

*INDIAN GOVERNMENT AND  
POLITICS*

**I YEAR**

**MA POLITICAL SCIENCE**

**PAPER II**

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**UNIVERSITY OF CALICUT**  
**SCHOOL OF DISTANCE EDUCATION**

**STUDY MATERIAL**

**I YEAR**

**MA POLITICAL SCIENCE**

**PAPER II**

**INDIAN GOVERNMENT AND POLITICS**

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Social and Ideological basis of the Indian Political System, Composition of the Indian Constituent Assembly, Characteristics and ideology of the constitution

**Module-2**

Individual and the state, Fundamental rights ( With special reference to the following cases, AK Gopalan Vs State of Madras, Maneka Gandhi Vs Union of India, Golaknath Vs State of Punjab, Keshavananda Bharathi Vs state of Kerala, In Re Kerala education Bill, Indira Sahney Vs Union India)

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## **MODULE-1**

Social and ideological basis of the Indian political system, composition of the Indian constituent assembly, characteristics and ideology of the constitution

### **Introduction**

Constitution is a legal document having a special legal sanctity, which sets out the framework and the principal functions of the organs of the government of a state, and declares the principles governing the operation of those organs. Like every other Constitution, the Indian Constitution also seeks to establish the fundamental organs of government and administration, lays down their structure, composition, powers and principal functions, defines the inter relationship of one organ with another, and regulates the relationship between the citizen and the state, more particularly the political relationship. The states have reasserted certain principles of law through written Constitutions. As a democratic Constitution, the Indian Constitution also reflects the fundamental political values in substantive ways by guaranteeing Fundamental Rights to the citizens, and in procedural ways by providing remedies. It mirrors basic values about who shall govern, and in what direction.

### **Development of Indian Constitution**

After the 1857 revolution, the British Parliament passed the Government of India Act 1858, which abolished the role of the East India Company in the government of India, and transferred British India to the direct rule of the Crown. The Act also established in England the office of the Secretary of State for India through whom Parliament would exercise its rule, as well as establishing the office of Viceroy of India. An Executive Council was also constituted. The Indian Councils Act 1861 provided for a Legislative Council consisting of the members of the Executive council and non-official members. The Indian Councils Act 1892 established provincial legislatures and increased the powers of the Legislative Council. Although these Acts increased the representation of Indians in the government, their power still remained limited. The Indian Councils Act 1909 and the Government of India Act 1919 further expanded participation of Indians in the government. In 1934 the idea of a constituent assembly was put forward by MN Roy. However the congress made it an official demand only in 1935. The British government accepted this proposal in the August offer of 1940.

**The Indian Council Act of 1909:** The Indian Council Act of 1909 which is known as Morley-Minto Reforms of 1909 is a significant event in constitutional history of India. The important provisions of this Act were- i) Enlargement of the size of the Central and Provincial Legislative Councils. The number of members was raised to 60 in central Legislature and the provincial Legislative Councils were to consist of 30 to 50 members, ii) Powers and functions of the Central and Provincial Councils were also increased, iii) Provision for the appointment of an Indian member in the Executive Council of the Governor General iv) Introduced the system of Communal representation.

**Government of India Act of 1919:** The British Parliament passed the Government of India Act of 1919 which is also known as Montague-Chelmsford Reforms. The Act made many important changes in the Central and provincial Government. The Act introduced a bicameral legislature at the centre. The two Houses were- Legislative Assembly (Lower House) and Council of States (Upper House). The term of Legislative Assembly and Council of States were five and three years respectively. But the Governor-General could alter this term. The powers and functions of both the Houses were also increased. The number of Indian members in the Executive Council of the Governor General was raised from one to three. The system of direct election was introduced. The Act made many changes in the provincial Government too. A system of Diarchy was introduced in the Provinces. The subjects which were dealt with by the Provincial Government were divided into two sets: Transferred and Reserved Subjects. The Governor administered the Reserved Subjects with the help of the Ministers chosen by him from the elected members of the legislature. The Governor General could shift a subject from Transferred to Reserved Part. The Act created two lists of Subjects and divided them into Central and Provincial Governments. The Central List included the subjects such as Defense, Currency, Commerce, Communication, Telegraph, Foreign Relations, Customs, Civil and criminal law etc. The legislative authority in this subjects was given to the Central Government. On the other hand, the Provincial List which were of provincial interest such as Local-Self Government, Education, Public Works, Agriculture, Public Health, Revenue, Irrigation, water Supplies etc. were given to the provincial Government. The Act created a post of a High Commissioner for India. The term of his office was six years. The Act of 1919 was an important landmark in the constitutional development of India which opened a new era of responsible Government. It provided the Indians real experience of self government in transferred subjects.

### **Government of India Act 1935**

The 1935 act was a significant turning point in the history of Indian Constitution. The most significant aspects of the Act were: the grant of a large measure of autonomy to the provinces of British India by ending the system of diarchy introduced by the Government of India Act 1919, provision for the establishment of a Federation of India, to be made up of both British India and some or all of the princely states, the introduction of direct elections, thus increasing the membership of the provincial assemblies so as to include more elected Indian representatives, who were now able to form majorities and be appointed to form governments, and the establishment of a Federal Court

However, the degree of autonomy introduced at the provincial level was subject to important limitations: the provincial Governors retained important reserve powers, and the British authorities also retained a right to suspend responsible government. The parts of the Act intended to establish the Federation of India never came into operation, due to opposition from rulers of the princely states. The remaining parts of the Act came into force in 1937, when the first elections under the Act were also held. However the act had a great impact on the Constitution of India. Many key features of the constitution are directly taken from this Act: the federal structure of government, provincial autonomy, a bicameral central legislature consisting of a federal assembly and a Council of States, and the separation of legislative powers between the centre and provinces, are some of the provisions of the Act which are present in the Constitution of India.

## **The Cabinet Mission Plan**

In 1946, British Prime Minister Clement Attlee formulated a cabinet mission to India to discuss and finalize plans for the transfer of power from the British Raj to Indian leadership as well as provide India with independence under Dominion status in the Commonwealth of Nations. The mission consisted of Lord Pethick-Lawrence, the Secretary of State for India, Sir Stafford Cripps, President of the Board of Trade, and A. V. Alexander, the First Lord of the Admiralty. The Mission discussed the framework of the constitution and laid down the procedure to be followed by the constitution drafting body. Elections for the 296 seats assigned to the British Indian provinces were completed by August 1946. The Constituent Assembly of India first met and began work on 9 December 1946.

## **Indian Independence Act 1947**

The Indian Independence Act, passed by the British Parliament on 18 July 1947, divided British India into two new independent states, India and Pakistan, which were to be dominions under the Commonwealth of Nations until they had each finished drafting and enacted a new constitution. The Constituent Assembly was divided into two for the separate states, with each new Assembly having sovereign powers transferred to it for the respective dominion. The Act also terminated British suzerainty over the princely states, each of which was left to decide whether to accede to one or other of the new dominions or to continue as independent states in their own right. However, in most cases the states were so dependent on central institutions that they were widely expected to accede to a dominion.

The rights of the British monarch to veto Bills passed by Indian legislature was given up in the act. The Act also provided for the termination of the sovereignty of the British crown over the Indian states. The office of the Secretary of State for India was abolished and the Secretary of State for Commonwealth Affairs was given charge of Indian affairs. Another significant provision of the act was that the title of the 'Emperor of India' was dropped from the Royal style as titles of the 'King of England'. The Indian Independence Act of 1947 was acclaimed as "the noblest and greatest law ever enacted by the British Parliament." It marked the end of the British supremacy in India. When the Constitution of India came into force on 26 January 1950, it repealed the Indian Independence Act. India ceased to be a dominion of the British Crown and became a sovereign democratic republic.

## **Constituent Assembly**

The Indian constitution was drafted by a constituent assembly elected for this purpose. Elections to the Constituent Assembly were held in July 1946 in tune with the cabinet mission proposals. Out of the 296 seats for British India, the Congress secured 209 seats and the Muslim League secured 73 seats. The first session of Indian Constituent Assembly was held on 9th December, 1946. Dr. Sachidananda Sinha was the first chairman of the assembly. The Vice-President of the Constituent Assembly was Professor Harendra Coomar Mookerjee. Sir Benegal Narsing Rau was appointed as the Constitutional Adviser to the Constituent Assembly. On 11th December, it elected Dr. Rajendra Prasad as its permanent president. The membership of the Constituent Assembly included eminent Indian leaders.

Members were chosen by indirect election by the members of the Provincial Legislative Assemblies, according to the scheme recommended by the Cabinet Mission. The arrangement was: (i) 292 members were elected through the Provincial Legislative Assemblies; (ii) 93 members represented the Indian Princely States; and (iii) 4 members represented the Chief Commissioners' Provinces. The total membership of the Assembly thus was to be 389. However, as a result of the partition under the Mountbatten Plan of 3 June, 1947, a separate Constituent Assembly was set up for Pakistan and representatives of some Provinces ceased to be members of the Assembly. As a result, the membership of the Assembly was reduced to 299.

The Interim Government of India was formed on 2 September 1946 from the newly elected Constituent Assembly. The Congress held a large majority in the Assembly, with 69 percent of all of the seats; however the party included wide diversity within itself, from conservative industrialists and radical Marxists, to Hindu revivalists. The Muslim League held almost all of the seats reserved in the Assembly for Muslims. There were also some members from smaller parties, such as the Scheduled Caste Federation, the Communist Party of India, and the Unionist Party.

