarily bound themselves down to the to the nexus test which is much narrower and specific. Therefore, the nexus test had always its critics.[18] Yet the most eloquent criticism came from

[12] See Justice *S.R. Das in State of W. Bengal* v. *Anwar Ali*, A.I.R. 1952 S.C..75

[13] Tripathi P K. SOME INSIGHTS INTO FUNDAMENTAL RIGHTS, 49 (1972); *Srinivasa theater* v. *Govt of T.N*, (1992) 2 S.C.C. 643; *St. Stephens's college* v. *University of Delhi*, A.I.R. 1992 S.C. 1630 at 1662; *Indira Sawhney* v. *Union of India*, (2000) 1 S.C.C. 168.

[14] Article-12, the Constitution of Indian, 1950.

[15] *See* Tripathi note 13 at 187.

[16] Sir Iner Jenning. *quoted* by V.N. Shukla, COMMENTARY ON CONSTITUTION OF INDIA, 38 (2007).

[17] *State of W. Bengal* v. *Anwar Ali*, A.I.R. 1952 S.C. 75.

[18] R. S. Sharma, THE SUPREME COURT IN THE INDIAN CONSTITUTION 131 (1959).

Professor P. K. Tripathi. The nexus test, as stated above, may be useful in certain situations but cannot be of universal application. According to Prof. Tripathi, three questions are relevant in the examination of the reasonableness-

1. Why the differential treatment has been provided (the why question),
2. What is the differential treatment (the what question) and
3. To whom does the differential treatment apply (the whom question).

According to Prof. Tripathi, an objectionable feature of the nexus test is that it notices only the object (why question) and the criterion for classification (whom question) and their mutual relationship. It altogether ignores the second or the 'what' element, i.e. the special treatment the statute devices for the selected class of persons and the relationship of this element with the other two.[19]

However, since 1970, the equality in 14 has acquired new and important dimensions. Until then, the requirement of article 14 were met it a law or administrative action satisfied *classification doctrine through nexus test*. In *E.P. Royappa* v. *State of Tamil Nadu*,[20] Bhagwati J. speaking for himself, Chandrachud, and Krishna, JJ. Proponded a new approach to article 14 in the following words,

"*Equality is dynamic concept with many aspects and dimension and it cannot be cribbed, cabined and confined within traditional and doctrinaire limits. Form 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 republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of article-14."*

The doctrine of *reasonableness or non- arbitrariness*[21], as some call it, has came to be established through the cases of *Maneka Gandhi* v. *Union of India*,[22] and *Ajay Hasaja* v. *Khalid Mujib*.[23] The reasonableness in state action is demand of article 14 and the classification doctrine in one of the methods of meeting that demand.[24] Our primary concern, however, in this sub-heading is to capture the dynamics of the claims of equality, in general and constitutionally inspired establishment of a society with substantial equality. As noted earlier, the Constitution re-empowers the state to undertake socio-economic change. Articles 15 (3) (4), 16(4) read with article 46 are some of instances of such re-empowerment. Of-late the courts have taken more positive views on equal protection clause of article 14. The expression 'equal protection of laws' is now being read as a positive obligation on the state to ensure equal protection of laws by bringing in necessary social and economic changes so that everyone may enjoy equal protection of the laws and nobody is denied such protection. If the state leaves the existing inequalities untouched by its laws, it fails in its duty of providing equal protection of laws to all persons.[25] This Constitutional conception of equality propounded the theory called *affirmative action*, which involves both executive and legislative action. This interpretation of equality is supported by article 38, which is the only operational provision, apart from preamble, that refers to justice- social, economic and political. However, the concept of justice is not limited only to directive principles.[26] There can be no justice without equality. Article 14 guarantees the fundamental right to equality before the law on all persons. Great social injustice resulted from treating sections of Hindu community as untouchables and therefore, article

[19] In his SOME INSIGHTS INTO FUNDAMENTAL RIGHTS, Prof. Tripathi intuitively shows inefficacy of nexus test in several cases such as *M.R. Balaji* v. *state of Mysore* A.I.R. 1963 S.C. 649

[20] A.I.R. 1974 S.C. 555 at 38.

[21] M. P. Singh, THE CONSTITUTIONAL PRINCIPLE OF REASONABLENESS 31 (1987) 3 S.C.C. (Journal).

[22] A.I.R. 1978 S.C. 597.

[23] A.I.R. 1981 S.C. 487.

[24] The shift from nexus test to the doctrine of non-arbitrariness has its own complications for techniques of Judicial review . In nexus test, technique of strict scrutiny or primary review in applied (which is more rigorous), in later case, *Wednesbury principle* (or secondary review) in applied. *See Om Kumar* v. *Union of India*, A.I.R. 2000 S.C. 3689. While on the other hand, judicial incorporation of *due process* of law, reasonableness, in article 21 through article 14 demands higher standard and intensity of techniques of judicial review of administrative and legislative actions of state (this forms a subject matter of separate enquiry).

[25] *St. Stephen's College* v. *University of Delhi*, A.I.R. 1992 S.C. 1630 at 1662.

[26] *M. Nagraj* v. *union of India* A.I.R. 2007, S.C. 71 at 86*; I R Coalho* v. *State of T.N.* (2007) 2 S.C.C. 1. Where justice Sabharwal observes that it is not that social content is found in part IV only, rather it is also present in part III of the constitution.

17 abolishes untouchability and article 25 permitted the state to make any law providing for throwing open all public Hindu religions temples to untouchables. Therefore, provisions of part III also provide for political and social justice.

Thus, we are concerned with the conflicting claims of right of an individual of equal opportunity on one hand and preferential treatment to an individual belonging to a backward class (including SC, and STs) in order to bring about equal level-playing field in mutual social relations. This brings us to the concepts of reservation and affirmative action. Reservation as a concept is very wide. Different people understand reservation to mean different things. One view of reservation as a generic concept is that reservation is anti-poverty measure. There is a different view, which says that reservation is merely providing a right of access and that it is not a right to redressal. Similarly, affirmative action as a generic concept has a different connotation. Some say that reservation is not a part of affirmative action whereas others say it is.[27]

Our Constitution has however, incorporated the word 'reservation' in article 16(4), which is not there in article 15(4). Instead, article 15(4) contains the phrase 'special provision in favor of…. Ever since the judicial affirmation of a 'fundament right to reservation[28]' (or affirmative/compensatory discrimination) for socially and educationally backward classes, people belonging to dominant ethnic majority has contested it as violation of their basic right to equality.[29] Such processes of affirmative action have been sustained in India through the dynamics of multi-party democratic system and not by black letters of the Constitution given the fact that article 15(4) and 16(4) has been pronounced by judiciary to be enabling in nature and not right in *stricto sensu*.[30] Eminent political scientist Morise Jones observes that democratic polity (multiparty) envisages some basis for democratic mobilization. In developed countries, generally, these are ideology or class which both were absent in India. In its place, dynamics of reservation provides for such mobilization. He further says that this is one of the major reasons for the success of Indian democracy. Thus, the party in power (both at Center and State) feel compelled to keep on such processes and initiate the new ones.[31]

On the other hand, such processes have caused political violence e.g. recent Gujjar's agitation in Rajasthan for being included in the scheduled caste category. The primary reason for the emergence and continuance of caste movements and agitations is the lack of objective criteria and data for determining beneficiaries (the '*whom*' question in Prof. Tripathi's terms) of affirmative action.[32] Thus, affirmative discrimination is a method for ameliorating the conditions of backward sections of society. Unless used with vision and insight into social dimensions of the problem, it is likely to create vested interests in backwardness. Since the power of delineating, the backward classes are vested with the governments it is alleged that such powers are used to serve short-term political end, which ultimately harms the society. With this in view, the supreme court has tried to reconcile the provisions under article 15(1) and 16(2) with 15(4) and 16(4), so that protective discrimination for backward classes, which is a legitimate means of social change/justice, does not exclude the basic postulate of the Constitution, namely the equal protection of the laws and equality before law.[33]