The prominent members of the Indian Constituent Assembly included, Pandit Jawaharlal Nehru, Sardar Vallabhbhai Patel, Bhimrao Ramji Ambedkar, Dr. Rajendra Prasad, C. Rajagopalachari, Syama Prasad Mookerjee, N. G Ayyangar, T. S Radhakrishnan, and Dr. John Mathai. There were more than 30 members of the [scheduled classes](#). [Frank Anthony](#) represented the Anglo-Indian community, and the [Parsis](#) were represented by H. P. Modi. The Chairman of the Minorities Committee was [Harendra Coomar Mookerjee](#), a distinguished Christian who represented all Christians other than Anglo-Indians. Ari Bahadur Gururung represented the Gorkha Community. Prominent jurists like [Alladi Krishnaswamy Iyer](#), [Benegal Narsing Rau](#) and [K. M. Munshi](#), [Ganesh Mavlankar](#) were also members of the Assembly. [Sarojini Naidu](#), Hansa Mehta, [Durgabai Deshmukh](#), [Rajkumari Amrit Kaur](#) and [Vijayalakshmi Pandit](#) were important women members.

The Assembly's work was organized into five stages: (1) committees were asked to present reports on basic issues; (2) the constitutional adviser, B.N. Rau, prepared an initial draft on the basis of these committees and his research into the constitutions of other countries; (3) the drafting committee, chaired by B.R. Ambedkar, presented a detailed draft constitution that was published for public discussion and comments; (4) the draft constitution was discussed and amendments were proposed and enacted; (5) the constitution was adopted.

At the time of its establishment, the Constituent Assembly was not a sovereign body. It stood organized on the basis of the Cabinet Mission Plan. Its powers were derived from the sovereign authority of British Parliament. However Sardar Patel and Pandit Nehru believed that it was a sovereign body. The Assembly resolved this issue by adopting: "The Assembly should not be dissolved except by a resolution assented to by at least 2/3rd of the whole number of members of the Assembly. Once constituted it could not be dissolved even by Britain." When on 15th August, 1947, India became Independent; the Constituent Assembly became a fully sovereign body and remained so till the inauguration of the Constitution of India. During this period, it acted in a dual capacity: first as the Constituent Assembly engaged in the making of the Indian Constitution, and secondly as the Parliament of India, it remained involved in legislating for the whole of India. Jawaharlal Nehru introduced the objectives Resolution on 13th December, 1946.

The objectives Resolution was adopted by the Constituent Assembly on 22 January, 1947. It provided the ideological framework which was to guide the process of framing of Constitution of India. The Preamble of the Constitution embodies all the ideals which were listed in the objectives Resolution. The objective Resolution was designed to declare the resolve to make India a sovereign, Independent, Republic and to secure all its citizens, fundamental rights, justices secularism and welfare state as well as to preserve the unity and integrity of the nation. It declared the resolve to make India a democratic Union with an equal level of self government in all constituent parts. It affirmed that all power and authority of the Government is derived from the people. It affirmed the resolve to frame a Constitution which should secure for India a due place in the country of Nations.

On 15th August, 1947, India became independent. The Constituent Assembly of India then got a sovereign status and started undertaking the task of formulating the Constitution of India with a new zeal and enthusiasm. For conducting its work in a systematic and efficient manner, the Constituent Assembly constituted several committees. The committees were to report on the subjects assigned to them. Some of these committees were committees on procedural matters while others were committees on substantive matters. The reports of these committees provided the bricks and mortar for the formulation of the Constitution of India.

### **Drafting Committee**

In the making of the Constitution, a very valuable role was played by the Drafting Committee. On 14 August 1947 meeting of the Assembly, a proposal for forming various committees was presented. Such committees included a Committee on Fundamental Rights, the Union Powers Committee and Union Constitution Committee. On 29 August 1947, the Drafting Committee was appointed, with Dr B. R. Ambedkar as the Chairman along with six other members. The committee was assisted by a constitutional advisor. The members were Pandit GB Pant, KMMunshi, Alladi Krishnaswamy Iyer, N Gopalaswami Ayengar, B L Mitter, Md. Saadullah and D P Khaitan. Later B L Mitter resigned and was replaced by Madhav Rao. Owing to death of D P Khaitan, T T Krishnamachari was chosen to be included in the drafting committee. Dr. B.N. Rau worked as the Chief Constitutional Advisor attached to this Committee. A Draft Constitution was prepared by the committee and submitted to the Assembly on 4 November 1947. Draft constitution was debated and over 2000 amendments were moved over a period of two years. Finally on 26 Nov. 1949, the process was completed and Constituent assembly adopted the constitution. From 14th November, 1949 to 26th November, 1949 the final debate was held on the draft. On 26th November, 1949, the Constitution was finally adopted and enacted when the Constitution was signed by the president of the Constituent Assembly.

Some of the provisions came into operation immediately while as a whole the Constitution was inaugurated on 26th January, 1950. It took the Constituent Assembly 2 years, 11 months and 18 days to accomplish the task of making the Constitution. In all it held 11 plenary sessions and discussions were held for 114 days. Constitution of India is the highest and most valuable contribution of the Constituent Assembly to the Indian Political System.

### **Preamble: The Philosophy of the Constitution**

Preamble is an introductory statement, stating the aims and objectives of the constitution. Accordingly, the preamble to the Indian constitution spells out the basic philosophy contained in the body of the Indian Constitution. The preamble provides the philosophy of our constitution. The Indian Constitution is based on the philosophy of evolving an egalitarian society free from fear and bias based on promoting individual freedom in shaping the government of their choice. The whole foundation of constitutional democracy is building a system of governance in systematic machinery functioning automatically on the wheels of norms and regulations but not on individual whims and fancies. The Indian Constitution is a marathon effort to translate philosophical rule of law into practical set up divided into three significant estates checking each other exercising parallel sovereignty and non-egoistic supremacy in their own way. Apart from excellent separation of powers to avoid the absolute concentration, the Constitution of India envisages a distinct distribution of powers between two major levels of Governments- central and provincial with a fair scope for a third tier – the local bodies. The system of rule of law is perfectly reflected in framing of the Constitutional norms codifying the best governing mechanisms tested and trusted in various democratic societies world over.

### **Democratic Ideology**

The words "We, the people" of India signifies the democratic principle that power is ultimately rested in the hands of the people. It also emphasizes that the constitution is made by and for the Indian people and not given to them by any outside power. The wording is close to the preamble to the Constitution of Ireland, which had been adopted in 1937. The phrase "we the people" emphasizes upon the concept of popular sovereignty as laid down by J.J.Rousseau. All the power emanates from the people and the political system will be accountable and responsible to the people. The ultimate authority of the people from whose will the constitution emerges. Since the Constituent Assembly enacted and adopted the constitution in the name of the people of India, the question has been asked whether the Assembly was really representative of the people of India. This question was raised both within and outside the Assembly. The circumstances under which the Constituent Assembly came into being shows that it was impracticable to constitute such a body in 1946 with adult suffrage as its basis. No part of the country had the experience of adult suffrage. To prepare an electoral roll on the basis of adult suffrage for the country and to hold elections on that basis would have certainly taken a number of years. Dr. Ambedkar observed; "I say that the Preamble embodies what is the desire of every members of the House, that the constitution should have its root, its authority, its sovereignty from the people that it has".

India is 'democratic' country, as it has chosen a representative and responsible system of government under which those who administer the affairs of the state are elected by the electorate and accountable to them. The first part of the preamble "We, the people of India" and, its last part "give to ourselves this Constitution" clearly indicate the democratic spirit involved in the Constitution. The people of India elect their governments at all levels by a system of universal adult franchise; popularly known as "one man one vote". Every citizen of India, who is 18years of age and above and not otherwise debarred by law, is entitled to vote. Every citizen enjoys this franchise right without any discrimination on the basis of caste, creed, colour, sex, religion or education

### **Popular sovereignty**

The word sovereign means supreme or independence. India is internally and externally sovereign - externally free from the control of any foreign power and internally, it has a free government which is directly elected by the people and makes laws that govern the people. Sovereignty of India does not come in the way of its remaining a member of the Commonwealth of Nations. Though the Queen of the UK is its symbolic head, it is a voluntary association and so does not violate India's sovereign status. The Popular sovereignty is also one of the basic structures of constitution of India. Hence, Citizens of India also enjoy sovereign power to elect their representatives in elections held for parliament, state legislature and local bodies as well. People have supreme right to make decisions on internal as well as external matters. No external power can dictate the government of India. The Indian involvement in the international community is a matter voluntary association and moral commitments. It is for the larger interests of the people and nation that we join regional and national organizations. These commitments no way limit our sovereignty.

### **Republican Form of Government**

The term 'republic' implies an elected head of the state. By declaring to become a republic, India has chosen the system of electing one of its citizens as its President- the head of the state at regular intervals. As opposed to a monarchy, in which the head of state is appointed on hereditary basis for a lifetime or until he abdicates from the throne, a democratic republic is an entity in which the head of state is elected, directly or indirectly, for a fixed tenure. The President of India is elected by an electoral college for a term of five years. The post of the President is not hereditary. Every citizen of India is eligible to become the President of the country. The leader of the state is elected by the people.

### **Commitment to Socialism**

The word socialist was added to the Preamble by the Forty-second Amendment. It implies social and economic equality. Social equality in this context means the absence of discrimination on the grounds only of caste, colour, creed, sex, religion, or language. Under social equality, everyone has equal status and opportunities. Economic equality means that the government will endeavor to make the distribution of wealth more equal and provide a decent standard of living for all. This is in effect emphasized a commitment towards the formation of a welfare state. India has adopted a socialistic and mixed economy and the government has framed many laws to achieve the aim. Socialism in India has been accepted in the meaning of Democratic Socialism. The main aim of the expression was to bring about a balance in the existing economic disparities

### **Secular State**

India is 'secular,' because it maintains perfect neutrality in religious matters. It does not have state-religion and the people are free to accept or reject any religion of their choice.

### **Justice, Liberty, Equality and Fraternity**

The Preamble pronounces the principles of 'Justice', 'Liberty', 'Equality' and 'Fraternity'. as the foundation of the political order. The essence of justice is the attainment of the common good. It

embraces the entire social, economic and political spheres of human activity. The term 'liberty' signifies not only the absence of any arbitrary restraint on the freedom of individual action but also the creation of conditions which are essential for the development of the personality of the individual. 'Liberty' and 'Equality' are complementary. Equality does not mean that all human beings are equal mentally and physically. It signifies equality of status, the status of free individuals and availability of opportunity to everyone to develop his potential capacities. The term "fraternity" emphasise the spirit of brotherhood. India being a multilingual and multi-religious state, the unity and integrity of the nation can be preserved only through a spirit of brotherhood that pervades the entire country, among all its citizens, irrespective of their differences.