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[27] For a lively discussion on this point *see* Ashok Acharya, *AFFIRMATIVE ACTION FOR DISADVANTAGED GROUPS: A CROSS CONSTITUTIONAL STUDY OF INDIA AND THE US in* Rajrrv Bhargava's (ed) POLITICS AND ETHICS OF INDIAN CONSTITUTION 267 (2008).

[28] *See* M. P. Singh, *ARE* ARTICLE 16(4) AND 15(4) FUNDAMENTAL RIGHTS? 31 (1994) 3 S.C.C. (J), P. N. Singh, PROMOTING EQUALITY THROUGH RESERVATION: A CRITIQUE OF JUDICIAL POLICY AND POLITICAL PRACTICE 20 DELHI L. REV. 23 (1998).

[29] *E.g.* Mandal movement of early 1990s, again such movements were revived in 2007 with the union government's decision of providing reservation to backward classes in central educational institutions.

[30] The Supreme Court has observed that article 16(4) and 15(4) are only enabling clauses and no writ can be issued compelling the government to make a reservation. *See P&T SC & ST Employees Association* v. *Union of India* A.I.R. 1989 S.C. 139; *Indira Sawhney* v. *Union of India* A.I.R. 1993 S.C. 477.

[31] *See* Generally *Morise Jones,* THE GOVERNMENT AND POLITICS OF INDIA, (1978).

[32] There is a lively argument on this point in the case of *Ashok Kumar Thakur* v. *Union of India and Others* (2008) 6 S.C.C. 1.

[33] *Ashok Kumar Thakur* v. *Union of India and Others,* (2008) 6 S.C.C. 1.

Taking Directives seriously:

Do the directive principles have the force of law? It has often been said since they are not justiciable; they are not laws in *stricto sensu*,[34] which I believe is not true with reference to all directive principles. The Supreme Court said in one of its earlier pronouncements that these principles have to confirm to and run subservient to the fundamental rights.[35] This meant that if there is a conflict between a fundamental rights and a directive principle, the former must prevail. This is, however, not true. Firstly, because through the first as well as twenty-fifth constitutional amendments,[36]certain directive principles have been given place of superiority. The first amendment expressly empowered the state to discriminate in favour of the backward classes of the citizen- an object, which is stated in Article 46, a directive principle. Similarly Twenty-fifth amendment declares that a law enacted for the purpose of implementing any of the directive principles stated in clauses (b) and (c) of article 39 shall not be called in question in any court on the ground that it is inconsistent with articles 14, 19 and 31.

The second reason for calling the directive principles, 'laws' is that they are the provisions of the Constitution. This reflects the original intent of the constituent assembly, which dichotomized the general regime of rights on practical/convenience ground. Although they are not [37] justiciable, the state is bound to give effect to them. The provision of the Constitution, including the fundamental rights must be read in the context of these principles. Where there is a conflict, the rules of harmonious construction must be followed to resolve it. This approach was advocated by Prof. P.K. Tripathi in one of his writings in 1972.[38] Happily after the Minerva Mills[39] the harmony between the two has become part of basic structure doctrine.

The initial years, after the inauguration of the Constitution, was a time of dedicated leadership of Indian national polity. Land reform and amelioration of the conditions of peasants, workers and weaker suctions were important issues at the time of independence. In the spirit of that dedication and to redeem the price of peoples' support in freedom struggle, the union government in pursuance of socialist agenda carried out first amendment act in 1951 (It is important to note that most of the MPs in 1951 had been member of the constituent assembly). It was through this amendment act, articles 31A and 31B along with *ninth schedule* were inserted in the Constitution. Article 31A was primarily intended towards land reform and article 31B protected such progressive legislation from being invalidated on ground of infringing fundamental rights.