### **Legal position of Preamble**

Supreme Court of India in *Berubari* case observed that the preamble is not an integral part of the Indian constitution and not enforceable in a court of law. However, Supreme Court of India has, in the *Kesavananda* case, recognized that the preamble may be used to interpret ambiguous areas of the constitution where differing interpretations present themselves. In the 1995 case of *Union Government Vs LIC of India* also the Supreme Court has once again held that Preamble is an integral part of the Constitution

The main features of Indian Constitution are the following:

#### **(i) A written and lengthy constitution:**

The Constitution of India is a written constitution. It was framed by a Constituent Assembly which was established for the purpose in 1946. On 26<sup>th</sup> November 1949 the document was adopted and finally it was enforced on 26<sup>th</sup> January 1950. Earlier the Constitution had 395 Articles and 8 schedules. Gradually, there were several amendments and the number had now reached to 448 Articles in 24 Parts, with 12 Schedules and 97 Amendments to it. The Constitution of India is the lengthiest constitution in the world. The constitution of USA has 7 Articles, of China 138, Japanese 103, and Canadian 107 Articles.

#### **(ii) Sovereign, socialist, secular, democratic, republic:**

The Constitution declares India to be a Sovereign, Socialist, Secular, Democratic, Republic. The words, 'Socialist' and 'secular' were added in the Preamble of the Constitution by 42nd amendment which was passed in 1976. Sovereign means absolutely independent; it is not under the control of any other state. Before 1947, India was not sovereign as it was under the Britishers. Now it can frame its policy without any outside interference.

**Socialist:** The Word 'Socialist' was added in the Preamble by 42nd Amendment of the Constitution which was passed in 1976. This implies a system which will endeavour to avoid concentration of wealth in a few hands and will assure its equitable distribution. It also implies that India is against exploitation in all forms and believes in economic justice to all its citizens. **Secular:** The word 'Secular', was added in the Preamble by 42nd Amendment of the Constitution. There is no state religion in India. Every citizen is free to follow and practice the religion of his/her own choice. The state cannot discriminate among its citizens on the basis of religion.

**Democratic:** The power of the government is vested in the hands of the people. People exercise this power through their elected representatives who, in turn, are responsible to them. All the citizens enjoy equal political rights. **Republic:** Means that the head of the State is not a hereditary monarch but a President who is indirectly elected by the people for a definite period.

**(iii) Federal government:**

The Constitution provides for a federal form of government. In a federation, there are two governments-at the central level and at the state level. In India, the powers of the government are divided between the central government and state governments. There are three different lists of subjects- (i) Union list, (ii) State list and (iii) Concurrent list. The Union list contains 97 subjects of national importance like Defense, Foreign Affairs, Currency, Post and Telegraph, Railways. On these subjects, only central legislature can make laws. State list contains 66 subjects of local importance. On these subjects, state legislatures make laws. These subjects include agriculture, police, and jails. Concurrent list contains 47 subjects which are of common concern to both the central and state governments. These include marriage, divorce, social security etc. On these subjects, both the parliament and state legislatures can legislate. However, if there is a conflict between a central law and the state law over a subject given in the concurrent list, the central law will prevail.

**(iv) Parliamentary government:**

Indian Constitution provides for a parliamentary form of government. President is nominal head of the state. In actual practice, the government is run by the Prime Minister and other members of the Council of Minister. The Council of Ministers is collectively responsible to the Parliament. The executive is made answerable to the legislature. The executive also evolves from parliament. The parliament can criticize and evaluate the government. Every legislation should be accepted by parliament.

**(v) Fundamental rights and duties.**

The Constitution of India guarantees six fundamental rights to every citizen. These are:

1. Right to Equality.
2. Right to Freedom.
3. Right against Exploitation.

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4. Right to Freedom of Religion.
5. Cultural and Educational Rights.
6. Right to Constitutional Remedies.

By 42nd Amendment of the Constitution, Fundamental Duties of citizens have also been added as article 51(A) of the constitution.

**(vi) Directive principles of state policy:**

The Directive Principles of State Policy are listed in Part Four of the Constitution. They are contained in articles 36-51. The framers of our constitution took the idea of having such principles from the Irish Constitution. These principles are instructions given by the Constitution to government. All the governments-Central, State and Local-are expected to frame their policies in accordance with these principles. The aim of these principles is to establish a welfare state in India. They, however, are not binding on the government. Equitable distribution of wealth, employment for all, protection of health, compulsory education for children and the establishment of village panchayats are some important principles.

**(vii) Partly rigid and partly flexible:**

The Constitution of India is neither wholly rigid nor wholly flexible. It is partly rigid and partly flexible. It is because of the fact that for the purpose of amendment, our constitution has been divided into three parts: (a) certain provisions of the constitution can be amended by a simple majority in the Parliament. (b) Certain provisions can be amended by a two-third majority of the Parliament and its ratification by at least fifty percent states. (c) The remaining provisions can be amended by the Parliament by two-third majority.

**(viii) Single citizenship:**

In federation, normally there is double citizenship. In U.S.A. every citizen besides being a citizen of United States of America is the citizen of the state in which he or she resides. But the Constitution of India provides for single citizenship-every Indian, irrespective of his place of birth or residence, is a citizen of India.

**(ix) Universal adult franchise:**

The constitution provides for Universal Adult Franchise. It means that every citizen who is 18 years of age or more is entitled to cast his/her vote irrespective of his caste, creed, sex, religion or place of birth.

**(X) Official Languages**

The Constitution contains a list of official languages. India is a country where different languages are spoken in various parts of the country. Hindi and English have been made official languages of the central government. A state can adopt the language spoken by its people in that state also as its official language. At present, we have 22 languages which have been recognized by the Indian Constitution.

**(xi) Special provisions for scheduled castes and scheduled tribes:**

The Constitution provides for giving certain special concessions and privileges to the members of these castes. Seats have been reserved for them in Parliament, State legislature and local bodies, all government services and in all professional colleges.

**(xii) Independent judiciary:**

The Indian Constitution provides for an independent judiciary. The judiciary has been made independent of the Executive as well as the Legislature. The judges are appointed by the president of India. They cannot be removed from their office easily. This requires a difficult process called impeachment. The salary and conditions of service cannot be altered during the term of their service.

**(xiii) Emergency provisions:**

The framers of our constitution had realized that there could be certain dangerous situations when government could not be run as in ordinary time. Hence the constitution contains certain emergency provisions. During emergency the fundamental rights of the citizens can be suspended and our government becomes a unitary one.

**(xiv) Borrowed Constitution**

The draft of the Indian Constitution has been derived from constitutions of other countries. The constitution has also taken many parts from the Government of India Act, 1935. The different parts of Indian Constitution adopted from other countries' constitution are:

1. **British Constitution:** Parliamentary form of government, introduction of Speaker and his role, the concept of single citizenship, the Rule of law, procedure of lawmaking, procedure established by Law
2. **Irish Constitution:** Directive principles of state policy.
3. **United States Constitution:** Federal structure of government, power of Judicial Review and independence of the judiciary, documentation of Fundamental Rights (similar to the United States Bill of Rights)
4. **Canadian Constitution:** A quasi-federal form of government, where the central government plays prime role in governing the country, the idea of Residual Powers
5. **Australian Constitution:** Freedom of trade and commerce between different states of the country, Power of the national legislature to make laws for implementing treaties
6. **French Constitution:** Ideals of Liberty, Equality and Fraternity
7. **Japan Constitution:** Fundamental Duties 51-A
8. **Weimar Constitution:** Emergency Provision Article 356
9. **Malaysian Constitution:** The concept of the Concurrent list

**Structure of Constitution**

The Indian Constitution, consists of a preamble, 25 parts containing 450 articles, 12 schedules, 2 appendices and 97 amendments to date (as of 2012 )

**Schedules:** Schedules are lists in the Constitution that categorize and tabulate bureaucratic activity and policy of the Government.

- First Schedule (Articles 1 and 4): This lists the states and territories of India, lists any changes to their borders and the laws used to make that change.
- Second Schedule (Articles 59, 65, 75, 97, 125, 148, 158, 164, 186 and 221): This schedule lists the salaries of officials holding public office, judges, and Comptroller and Auditor-General of India.
- Third Schedule (Articles 75, 99, 124, 148, 164, 188 and 219): The schedule incorporates the Forms of Oaths – This lists the oaths of offices for elected officials and judges.
- Fourth Schedule (Articles 4 and 80) – This details the allocation of seats in the Rajya Sabha (the upper house of Parliament) per State or Union Territory.
- Fifth Schedule (Article 244) – This provides for the administration and control of Scheduled Areas and Scheduled Tribes (areas and tribes needing special protection due to disadvantageous conditions).
- Sixth Schedule (Articles 244 and 275): details out provisions for the administration of tribal areas in Assam, Meghalaya, Tripura, and Mizoram.
- Seventh Schedule (Article 246): This schedule contains an exhaustive list of responsibilities. This includes the union list, state list and concurrent list.
- Eighth Schedule (Articles 344 and 351): The Eighth Schedule contains the list of official languages. The Schedule originally contained a list of 14 languages, but since expanded to 22. At the time the constitution was enacted, inclusion in this list meant that the language was entitled to representation on the Official Languages Commission and that the language would be one of the bases that would be drawn upon to enrich Hindi, the official language of the Union. The list has since, however, acquired further significance. The Government of India is now under an obligation to take measures for the development of these languages, such that they grow rapidly in richness and become effective means of communicating modern knowledge. In addition, a candidate appearing in an examination conducted for public service at a higher level is entitled to use any of these languages as the medium in which he answers the paper

**Ninth Schedule (Article 31-B):** The ninth schedule contains a list of laws that were kept immune from the judicial review. The list mainly consists of land reform acts passed by state legislatures. During the early days of the constitution the land reform acts passed by the state legislatures were made void by the use of article 31-right to property. In order to overcome this difficulty, the parliament amended the constitution to incorporate the ninth schedule. The Ninth Schedule emanates from Articles 31 A and 31 B, which were introduced by the Constitution's (first amendment) Act 1951, with effect from June 18, 1951, to ensure that certain laws were valid even if it violated the fundamental rights of a citizen. In other words, Parliament arrogated to itself the power to amend the Constitution in any manner it liked, irrespective of the fact whether it overrode

the fundamental rights. In 1952, the Supreme Court in *Shankari Prasad Singh Deo vs Union of India* case held that Articles 31 and 31 B were constitutionally valid amendments. But this position was reversed in a landmark judgment in 2007. In *I.R. Coelho v. State of Tamil Nadu and others (2007)* the Supreme Court of India held that laws included in the 9th schedule can be subject to judicial review if they violated the fundamental rights guaranteed under Article 14, 15, 19, 21 or the basic structure of the Constitution.