By 1970s, about three decades of independence had passed; but no appreciable progress had been made towards securing better socio-economic rights of the people. Peasant and student monuments (e.g. Jayprakash Narayan's total revolution agitation) had beleaguered the central government. *This promoted the radical socialist ideas* in the country even within the ruling party.[40] This necessitated enactment of laws like Monopolies and Restrictive Trade Practices Act 1969, Foreign Exchange Regulation Act 1973 and launching of Garibi Hatao (20 point) Programme. The purpose of these laws was to implement the directives contained under article 39 of the Constitution. The preamble of Monopolies Act 1969 read as follows- "An act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected herewith or incidental thereto (emphasis added).

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[34] "Not all of then (directives)… are either so fundamental as to be enshrined in the constitution or such as their neglect will frustrate the constitutionally desired social order" *See* Upendra Baxi, THE LITTLE DONE, VAST UNDONE- SOME REFLECTIONS ON READING GRANVILLE AUSTIN'S THE INDIAN CONSTITUTION, 1 JOUR. OF INDIAN LAW INSTITUTE 345 (1967); *See also* by some author DIRECTIVE PRINCIPLES AND SOCIOLOGY OF INDIA LAW, 2 JOUR. OF INDIAN LAW INSTITUTE 245 (1969)

[35] *State of madras* v. *Champakam Dorairajan* A.I.R. 1951 S.C. 226 at.228

[36] The validity of these amendments has been upheld by the Supreme Court in *Shankari Prasad* v. *Union of India* A.I.R. 1951 S.C. 89; *Keshvanand Bharati* v. *State of Kerala* A.I.R. 1973 S.C. 1461.

[37]The Karanchi Resolution of 1931 on which member of constituent assembly drew heavily, and also Nehru report of 1929 does not contain such division of rights. *See* B. N. Rau, NOTES ON FUNDAMENT RIGHTS in B Shiva Rao, FRAMING OF INDIAN CONSTITUTION-SELECT DOCUMENTS 21 (1966).

[38] P. K. Tripathi, DIRECTVE PRINCIPLES OF STATE POLICY: THE LAWYER'S APPROACH TO THEM HITHERTO, PAROCHIAL, INJURIOUS AND UNCONSTITUTIONAL in SPOTLIGHT'S ON CONSTITUTIONAL INTERPRETATIONS 213-28 (1972).

[39] *Mineva Mills Ltd* v. *Union of India* (1980) 3 S.C.C. 625.

[40] *Se*, generally Bipan Chandra, INDIA AFTER INDEPENDENCE 1947-2000 (2000).

How effective these enactments, along with various legislations regulating wages[41] and recent National Rural Employment Guarantee Act 2005, have been in achieving and securing socio-economic rights contained in directives of part IV, forms subject of separate investigation. We are here concerned with social economic factors and political force that has necessitated steps for implementation of the directions. Directives *demand positive action* [42]on the part of the state, the assumption has proved true. The fact that minority, vocal class of citizens have disproportionate influence over state, makes the directives as mere recital hymns on national occasions. This is the import of the following paragraphs.

Of late, the higher judiciary has been proactive in securing implementation of directive principles. The two main directives of judicial creativity and promotion have been articles 45 and 44. Article 45 before 86th amendment 2002, required the state to endeavor to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of 14 years. In *Unni Krishnan* v. S*tate of AP*,[43] the Supreme Court created a fundamental right to education in the right to life under article 21, taking help from articles 41 and 45. After the age of fourteen years, the right to education is subject to economic capacity and development of state. However, the parliament by Constitution eighty-sixth amendment act 2002, inserted article 21A [44] making it only an enabling prevision. (Recently, a bill-right to education bill has been introduced in parliament which seeks to make right to education merely a statutory right, derogating it from judicial up-gradation).

Article 44 obligates the state to endeavor to secure for the citizens a uniform civil code throughout the territory of India. Religion oriented personal laws were a concept of medieval times. A society, which is compartmentalized by its laws, can hardly become a homogeneous unit. In the constituent assembly vested interests, Hindu as well as Muslim, had bitterly opposed the enactment of article 44. However, the founding fathers of the Constitution refused to bow to their pressure. Such a medieval idea has no place in modern world. This apart, personal laws also violates, several underlying principles of the Constitution e.g. equality. In this connection, reference may be made to article 25, which guarantees freedom of conscience and profession, practice and propagation of religion. However, secular activity associated with religious practice is exempted from this guarantee. It could therefore, plausibly be argued that personal laws pertain to secular activities and hence fall within regulatory power of the state.

Not much progress has so far been made towards achieving the ideal of a uniform civil code, which still remains a distant dream. Unlike Hindu law, the codification of Muslim law remains a sensitive matter, though enlightened 'Muslim opinion'[45] and the Supreme Court[46] appears to favour such step. The Supreme Court has tried to bridge the gap between Hindu and Muslim laws.[47] Yet in a public interest litigation where the supreme court was invited to declare certain aspects of Muslims personal laws as void e.g. Polygamy etc. as being void under articles 14 and 15, the court refused to do so saying that the issue raised was fit to be dealt with by legislature and not the courts.[48] However, the court has reiterated several times on the need to have a uniform civil code in the country. In *Sarla Mudgal* v. *Union of India*,[49] the court has again urged the government to have a fresh look at article 44. The issue has now been embroiled into the dynamics of party politics of the country, though every enlightened mined favour such code.

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[41] Minimum wages for Agricultural workers.

[42] The original idea is that of *Laughterpacth,* who drew *INTERNATIONAL BILL OF RIGHTS* in 1945, dividing rights in positive and negative categories. The Indian Constituent Assembly borrowed it.

[43] (1993) 1 S.C.C. 645.

[44] Article 21A reads- "**Rights to education**- The state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine.

[45] S. S. Nigam, UNIFORM CIVIL CODE AND SECULARISM" in JOUR. OF 5 INDIAN LAW INSTITUTE 47 (1963); Tahir Mahmood, THE PROGRESS IN IMPLEMENTING SOCIAL DIRECTIVES OF THE CONSTITUTION- A CRITICAL APPRASIAL *in* Alice Jacob CONSTITUTIONAL DEVELOPMENTS SINCE INDIPENDENCE 652 (1975).

[46] *Mohd. Ahmad Khan* v. *Shah Bano Begum,* A.I.R. 1985 S.C. 945.

[47] *Madhu Kishwar* v. *state of Bihar,* A.I.R. 1996 S.C. 1864; *Danial Latifi* v. *Union of India* A.I.R. 2001 S.C. 3958.

[48] *Ahmadabad Women's Action group* v. *Union of India,* A.I.R. 1997 S.C. 3614.

[49] A.I.R. 1995 S.C. 1531.

The directive principles were intended to draw their sanction from popular support. In the constituent assembly, Ambedkar had said that a party, which failed to implement these principles, would stand to lose in the next elections.[50] How far this is true, is doubtful. No research has so far been conducted as to the attitude of political parties towards the directives. Similarly, no research has been so far conducted regarding the sensitivity of public opinion on the question of the implementation of directives and a correlation between the election results and commitment to directive principles. Many directives have not been implemented and the prospect of their implementation in the "*new developmental discourse*" of the country is not bright.

Right to property:

Individual Interest vs. Public Good:

Ambivalence in the Assembly: The drafting of right to property, in the constituent assembly, had caused, what is called in political philosophy the classic dilemma of balancing individual right with the claims of common/social good. The institution of property, particularly, landed property in British period had become a symbol of oppression. 'Zamindars were subjected to intense criticism partly because they were popularly associated with support for the British Raj and partly because they had rarely improved the land and had rack-rented their tenants for generations.'[51]

Though the majority in the assembly was united against the existence of Zamindars, the question of property rights assumed different and vaster proportions in the debates. However, the greater agonizing occurred on the question: whose determination shall be final in the matters relating to the justness of compensation- 'the courts or the legislatures'?