- Tenth Schedule (Articles 102 and 191) incorporates a list of "Anti-defection" provisions for Members of Parliament and Members of the State Legislatures. The Tenth Schedule to the Constitution sets out certain provisions as to disqualification on ground of defection. A member of a House belonging to any political party shall be disqualified for being a member of House if he has voluntarily given up his membership of such political party; or if he votes or abstains from voting in such House contrary to any direction issued by the Political party to which he belongs.
- Eleventh Schedule (Article 243-G) is the result of 73<sup>rd</sup> constitutional amendment. By this amendment panchayati raj institutions gained constitutional status. Thus the schedule lists out the powers of Panchayat Raj institutions.
- Twelfth Schedule (Article 243-W) is an outcome of 74<sup>th</sup> constitutional amendment. By this amendment Nagaraplaika institutions gained constitutional status. Thus the schedule lists out the powers of Nagaraplaika institutions.

## **MODULE-2**

### **INDIVIDUAL AND THE STATE, FUNDAMENTAL RIGHTS**

(With special reference to the following cases, AK Gopalan Vs State of Madras, Maneka Gandhi Vs Union of India, Golaknath Vs State of Punjab, Keshavananda Bharathi Vs state of Kerala, In Re Kerala education Bill, Indira Sahney Vs Union India)

#### **Introduction**

The Fundamental Rights are defined as basic human freedoms which every citizen has the right to enjoy for a proper and harmonious development of personality. These rights universally apply to all citizens, irrespective of race, place of birth, religion, caste, creed, color or Gender. They are enforceable by the courts, subject to certain restrictions. The chapter on Fundamental Rights' is a charter of rights contained in the Constitution of India. It guarantees civil liberties and individual rights common to most liberal democracies. These rights include rights such as equality before law, freedom of speech and expression, freedom of association and peaceful assembly, freedom to practice religion, and the right to constitutional remedies for the protection of civil rights by means of writs such as habeas corpus.

#### **Classification of Fundamental Rights**

The fundamental rights provided in the Indian constitution are classified into six groups:

1) Right to equality, including equality before law, prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, and equality of opportunity in matters of employment, abolition of untouchability and abolition of titles.

2) Right to freedom which includes speech and expression, assembly, association or union, movement, residence, and right to practice any profession or occupation, right to life and liberty, right to education, protection in respect to conviction in offences and protection against arrest and detention in certain cases.

3) Right against exploitation, prohibiting all forms of forced labour, child labour and traffic in human beings

4) Right to freedom of religion, including freedom of conscience and free profession, practice, and propagation of religion, freedom to manage religious affairs, freedom from certain taxes and freedom from religious instructions in certain educational institutes.

5) Cultural and Educational rights preserving Right of any section of citizens to conserve their culture, language or script, and right of minorities to establish and administer educational institutions of their choice.

6) Right to constitutional remedies for enforcement of Fundamental Rights.

The right to property was a fundamental right prior to the 42<sup>nd</sup> amendment. But now it is moved to the category of legal rights.

### **The Concept of Fundamental Rights**

The demands for fundamental rights were a part of human history. Its origin can be traced back to the city state demand for democracy. The roman state also acknowledged the individual and his rights as part of the state system. However organized and focused demands for the fundamental rights can be evidenced with England's Bill of Rights (1689). It proposed certain basic individual rights against state absolutism. The United States Bill of Rights (1787) and French Declaration of the Rights of Man and citizen (1789) provided further justification for the establishment of individual rights as fundamental.

In India the discussion on fundamental rights gained momentum during the national movement for freedom. This discussion was ignited by the British attitude towards the basic rights and liberties of Indian citizen. In 1919, the Rowlatt Act gave extensive powers to the British government and police, and allowed indefinite arrest and detention of individuals, warrant-less searches and seizures, restrictions on public gatherings, and intensive censorship of media and publications. The public opposition to this act eventually led to mass campaigns of non-violent civil disobedience throughout the country demanding guaranteed civil freedoms, and limitations on government power. Indians, who were seeking independence and their own government, were particularly influenced by the independence of Ireland and the development of the Irish constitution. Also, the directive principles of state policy in Irish constitution were looked upon by the people of India as an inspiration for the independent India's government to comprehensively tackle complex social and economic challenges across a vast, diverse nation and population.

In 1928, the Nehru Commission composing of representatives of Indian political parties proposed constitutional reforms for India These reforms were supposed to guarantee rights deemed fundamental, representation for religious and ethnic minorities, and limit the powers of the government. In 1931, the Indian National Congress adopted resolutions committing itself to the defense of fundamental civil rights, as well as socio-economic rights such as the minimum wage and the abolition of untouchability and serfdom. Committing themselves to socialism in 1936, the Congress leaders took examples from the constitution of the erstwhile USSR, which inspired the fundamental duties of citizens as a means of collective patriotic responsibility for national interests and challenges.

When India obtained independence, the task of developing a constitution for the nation was undertaken by the Constituent Assembly of India. It is in this period the United Nations General Assembly adopted the Universal Declaration of Human Rights (1948) and called upon all member states to adopt these rights in their respective constitutions. The constituent assembly of India was significantly influenced by the UDHR. The tree drafts of the Indian constitution thus contained an extensive list of fundamental rights.

## **Nature of Fundamental Rights**

The fundamental rights were included in the constitution as they were considered essential for the development of the personality of every individual and to preserve human dignity. According to the constitutional fathers, democracy is, in essence, a government by opinion and therefore, the means of formulating public opinion should be secured to the people of a democratic nation. For this purpose, the constitution guaranteed to all the citizens of India the freedom of speech and expression and various other freedoms in the form of the fundamental rights. All people, irrespective of race, religion, caste or sex, have been given the right to move the Supreme Court and the High Courts for the enforcement of their fundamental rights.

These fundamental rights help not only in protection but also the prevention of violations of human rights. They emphasize on the fundamental unity of India by guaranteeing to all citizens the access and use of the same facilities. Some fundamental rights apply for persons of any nationality whereas others are available only to the citizens of India. The right to life and personal liberty is available to all people and so is the right to freedom of religion. On the other hand, freedoms of speech and expression and freedom to reside and settle in any part of the country are reserved to citizens alone, including non-resident Indian citizens.

Fundamental rights primarily protect individuals from any arbitrary state actions, but some rights are enforceable against individuals. For instance, the Constitution abolishes untouchability and also prohibits begar. These provisions act as a check both on state action as well as the action of private individuals. However, these rights are not absolute or uncontrolled and are subject to reasonable restrictions as necessary for the protection of general welfare. They can also be selectively curtailed. The Supreme Court has ruled that all provisions of the Constitution, including fundamental rights can be amended. However, the Parliament cannot alter the basic structure of the constitution.

A state of national emergency has an adverse effect on these rights. Under such a state, the rights conferred by Article 19 (freedoms of speech, assembly and movement, etc.) remain suspended. Hence, in such a situation, the legislature may make laws which go against the rights given in Article 19. Also, the President may by order to suspend the right to move court for the enforcement of other rights as well.

### **Right to equality**

Article 14 provides equality before law and equal protection of laws. The other provisions with regard to equality are contained in Articles 15, 16, 17 and 18 of the constitution. It is the principal foundation of all other rights and liberties, and guarantees the following:

Article 14 declares that "the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India". The phrase "equality before the law" occurs in almost all written constitutions that guarantee fundamental rights. Equality before the law is an expression of English Common Law while "equal protection of laws" owes its origin to the American Constitution. Both the phrases aim to establish what is called the "equality to status and of opportunity" as embodied in the Preamble of the Constitution. While equality before the law is a

somewhat negative concept implying the absence of any special privilege in favor of any individual and the equal subjection of all classes to the ordinary law, equal protection of laws is a more positive concept employing equality of treatment under equal circumstances. Thus, Article 14 stands for the establishment of a situation under which there is complete absence of any arbitrary discrimination by the laws themselves or in their administration.

Interpreting the scope of the Article, the Supreme Court of India held in *Charanjit Lai Choudhury Vs The Union of India* that: (a) Equal protection means equal protection under equal circumstances; (b) The state can make reasonable classification for purposes of legislation; (c) Presumption of reasonableness is in favour of legislation; (d) The burden of proof is on those who challenge the legislation.

Article 15 of the constitution states that no person shall be discriminated on the basis of caste, color, language etc. Every person shall have equal access to public places like public parks, museums, wells, bathing ghats and temples etc. However, the State may make any special provision for women and children. Special provisions may be made for the advancements of any socially or educationally backward class or scheduled castes or scheduled tribes.

Article 16 of the constitution lays down that the State cannot discriminate against anyone in the matters of employment. All citizens can apply for government jobs. There are some exceptions. The Parliament may enact a law stating that certain jobs can only be filled by applicants who are domiciled in the area. This may be meant for posts that require knowledge of the locality and language of the area. The State may also reserve posts for members of backward classes, scheduled castes or scheduled tribes which are not adequately represented in the services under the State to bring up the weaker sections of the society.

Article 17 of the constitution abolishes the practice of untouchability. Practice of untouchability is an offense and anyone doing so is punishable by law. The Untouchability Offences Act of 1955 which later renamed as Protection of Civil Rights Act in 1976, provided penalties for preventing a person from entering a place of worship or from taking water from a tank or well. This is a gandhian principle taken over to the chapter of fundamental rights.

Article 18 of the constitution prohibits the State from conferring any titles. Citizens of India cannot accept titles from a foreign State. The British government had created an aristocratic class known as Rai Bahadurs and Khan Bahadurs in India — these titles were also abolished. However, Military and academic distinctions can be conferred on the citizens of India. The awards of Bharat Ratna and Padma Vibhushan cannot be used by the recipient as a title and do not, accordingly, come within the constitutional prohibition.

**Right to freedom:** Articles 19-22 of the Indian Constitution contains the right to freedom. The right to freedom in Article 19 guarantees the following six freedoms

**Freedom of speech and expression:** It enables an individual to participate in public activities. The phrase, "freedom of press" has not been used in Article 19, but Supreme Court of India observed that freedom of expression includes freedom of press. In *Romesh Thapar v. State of Madras*, Patanjali Shastri, CJ observed: "Freedom of speech and of the press lay at the foundation

of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible.” This argument was further widened in *Union of India Vs. Association for Democratic Reforms*. In *Indian Express v. Union of India*, it has been held that the press plays a very significant role in the democratic machinery. The courts have duty to uphold the freedom of press and invalidate all laws and administrative actions that abridge that freedom. Freedom of press has three essential elements. They are: 1. freedom of access to all sources of information, 2. freedom of publication, and 3. freedom of circulation.

In USA the bill of rights contains a clear guarantee of freedom of press. With regard to freedom of speech and expression, reasonable restrictions can be imposed in the interest of public order, security of State, decency or morality. The freedom of speech also contains a freedom ‘not to speech’.

In a landmark judgment of the case *Maneka Gandhi v. Union of India*, the Supreme Court held that the freedom of speech and expression has no geographical limitation and it carries with it the right of a citizen to gather information and to exchange thought with others not only in India but abroad also.

Clause (2) of Article 19 of the Indian constitution enables the legislature to impose certain restrictions on free speech under following heads:

- I, security of the State,
- II. Friendly relations with foreign States,

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- III. Public order,
- IV. Decency and morality,
- V. contempt of court,
- VI. Defamation,
- VII. Incitement to an offence, and
- VIII. Sovereignty and integrity of India.

**Freedom to assemble peacefully without arms**, on which the State can impose reasonable restrictions in the interest of public order and the sovereignty and integrity of India.

**Freedom to form associations or unions** is also guaranteed by article 19. However the State can impose reasonable restrictions on this freedom in the interest of public order, morality and the sovereignty and integrity of India.

**Freedom to move freely throughout the territory of India** though reasonable restrictions can be imposed on this right in the interest of the general public, for example, restrictions may be imposed on movement and travelling, so as to control epidemics.

**Freedom to reside and settle in any part of the territory of India** which is also subject to reasonable restrictions by the State in the interest of the general public or for the protection of the scheduled tribes because certain safeguards as are envisaged here seem to be justified to protect indigenous and tribal peoples from exploitation and coercion.

**Freedom to practice any profession or to carry on any occupation, trade or business** is another right guaranteed. But this is not absolute. There is no right to carry on a business which is dangerous or immoral. Also, professional or technical qualifications may be prescribed for practicing any profession or carrying on any trade. The State may impose reasonable restrictions in the interest of the general public.

Protection with respect to conviction for offences is guaranteed in the right to life and personal liberty. According to Article 20, no one can be awarded punishment which is more than what the law of the land prescribes at that time. This legal axiom is based on the principle that no criminal law can be made retrospective, that is, for an act to become an offence, the essential condition is that it should have been an offence legally at the time of committing it. Moreover, no person accused of any offence shall be compelled to be a witness against himself. "Compulsion" in this article refers to what in law is called "Duress" (injury, beating or unlawful imprisonment to make a person do something that he does not want to do). This article is known as a safeguard against self incrimination. The other principle enshrined in this article is the principle of double jeopardy, that is, no person can be convicted twice for the same offence, which has been derived from Anglo Saxon law. This principle was first established in the Magna Carta. In USA a second trial is also prohibited. But in India the restriction is on a second trial when the accused is punished under the first trial.

Protection of life and personal liberty is also stated under right to life and personal liberty. Article 21 declares that no citizen can be denied his life and liberty except by procedure established by law. This means that a person's life and personal liberty can only be disputed if that person has committed a crime. Against the American principle of due process of law, the Indian guarantee of procedure established by law provides for more insularity against arbitrary state intervention. However, the right to life does not include the right to die, and hence, suicide or an attempt thereof, is an offence. Attempted suicide being interpreted as a crime has seen many debates. The Supreme Court of India gave a landmark ruling in 1994. The court repealed section 309 of the Indian penal code, under which people attempting suicide could face prosecution and prison terms of up to one year. In 1996 however another Supreme Court ruling nullified the earlier verdict. In *Maneka Gandhi Vs Union of India* the Supreme Court made it clear that the right to travel abroad is also covered under "personal liberty" in Article 21. In 2002, through the 86th Amendment Act, Article 21(A) was incorporated. It made the right to primary education part of the right to freedom, stating that the State would provide free and compulsory education to children from six to fourteen years of age.

Article 21 requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful. The law of preventive detention has therefore now to pass the test not only for Article 22, but also of Article 21 and if the constitutional validity of any such law is challenged,

the court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just.

Article 21 assures the right to live with human dignity, free from exploitation. The state is under a constitutional obligation to see that there is no violation of the fundamental right of any person, particularly when he belongs to the weaker section of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. Both the Central Government and the State Government are therefore bound to ensure observance of the various social welfare and labour laws enacted by Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the directive principles of the state policy (*Bandhua Mukti Morcha v. Union of India*).

The meaning of the word life includes the right to live in fair and reasonable conditions, right to rehabilitation after release, right to live hood by legal means and decent environment. The expanded scope of Article 21 has been explained by the Apex Court in the case of *Unni Krishnan Vs State of A.P.* The Court provided the list of some of the rights covered under Article 21:

- (1) The right to go abroad.
- (2) The right to privacy.
- (3) The right against solitary confinement.
- (4) The right against hand cuffing.
- (5) The right against delayed execution.
- (6) The right to shelter.
- (7) The right against custodial death.
- (8) The right against public hanging.
- (9) Doctors assistance.

It was observed in *Unni Krishnans case* that Article 21 is the heart of Fundamental Rights and it has extended the Scope of Article 21 by observing that the life includes the education as well as, as the right to education flows from the right to life.

As a result of expansion of the scope of Article 21, the Public Interest Litigations in respect of children in jail being entitled to special protection, health hazards due to pollution and harmful drugs, housing for beggars, immediate medical aid to injured persons, starvation deaths, the right to know, the right to open trial, inhuman conditions in aftercare home have found place under it. Through various judgments the Apex Court also included many of the non-justifiable Directive Principles embodied under part IV of the Constitution

Rights of a person arrested under ordinary circumstances are laid down in the right to life and personal liberty. No one can be arrested without being told the grounds for his arrest. If

arrested, the person has the right to defend himself by a lawyer of his choice. Also an arrested citizen has to be brought before the nearest magistrate within 24 hours. The rights of a person arrested under ordinary circumstances are not available to an enemy alien. They are also not available to persons detained under the Preventive Detention Act. Under preventive detention, the government can imprison a person for a maximum of three months. It means that if the government feels that a person being at liberty can be a threat to the law and order or to the unity and integrity of the nation, it can detain or arrest that person to prevent him from doing this possible harm. After three months such a case is brought before an advisory board for review.

### **Right against exploitation**

The right against exploitation, given in Articles 23 and 24, provides for the abolition of trafficking in human beings and Begar (forced labor), and abolition of employment of children below the age of 14 years in dangerous jobs like factories and mines. Child labour is considered a gross violation of the spirit and provisions of the constitution. Begar, practiced in the past by landlords, has been declared a crime and is punishable by law. Trafficking in humans for the purpose of slave trade or prostitution is also prohibited by law. The right against exploitation provides wider coverage as it defines any compulsory and unpaid labor as slavery. An exception is made in employment without payment for compulsory services for public purposes.

### **Right to freedom of religion**

India is declared as a secular state in its preamble itself. This commitment to secularism is evident in Right to freedom of religion, covered in Articles 25, 26, 27 and 28. According to the Constitution, all religions are equal before the State and no religion shall be given preference over the other. Citizens are free to preach, practice and propagate any religion of their choice.

Article 25 guarantees to every person the freedom of conscience and right to profess practice and propagate religion. This right is however, subjected to public order, morality and health and to the other provisions of Part III of constitution. Also, under sub-Clauses (a) and (b) of Clause (2) of Article 25 The State is empowered by law: (a) to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice; (b) to provide for (i) social welfare and reform, and (ii) to throw open Hindu religious institution of a public character to all classes and sections of Hindus. Article 25 (1) allows to transmit or spread one's religion by an exposition of its tenets. The protection of Article 25 and 26 is not limited to matters of doctrine of belief. It extends also to acts done in pursuance of 'religion' and, therefore, contains a guarantee for rituals and observances, ceremonies and mode of worship which are integral parts of religion. What constitute an essential part of religion or religious practice has to be decided by the courts with reference to a doctrine of a particular religion and include practice which are regarded by the community as a part of its religion.

### **Restrictions on Freedom of Religion:**

Religious liberty subjected to public order, morality and health - In the name of religion no act can be done against public order, morality and health of public. Thus section 34 of the Police

Act prohibits the slaughter of cattle or indecent exposure of one's person in public place. These acts cannot be justified on plea of practice of religious rites. Likewise, in the name of religion 'untouchability' or traffic in human beings ' e.g. system of Devdasis cannot be tolerated. These rights are subjected to the reasonable restrictions under clause (2) of Article 19. For instance, a citizen's freedom of speech and expression in matters of religion is subjected to reasonable restrictions under Article 19 (2). Right to propagate one's religion does not give right to anyone to "forcibly" convert any person to one's own religion. Forcible conversion of any person to one's own religion might disturb the public order and hence could be prohibited by law.