At the one extreme was the view of Pandit Pant, who favoured the legislature as the final arbiter of the compensation to be provided for deprivation of property.[52] On this other extreme were protagonists of 'just compensation'- John Mathai, T.T. Krishnamachari. Sardar Patel was against any sort of violent expropriation, which he described as *chori* (theft) or *daaka* (dacoity). But the overall middle-of-the-road-policy led to the formulation of the right to property as finally adopted in article 31. Patel was no doubt committed to the abolition of zamindari, but at the same time, he did not favour expropriation without compensation. Patel's experience, of administration of Bombay Forfeited Land Restoration Act 1938, provided solution to the assembly in the form of principled compensation.[53] This meant that a legislative enactment embodying principle of compensation would not raise difficulty because of the presence of judicial review power of the court, in land reform programmes. Ultimately, it was this approach, which crystallized in the Constitution. The alternative to grant complete judicial review over expropriation did not succeed. Nehru made it clear that justice of compensation was a double-edged justice. It comprised reference to both individual and social justice. The principle of social justice was as important as those of the individual justice.[54] The implication was that directive principles, providing policy guidance to all organ of state also provide the basic content of social justice.

It is clear that commitment to liberal democratic ideology did not permit the Constitution-makers to do away with the property right altogether. 'The Constitution-makers institutionalized their ambivalence towards property rights through article 31 of the Constitution.[55]

Two decades of initial Duel:-

In independent India, no fundamental right has caused so much trouble and has given rise to so much litigation between the government and citizens, as the right to property.[56] While the Supreme Court has sought to expand the scope and ambit of many fundamental rights, including the right to property, this right has been progressively curtailed through Constitutional

[50] B.R. Ambedkar, CONSTITUENT ASSEMBLY DEBATES, VOL. VII, at 41.

[51] Granville Austin, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 89 (1966).

[52] Pandit Pant's definition of 'fairness' of compensation included the "circumstances and the paying capacity of the state". *Id.* at 91.

[53] *See* note 47.

[54] *Id.* at 99.

[55] *See* note 30, at 323.

[56] M. P. Jain, INDIAN CONSTITUTIONAL LAW 1253 (2003).

amendments. Two trends, rather inconsistent, hold out in this area. On the one hand, generally speaking, the courts have leaned towards, protecting property rights and payment of adequate compensation for property rights acquired by state. On the other hand, the state has progressively, by amending the Constitution, reduced the occasions when compensation is payable for disturbance of property rights and has sought to minimize intervention by courts in this area. The action and interaction thus produced between *legislative and judicial processes* form an extremely fascinating chapter in India's constitutional development, so much so that the enactment of the first and seventeenth amendments curtailing property rights even led to the crucial question of the ammendability of the Constitution itself.

Article 31 as originally enacted was in the following terms-

(1) No person shall be deprived of his property save by authority of law.
(2) No property, movable or immovable, including any interest in, or in any company owing any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.
(3) No such law as is refereed to in clause (2) made by the legislature of a state shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.
(4) If any Bill pending at the commencement of this Constitution in the legislature of a state has, after it has been passed by such legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause(2)
(5) Nothing in clause (2) shall affect-
(a) The provisions of any existing law other than a law to which the provisions of clause (6) apply, or
(b) The provisions of any law which the State may hereafter make-
(i) For the purpose of imposing or levying any tax or penalty, or
(ii) For the promotion of public health or the prevention of danger to life or property, or
(iii) In pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.
(6) Any law of a state enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of Section 299 of the Government of India Act,1935."