Article 26 says that, subject to public order, morality and health, every religious denomination or any section of it shall have the following rights- (a) to establish and maintain institutions for religious and charitable purpose, (b) to manage its own affairs in matters of religion, (c) to own and acquire movable and immovable property, (d) to administer such property in accordance with law. The right guaranteed by Article 25 is an individual right while the right guaranteed by Article 26 is the right of an 'organized body' like the religious denomination or any section thereof.

Article 27 provides that no person shall be compelled to pay tax for the promotion or maintenance of any religion or religious denomination. This Article emphasizes the secular character of the State. The public money collected by way of tax cannot be spent by the State for the promotion of any particular religion.

According to Article 28(1) no religious instruction shall be imparted in any educational institution wholly maintained out of State funds. But this clause shall not apply to an educational institution which is administered by the State but was not established under any endowment or trust which requires that religious instruction shall be imparted in such institution. Thus Article 28 mentions four types of educational institutions: (a) Institutions wholly maintained by the State. (b) Institutions recognized by the State. (c) Institutions that are receiving aid out of the State fund. (d) Institutions that are administered by the State but are established any trust or endowment. In the institutions of (a) type not religious instructions can be imparted. In (b) and (c) type of institutions religious instructions may be imparted only with the consent of the individuals. In the (d) type institution, there is not restriction on religious instructions.

### **Cultural and educational rights**

As India is a country of many languages, religions, and cultures, the Constitution provides special measures, in Articles 29 and 30, to protect the rights of the minorities. Any community which has a language and a script of its own has the right to conserve and develop it. No citizen can be discriminated against for admission in State or State aided institutions.

All minorities, religious or linguistic, can set up their own educational institutions to preserve and develop their own culture. In granting aid to institutions, the State cannot discriminate against any institution on the basis of the fact that it is administered by a minority institution. But the right to administer does not mean that the State cannot interfere in case of maladministration. In a precedent-setting judgment in 1980, the Supreme Court held that the State can take regulatory measures to promote the efficiency and excellence of educational standards. It can also issue

guidelines for ensuring the security of the services of the teachers or other employees of the institution. In another landmark judgment in 2002, the Supreme Court ruled that in case of aided minority institutions offering professional courses, admission could only be through a common entrance test conducted by State or a university. Even an unaided minority institution ought not to ignore the merit of the students for admission.

### **Right to constitutional remedies**

Right to constitutional remedies empowers the citizens to move a court of law in case of any denial of the fundamental rights. For instance, in case of imprisonment, the citizen can ask the court to see if it is according to the provisions of the law of the country. If the court finds that it is not, the person will have to be freed. This procedure of asking the courts to preserve or safeguard the citizens' fundamental rights can be done in various ways. The courts can issue various kinds of writs. These writs are habeas corpus, mandamus, prohibition, quo warranto and certiorari. When a national or state emergency is declared, this right is suspended by the central government.

### **Constitutional remedies under article 32**

The Constitution of India provides various Fundamental rights to all its citizens. The provisions for proper enforcement of these Fundamental rights are also given in the Constitution by article 32. Enforcement of the Fundamental rights is safeguarded with the help of prerogative Writs. Writs are written orders of the court ordering a party to whom it is addressed to perform or cease from performing a specified act. Article 32 empowers the Supreme Court and Article 226 empowers the High Courts to issue writs against any authority of the State in order to enforce the Fundamental rights.

#### **Different type of Writs:**

**Habeas Corpus:** One of the valuable writs for personal liberty is “Habeas Corpus” which means “You may have the body”. If any person is detained in prison or a private custody without legal justification; this writ is issued to the authority confining such person, to produce him/her before the Court. The Court intervenes here and asks the authority to provide the reasons for such detention and if there is no justification, the person detained is set free. The applicant for this writ can either be the person in detention or any person acting on his/her behalf to protect his/her liberty. This writ provides for immediate relief in case of unlawful detention.

. **Writ of Certiorari:** The meaning of Certiorari is ‘to be certified’. This writ is issued when any lower court or a tribunal exercises a wrongful jurisdiction and decides the case. The party affected can move this writ to higher courts like the High Court or the Supreme Court. Writ of Certiorari can be issued to the quasi judicial or subordinate courts when they act:

In excess or without any jurisdiction

In contravention to the principles of Natural justice

In violation of the prescribed procedure as established by law

Resulting in an error of judgment apparent on the face of it.

The writ of Prohibition and Writ of Certiorari are similar except for the time of their issuance. The former is issued before the passing of the order by the lower court while the latter is issued after passing of the order.

**Writ of Mandamus:** The term “Mandamus” in Latin means “We command”. This writ is issued to a public official who refrains from performing his public duties which he is obliged to do. This writ can also be issued to any public authority (including the government, corporation and Court) commits an act which is detrimental to the welfare of the general public. This writ however cannot be issued against the President and the Governor.

**Writ of Quo-Warranto:** Quo Warranto means “By what warrants”. The issuance of this writ takes place to restrain a person from acting in public office to which he is not entitled. If a person occupies a public office without being qualified for the office, then this writ is issued to restrain the concerned authority from discharging his duties. The High Court of that particular state has the authority to issue this writ and direct the person to vacate the office in question. The writ of Quo-Warranto is issued in 3 instances when

The office in question is a public office and is substantive in nature.

The State or the Constitution has created the office

The public servant (respondent) should have asserted a claim on the office.

**Writ of Prohibition:** Writ of Prohibition is issued to a subordinate to cease doing something which it is not supposed to do as per law. Normally, this writ is issued by the superior courts to the lower courts when the lower court tries to exceed the limit of jurisdiction vested in it. Likewise, if the court acts in absence of jurisdiction, this writ can be issued. Once this writ is issued the lower court is under an obligation to stop its proceedings. One cannot issue this writ against a public official who does not have judicial or quasi judicial powers.

### **Fundamental rights and the individual**

The fundamental rights occupy an important position in the scheme of the constitution. It is said that a state is known with the rights it maintains. The very concept of state itself is related to the protection of rights. This argument is highlighted in the French declaration of rights of man and citizen and later in American declaration of Independence. To them rights are prior to state. In India the constitution provides for an exhaustive list of fundamental rights. However political groups have demanded that the right to work, the right to economic assistance in case of unemployment, old age, and similar rights be enshrined as constitutional guarantees to address issues of poverty and economic insecurity, though these provisions have been enshrined in the Directive Principles of state policy.

The right to freedom and personal liberty has a number of limiting clauses, and thus has been criticized for failing to check the sanctioning of powers often deemed "excessive". There is the provision of preventive detention and suspension of fundamental rights in times of Emergency.

The provisions of acts like the Maintenance of Internal Security Act (MISA) and the National Security Act (NSA) are a means of countering the fundamental rights, because they sanction excessive powers with the aim of fighting internal and cross-border terrorism and political violence, without safeguards for civil rights. All the fundamental rights are conditional. The state can put reasonable restriction on the rights. The restricting phrases "security of State", "public order" and "morality" are of wide implication. The meaning of phrases like "reasonable restrictions" and "the interest of public order" have not been explicitly stated in the constitution, and this ambiguity leads to unnecessary litigation.

Another issue is related to the freedom of press. "Freedom of press" has not been included in the right to freedom, which is necessary for formulating public opinion and to make freedom of expression more legitimate. Employment of child labour in hazardous job environments has been reduced, but their employment even in non-hazardous jobs, including their prevalent employment as domestic help violates the spirit and ideals of the constitution. More than 16.5 million children are employed and working in India. *India was ranked 88 out of 159 in 2005, according to the degree to which corruption is perceived to exist among public officials and politicians worldwide.*

### **Right to property**

The Constitution originally provided for the right to property under Articles 19 and 31. Article 19 guaranteed to all citizens the right to acquire, hold and dispose of property. Article 31 provided that "no person shall be deprived of his property save by authority of law." It also provided that compensation would be paid to a person whose property has been taken for public purposes.

The provisions relating to the right to property were changed a number of times. The Forty-Forth Amendment deleted the right to property from the list of fundamental rights. Article 300-A, was added to the constitution which provided that "no person shall be deprived of his property save by authority of law". Thus if a legislature makes a law depriving a person of his property the aggrieved person shall have no right to move the court under Article 32. Thus, the right to property is no longer a fundamental right, though it is still a constitutional right. If the government appears to have acted unfairly, the action can be challenged in a court of law by citizens.

The right to property under the Indian constitution tried to approach the question of how to handle property and pressures relating to it by trying to balance the right to property with the right to compensation for its acquisition. This was done through an absolute fundamental right to property and then balancing the same with reasonable restrictions and adding a further fundamental right of compensation in case the properties are acquired by the state. This was exemplified by Article 19(1) (f) balanced by Article 19(5) and the compensation article in Article 31.

### **Right to Property before 1978**

The issue of right to property was a major issue of contestation in the Indian discourses on development. The government finds it necessary to bring land reform acts to check the concentration of wealth in a few hands. This was in tune with the social justice principle propagated in the preamble. The outburst against the Right to Property as a Fundamental Right in Articles 19 (1) (f) and 31 started immediately after the enforcement of the Constitution in 1950. Land reforms,

zamindari abolition laws, disputes relating to compensation, several rounds of constitutional amendments, litigations and adjudications ultimately culminated first in the insertion of the word socialist in the Preamble by the 42nd Amendment in 1977 and later in the omission of the Right to Property as a Fundamental right and its reincarnation as a bare constitutional right in Article 300-A by the 44th Amendment in 1978. The Ninth Schedule was inserted in the constitution by the Constitution (First Amendment) Act, 1951 along with two new Articles 31 A & 31 B so as to make laws acquiring zamindaris unchallengeable in the courts.

By the Fourth Amendment Act, 1955, Art 31 relating to right to property was amended in several respects. The purpose of these amendments related to the power of the state o compulsory acquisition and requisitioning of private property. The amount of compensation payable for this purpose was made unjustifiable to overcome the effect of the Supreme Court judgment in the decision of State of West Bengal Vs. Bella Banerjee. By the constitution (Seventeenth Amendment) Act, 1964, article 31 A was amended with respect to meaning of expression estate and the Ninth Schedule was amended by including therein certain state enactments. During this period the Supreme Court was generally of the view that land reforms need to be upheld even if they did strictly clash against the right to property. However during the period of nationalization by the Indira Gandhi government the Supreme Court stood against the violation of right to property and declared much legislation in valid on the grounds of article 31. The Government of India then moved the amendment to abolish the fundamental right of right to property.

The liberalization of the economy and the government's initiative to set up special economic zones has led to many protests by farmers and has led to calls for the reinstatement of the fundamental right to private property. The Supreme Court has sent a notice to the government questioning why the right should not be brought back but in 2010 the court rejected the PIL and accommodated the government position.

### **Case studies**

#### **Kesavananda Bharati Vs. State of Kerala**

Kesavananda Bharati Vs State of Kerala (AIR 1973) is a landmark decision of the Supreme Court of India that outlined the Basic Structure doctrine of the Constitution. The Basic Structure doctrine forms the basis of the power of the Indian judiciary to review, and strike down, amendments to the Constitution of India enacted by the Indian parliament which conflict with or seek to alter this basic structure of the Constitution.

The case originated when Swami Kesavananda Bharati, challenged the Kerala government's attempts, under two state land reform acts. The Supreme Court reviewed the decision in Golaknath Vs State of Punjab, and considered the validity of the 24th, 25th, 26th and 29th Amendments. The case was heard by the largest ever Constitutional Bench of 13 Judges.

The Court held that although no part of the constitution, including fundamental rights, was beyond the amending power of Parliament, the "basic structure of the Constitution could not be abrogated even by a constitutional amendment". All of the Judges held that the 24th, 25th and 29th Amendments Acts are valid. Majority judges held that Golak Nath's case was wrongly decided and

that an amendment to the Constitution was not a "law" for the purposes of Article 13. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.

Upholding the validity of clause (4) of article 13 and a corresponding provision in article 368(3), inserted by the 24th Amendment, the Court settled in favour of the view that Parliament has the power to amend the Fundamental Rights also. However, the Court affirmed another proposition also asserted in the Golaknath case, by ruling that the expression "amendment" of this Constitution in article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to Fundamental Rights, it would be that while Fundamental Rights cannot be abrogated, reasonable abridgement of Fundamental Rights could be effected in the public interest. The position is that every provision of the Constitution can be amended provided the basic foundation and structure of the Constitution remains the same. The ruling thus established the principle that the basic structure cannot be amended on the grounds that a power to amend is not a power to destroy.

### **Golaknath Vs State of Punjab**

The 1953 Punjab Security and Land Tenures Act provided ceiling on private property to thirty acres. This was challenged by the Golak Nath family, one of the largest landholders in the state. The family filed a petition under Article 32 challenging the 1953 Punjab Act on the ground that it denied them their constitutional rights to acquire and hold property and practice any profession (Articles 19(f) and (g)) and to equality before and equal protection of the law (Article 14). They also sought to have the Seventeenth Amendment - which had placed the Punjab Act in the Ninth Schedule - declared ultra vires. The major question brought before the court was 1, Whether Fundamental Rights can be amended or not; 2, Whether Amendment is a "law" under the meaning of Article 13(2)

Article 13(2) reads, "The State shall not make any law which takes away or abridges the right conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void." In this context the Supreme Court held that an amendment of the Constitution is a legislative process, and that an amendment under article 368 is "law" within the meaning of article 13 of the Constitution and therefore, if an amendment "takes away or abridges" a Fundamental Right conferred by Part III, it is void. The Court also ruled that Fundamental Rights included in Part III of the Constitution are given a "transcendental position" under the Constitution and are kept beyond the reach of Parliament. The Court also held that the scheme of the Constitution and the nature of the freedoms it granted incapacitated Parliament from modifying, restricting or impairing Fundamental Freedoms in Part III.

The judgment reversed the Supreme Court's earlier decision which had upheld Parliament's power to amend all parts of the Constitution, including Part III related to Fundamental Rights. The judgment left Parliament with no power to curtail Fundamental Rights. It was in this case that the doctrine of prospective overruling was invoked. This doctrine was used to preserve the constitutional validity of the Constitution (Seventeenth Amendment) Act, legality of which had been challenged.

### **A.K. Gopalan Vs. State of Madras**

The famous case of A.K. Gopalan v. State of Madras was the first case filed challenging the constitutional validity of an act under the provision of Article 21. A.K. Gopalan was charged for Sedition U/S 124A, IPC, a draconian Law enacted by the British Parliament, to be used against the leaders of the Freedom movement. Gopalan was charged for this offence, for his act of celebrating India's independence within jail premises joined by this fellow jail prisoners. Gopalan was released in 1947, only to be re-arrested this time under Preventive Detention Law. When the Constitution came into force, Gopalan continued in detention. When Gopalan sent a petition from jail to Supreme Court, his detention was brought under the Preventive Detention Act, 1950, which came into force on 26<sup>th</sup> Feb 1950. The Executive continued with the colonial tradition of arbitrariness in booking Gopalan u/s 124 A, IPC and thereafter the legislature, protected the action of the Executive, by enacting, Preventive Detention Act, 1950, on 26<sup>th</sup> Feb 1950.

Article 21 says 'No person shall be deprived of his life or personal liberty except according to procedure established by law the Indian Constitution'. Article 22 provides for preventive detention. AK Gopalan questioned the validity of preventive detention law as it violates article 14, 19 and 21.

Majority judgment held that Art. 22 was a self contained code and therefore a law of Preventive Detention did not have to satisfy the requirement of Article 19, 14, 21 and the argument that the provisions of Article 19 relating to various personal freedoms should be read into the provisions of Art. 21 and Art. 22 were rejected. The minority judges however disagreed with this view, taken by majority, by holding that Fundamental right of life and personal liberty has many attributes, and some of them are found in Article 19. Article 21 covers a variety of rights including those, which are specifically provided U/A 19.

### **Maneka Gandhi Vs Union of India**

Maneka Gandhi Vs Union of India (AIR 1978) is a landmark judgment and played the most significant role towards the transformation of the judicial view on Article 21 of the constitution of India so as to imply many more fundamental rights from Article 21. Maneka Gandhi was issued a passport under the Passport Act 1967. The regional passport officer asked her to surrender her passport under section 10(3) (c) of the Act in public interest. Maneka Gandhi then filed a writ petition under Article 32 of the constitution in the Supreme Court challenging the order of the government of India as violating her fundamental rights guaranteed under Article 21 of the constitution. The main issues before the court in this case were –whether right to go abroad is a part of right to personal liberty under Article 21. –Whether section 10(3) (c) of the Passport Act is violative of Article 14, 19(1) (a) and 21 of the constitution. –Whether the impugned order of the regional passport officer is in contravention of the principles of natural justice.

The Supreme Court in this case reiterated the proposition that the fundamental rights under the constitution of India are not mutually exclusive but are interrelated. According to Justice K. Iyer, 'a fundamental right is not an island in itself'. The expression "personal liberty" in Article 21 was interpreted broadly to engulf a variety of rights within itself. The court further observed that the fundamental rights should be interpreted in such a manner so as to expand its reach and ambit

rather than to concentrate its meaning and content by judicial construction. Article 21 provides that no person shall be deprived of his life or personal liberty except in accordance with procedure established by law but that does not mean that a mere semblance of procedure provided by law will satisfy the Article, the procedure should be just, fair and reasonable. The principles of natural justice are implicit in Article 21 and hence the statutory law must not condemn anyone unheard. One of the significant interpretation in this case is the discovery of inter connections between Article 14, 19 and 21. Thus a law which prescribes a procedure for depriving a person of "personal liberty" has to fulfill the requirements of Article 14 and 19 also. Moreover the 'procedure established by law' as required under Article 21 must satisfy the test of reasonableness in order to conform with Article 14. The court finally held that the right to travel and go outside the country is included in the right to personal liberty guaranteed under Article 21.

### **Indra Sawhney Vs Union of India**

The case is highly debatable and has had a considerable impact on the Indian socio-political scenario. The Supreme Court has consciously sought to explain the legality and necessity of affirmative action in its governance policy. Moreover the Supreme Court laid down certain guidelines considering past situations and the present scenario which required a more progressive outlook.

The three main impacts of the case are:

Reservations were validated for Backward Classes.

50% ceiling was imposed to ensure equality of opportunity and maintenance of efficiency and standards.

The creamy layer was distinguished by careful examination of existing economic conditions and was rightly excluded from any reservation category.

On January 1, 1979 the Government appointed the second Backward Classes By a Presidential Order under Article 340 of the Constitution under the chairmanship of B.P. Mandal to investigate the conditions of Socially & Educationally Backward Classes within the territory of India. The commission submitted its report on December, 1980 and recommended for reservation of 27% in Government jobs. The implementation of reservation cause civil disturbance throughout India. A writ petition was filed challenging the validity of the order. The Judges issued a stay order. Later the next government by introduced the economic criterion in granting reservation. They also reserved another 10% of vacancies for the socially & educationally backward classes. The matter was taken up by the court. The questions were;

1. Whether Article 16(4) is an exception to Article 16(1) and would be exhaustive of the right to reservation of posts in services under the State?

2. What would be the content of the phrase "Backward Class" in Article 16(4) of the Constitution and whether caste by itself could constitute a class and whether economic criterion by itself could identify a class for Article 16(4) and whether "Backward Classes" in Article 16(4) would include the "weaker sections" mentioned in Article 46 as well

3. If economic criterion by itself could not constitute a Backward Class under Article 16(4), whether reservation of posts in services under the State, based exclusively on economic criterion would be covered by Article 16(1) of the Constitution?