Although clause (4) had saved Zamindari abolition laws from the operation of provisions of clause (2), it was open to doubt if such laws were open to challenge if they violated some other fundamental rights of the owner. The Patna high court in *Kameshwar Singh* v. *State*[57] answered the question in the affirmative. Such interpretation would have frustrated the massive legislative effort of central and state Governments aimed at regulating property rights.[58]

Thus, the parliament by Constitution First Amendment Act (1951) inserted 31A and 31B in the Constitution. Article 31A enacted that no law providing for acquisition by the state of any *estate* or any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by any provision of this part. Article 31B purports to validate retrospectively certain specified Acts and regulations already passed, which, but for such a provision, might have been open to challenge under article 31 or some

[57] A.I.R. 1951 Pat 91.

[58] *Firs*t, the government undertook to reconstruct the agrarian economy inter-alia, by trying to confer rights of property on the tiller, abolition of zamindari, giving security of tenure to tenants, fixing a ceiling on personal holding of agricultural land and redistributing the surplus land among the landless. *Secondly*, in the area of urban property, measures have been initiated to provide housing to the people, clearance of the slums and town planning, control rents, acquire property and impose a ceiling on urban land ownership, *etc*. *Thirdly*, the government has undertaken regulation of private enterprise and nationalization of some commercial undertakings.

other provision of part III. Put differently, article 31B in addition enacted that this legislative enactments mentioned in the new ninth schedule of the Constitution shall be deemed to be valid and in force, notwithstanding the judicial decisions to the contrary or their infringing the fundamental rights. The Indian Supreme Court upheld the validity of this amendment in *Sankari Parsad Singh Deo* v. *Union of India*.[59]

The requirement of payment of compensation to the owner whose property was acquired or taken possession of, was considered in *State of West Bangel* v. *Mrs Bela Barerjee.*[60] Where, the Supreme Court held that the term "compensation" in article 31(2) meant "a just equivalent of what the owner has been deprived of". Such liberal judicial "*processing*" of the world "compensation" provoked Fourth Amendment Act 1954.[61]

The fourth amendment enacted that the adequacy of compensation shall not be reviewed by the courts. It also amended article 31A providing *inter alia* that: notwithstanding anything contained in article 13, no law providing for (a) the acquisition by the state of any estate or of any rights there in or the extinguishment or modification of any such rights…. shall be deemed to be void on the ground that it is inconsistent with, or takes away, or abridges any of the rights conferred by article 14, 19 or 31.

Notwithstanding this amendment, several state enactments were declared invalid by the Supreme Court as not falling within the meaning as given to "estate" and also as violative of article 14 of the Constitution, which grants equal protection of laws.[62] Parliament therefore thought it necessary to make a further amendment (Seventeenth Amendment Act 1964) in articles 31A and 31B. A new definition of the expression "estate", retrospectively provided in Article 31A which read- "The expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area an shall also include-

(i) Any Jaagir, Inam or Muafi or other similar grants and estate of Madras and Kerala, any *janmam* right,
(ii)Any land held under *ryotwari* settlement,
(iii) Any land held or let for purpose of agriculture or purposes ancillary thereto, including wasteland, forestland, land for pasture or sights of buildings or other structures occupied by cultivators of land, agricultural labourers and village artisans….

The act further added 44 legislative enactments to the ninth schedule, either validating them contrary to previous judicial decisions or immunizing them from judicial review. This act (amendment) was challenged in *Sajjan Singh* v. *State of Rajasthan,*[63] where the Supreme Court upheld the amendment.

The Constitutionality of the seventeenth amendment itself came for attack in *Golak Nath* v. S*tate of Pubnjab.*[64] Similar challenge against the First and fourth amendments had not been accepted by the court. However, in Golak Nath, the Supreme Court reversed its earlier approach. In a 6-5 decision, the court held that parliament did not have power to amend the Constitution so as to abridge or take away fundamental rights, but the ruling was given prospective operation.

Thus, Golak Nath created a situation; where there were at stake much more than mere judicial policy making. What was at stake could, perhaps oversimply (but not erroneously), be stated in one phrase: 'the social and economic development of the country'. Reorganization and rationalization of agriculture in a predominantly agrarian society required, among other things, elimination of feudal type land tenures, restructuring of landholdings oriented towards maximization of output. These processes involved social uplift of a large part of India.[65]

In *R.C. Cooper* v. *Union India,*[66] the Supreme Court adopted Vajravelu[67] line and held that bank nationalization was liable to be struck down as it failed to provide to the expropriated banks, compensation determined according to relevant principles. It was not acceptable to the court that a principle specified by parliament for determining compensation is conclusive. The

[59] A.I.R. 1951 S.C. 458.
[60] A.I.R. 1954 S.C. 170.
[61] The decision in the following cases also provoked this amendment: A.I.R. 1954 S.C. 92; *Dwarkadas Srinivas* v. *Solapur Spinning and Weaving Co. Ltd*, A.I.R. 1954 S.C. 119; *Sagir Ahmed* v. *State of UP* A.I.R. 1954 S.C. 728.
[62] *K. Kunhikonam* v. *State of Kerala*, A.I.R. 1962 S.C. 723; *Krishnaswami* v. *State of Madras*, A.I.R. 1964 S.C. 1515.
[63] A.I.R. 1955 S.C. 845.
[64] A.I.R. 1967 S.C. 1643.
[65] *See* note 34 at 384.
[66] (1970) 1 S.C.C. 248.
[67] A.I.R. 1958 S.C. 1017.

principle specified by parliament was beyond the pale of the challenge only if it was relevant for determination of compensation. This decision led to passing of the Twenty Fifth Amendment Act 1971, which amended clause (2) of article 31. It dropped the word "compensation" and instead inserted "amount" in article31 (2) in order to avoid judicial review of "compensation" as just and equivalent. Twenty fifth Amendment also added article 31C. Meanwhile, Twenty Fourth Amendment Act had restored parliament's Constitution amending power.

Forty Second Amendment and after:

The effect of the changes, made in article 31(2) by substitution of the word "amount" for "compensation", came to the consideration of Supreme Court in *Kesvananda Bharati* v. *State of Karala*.[68] The broad effect of the multiple judicial opinions delivered therein was broadly as follows: - 'amount' was not the same concept as 'compensation' and the court would not go the question of its adequacy or inadequacy. Nevertheless, the amount could not be 'illusory', 'arbitrary', or 'grossly low'.

1970s was a time when socialist wave had rocked the country. Even outside the Congress party, persons like J.P. Narayan, Lohia had considerable influence whose socialist ideas favoured less to the institution of fundamental rights to property. Thus when, Janta Party came into power in 1978, by Constitutional Forty Fourth Amendment Act, the right to property practically ceased to exist as a fundamental right.[69]

Conclusion:

The working of a constitution is not determined by mere black letters of its provisions but by its "workers". A Constitution is not simply a document; rather it is a 'Living Creature'. This life comes into it through reading/interpretation giving nourishment to the people who establish it "(or for whom it is established). It was this in mind when 'Roland Barthes' captured in his telling image – 'constitutions are never "Writerly" but "Readerly" texts. Constitutions entail not just practices of writing but of reading to the point that the birth of the reader necessarily entails the death of the author'[70]. In democratic polities, the dynamics of electoral processes has a definite influence on this 'working'. With the onset of intensive globalization the work of 'workers' is bound to take a particular course, in consonance with, dominant economic philosophy and cultural hue, with immense consequences for the various sections of citizens.

[68] A.I.R. 1973 S.C. 1461.

[69] Transferred to, as a Constitutional right, under article 300A. Recently the deletion of right to property from part VI of the Constitution by 44th amendment Act has been challenged in the Supreme Court, the petition is still pending.

[70] Quoted by Upendra Baxi, UNIVERSAL RIGHTS AND CULTURAL PLURALISM: CONSTITUTIONALISM AS A SITE OF STATE FORMATIVE PRACTICES 21 CARDOZO L. REV. 1183 (2000a).