4. Can the extent of reservation of posts in the can exceed 50 %

5. Does Article 16(4) permit the classification of 'Backward Classes' into Backward Classes and Most Backward Classes

The court observed that

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I. Backward class of citizen in Article 16(4) can be identified on the basis of the caste system & not only on economic basis.

II. Article 16(4) is not an exception of Article 16(1). It is an instance of the classification. Reservation can be made under article 16(1).

III. Backward classes in Article 16(4) were not similar to as socially & educationally backward in article 15(4).

IV. Creamy layer must be excluded from the backward classes.

V. Article 16(4) permits classification of backward classes into backward & more backward classes.

VI. A backward class of citizens cannot be identified only & exclusively with reference to economic criteria.

VII. Reservation shall not exceed 50%.

IX. No reservation in promotion.

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### **In Re; The Kerala Education Bill**

The Education Bill was introduced in the Kerala assembly by Professor Joseph Mundasseri, who was then the education minister for the first elected (1957) Communist Party of India government. This bill aimed at eradicating the malpractices prevalent in the private sector educational institutions, and attempted to regulate the educational institutions' function, including standardizing syllabi and pay structures. This bill, imparted drastic changes in Kerala society. The Education Bill sought to regulate appointments and conditions of teachers. Salaries of teachers were to be paid through the treasury. There was a provision of takeover of management of educational institutions, which arguably violated the constitution. The bill was passed by the Legislative Assembly of the State of Kerala on September 2, 1957, and was, under Art. 200, reserved for the president. The president has submitted the same to presidential reference.

This reference has been made by the President under Art. 143(1) of the Constitution of India for the opinion of this Court on certain questions of law of considerable public importance that

have arisen out of or touching certain provisions of the Kerala Education Bill, 1957, The major questions were;

- (1) Does the Kerala Education Bill offend article 14 of the Constitution
- (2) Do the Kerala Education Bill, or any provisions thereof, offend article 30 of the Constitution?
- (3) Does the Kerala Bill, offend article 14 of the Constitution?

The court observed that true intention of Art. 30(1) is to equip minorities with a shield whereby they could defend themselves against attacks by majorities, religious or linguistic, and not to arm them with a sword whereby they could compel the majorities to grant concessions. It should be noted in this connection that the Constitution has laid on the State various obligations in relation to the minorities apart from what is involved in Art. 30(1). Thus, Art. 30(2) provide that a State shall not, when it chooses to grant aid to educational institutions, discriminate against institutions of minorities based on language or religion. Likewise, if the State frames regulations for recognition of educational institutions, it has to treat all of them alike, without discriminating against any institution on the ground of language or religion.

The court made it clear that the various clauses of the bill no way offend articles 14 and 30 of the constitution.

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### **MODULE-3**

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## **DIRECTIVE PRINCIPLES OF STATE POLICY (AN EVALUATION OF THE PRINCIPLES IN THE CONTEXT OF CONTEMPORARY REALITIES**

### **Introduction**

The fourth chapter of the Indian constitution (Articles 36-51) provides for a set of directive principles. The Directive Principles of State Policy are guidelines to the central and state governments of India, to be kept in mind while framing laws and policies. It advises every state structure to follow these principles in governance. Governments and legislatures are not legally bound to implement these principles. These provisions, contained in Part IV of the Constitution of India, are not enforceable by any court, but the principles laid down therein are considered fundamental in the governance of the country, making it the duty of the State to apply these principles in making laws to establish a just society in the country. The principles have been inspired by the Directive Principles given in the Constitution of Ireland and also by the principles of Gandhism; and relate to social justice, economic welfare, foreign policy, and legal and administrative matters. They project the ideal of welfare and Gandhian state that the constitution aims to establish. Despite of all these limitations, it cannot be said that these Principles are absolutely useless. They have their own utility and significance. The Directive Principles are just like a polestar in the sea that provides direction to the activities of the state and the governance of the polity. Their basic aim is to persuade the government to provide social and economic justice in all spheres of life. However in the course of the time some of these directive principles were transferred into the chapter of fundamental rights and many others were implemented by state legislations.

The Directive Principles may be said to contain the philosophy of the constitution. As the very term “Directives” indicate, the Directive principles are broad directives given to the state in accordance with which the legislative and executive powers of the state are to be exercised. As Nehru observed, the governments will ignore the directives “Only at their own peril.” As India seeks to secure an egalitarian society, the founding fathers were not satisfied with only political justice. They sought to combine political justice with economic and social justice. The Directive Principles may be classified into three broad categories;

- a. Socialistic
- b, Gandhian and
- c, Liberal-intellectual.

### **(a) Socialistic Directives**

Principal among this category of directives are (a) securing welfare of the people (Art. 38) (b) securing proper distribution of material resources of the community as to best sub serve the common-good, equal pay for equal work, protection of childhood and youth against exploitation. etc. (Art.39), (c) curing right to work, education etc. Art. (41), (d) securing just and humane conditions of work and maternity relief (Art. 42) etc.

### **(b) Gandhian Directives**

Such directives are spread over several Arts. Principal among such directives are (a) to organize village Panchayats (Art. 40), (b) to secure living wage, decent standard of life, and to promote cottage industries (Art.43), (c) to provide free and compulsory education to all children up to 14 years of age (Art. 45), (d) to promote economic and educational interests of the weaker sections of the people, particularly, the scheduled castes and scheduled tribes, (e) to enforce prohibition of intoxicating drinks and cow-slaughter and to organize agriculture and animal husbandry on scientific lines (Arts. 46-48).

### **(c) Liberal intellectual directives**

Principal among such directives are (a) to secure uniform civil code throughout the country (Art.44), (b) to separate the judiciary from the executive (Art.50), (c) to protect monuments of historic and national importance and (d) to promote international peace and security.

## **Origin of the Concept**

The concept of Directive Principles of State Policy was borrowed from the Irish Constitution. The makers of the Constitution of India were influenced by the Irish nationalist movement. Hence, the Directive Principles of the Indian constitution have been greatly influenced by the Directive Principles of State Policy. The idea of such policies can be traced to the Declaration of the Rights of Man proclaimed by Revolutionary France and the Declaration of Independence by the American Colonies. The Indian constitution was also influenced by the United Nations Universal Declaration of Human Rights.

In 1919, the Rowlett Acts gave extensive powers to the British government and police, and allowed indefinite arrest and detention of individuals, warrant-less searches and seizures, restrictions on public gatherings, and intensive censorship of media and publications. The public opposition to this act eventually led to mass campaigns of non-violent civil disobedience throughout the country, demanding guaranteed civil freedoms, and limitations on government power. Indians, who were seeking independence and their own government, were particularly influenced by the independence of Ireland and the development of the Irish constitution. Also, the directive principles of state policy in the Irish Constitution were looked upon by the people of India as an inspiration for the independent India's government to comprehensively tackle complex social and economic challenges across a vast, diverse nation and population.

In 1928, the Nehru Commission composing of representatives of Indian political parties proposed constitutional reforms for India. In 1931, the Indian National Congress adopted resolutions committing itself to the defense of fundamental civil rights, as well as socio-economic

rights such as the minimum wage and the abolition of untouchability and serfdom. Committing themselves to socialism in 1936, the Congress leaders took examples from the constitution of the erstwhile USSR, which inspired the fundamental duties of citizens as a means of collective patriotic responsibility for national interests and challenges.

### **Constituent Assembly**

When India obtained independence in 1947, the task of developing a constitution for the nation was undertaken by the Constituent Assembly of India. Both the Fundamental Rights and the Directive Principles of State Policy were included in the first Draft Constitution itself. Later it was carried over to the second Draft Constitution and the third and final Draft Constitution (26 November 1949), being prepared by the Drafting Committee.

### **Nature of Directive principles**

Directive Principles of State Policy aim to create social and economic conditions under which the citizens can lead a good life. They also aim to establish social and economic democracy through a welfare state. They act as a check on the government, theorized as a yardstick in the hands of the people to measure the performance of the government. The Directive Principles are non-justiciable rights of the people. Article 31-C, inserted by the 25th Amendment Act of 1971 seeks to upgrade the Directive Principles. If laws are made to give effect to the Directive Principles over Fundamental Rights, they shall not be invalid on the grounds that they take away the Fundamental Rights. In case of a conflict between Fundamental Rights and DPSP's, if the DPSP aims at promoting larger interest of the society, the courts shall have to uphold the case in favour of the DPSP. The Directive Principles, though not justiciable, are fundamental in the governance of the country. It shall be the duty of the State to apply these principles in making laws. Besides, all executive agencies should also be guided by these principles. Even the judiciary has to keep them in mind in deciding cases.

### **Legal status of Directive Principles**

The directive principles are non-justiciable in legal courts. However they put forth an obligation on the state and its mechanisms. Thus Article 37, while stating that the Directive Principles are not enforceable in any court of law, declares them to be "fundamental to the governance of the country" and imposes an obligation on the State to apply them in matters of legislation. They serve to emphasize the welfare state model of the Constitution and emphasize the positive duty of the State to promote the welfare of the people by affirming social, economic and political justice, as well as to fight income inequality and ensure individual dignity, as mandated by Article 38. The Directive Principles have been used to uphold the Constitutional validity of legislations in case of a conflict with the Fundamental Rights. Article 31C, added by the 25th Amendment in 1971, provided that any law made to give effect to the Directive Principles in Article 39(b) &(c) would not be invalid on the grounds that they derogated from the Fundamental Rights conferred by Articles 14, 19 and 31. The application of this article was sought to be extended to all the Directive Principles by the 42nd Amendment in 1976, but the Supreme Court struck down the extension as void on the ground that it violated the basic structure of the Constitution. Thus Article, 31(c) is restored to pre-1976 position. The position today is that, in

general, the fundamental rights enjoy priority over the directives. But the laws passed to implement Article 39 (b) and (c) cannot be declared void on ground of violation of fundamental rights guaranteed by Articles 14 and 19. The Fundamental Rights and Directive Principles have also been used together in forming the basis of legislation for social welfare.

In the case of *State of Madras Vs Champakam Dorairajan*, 1951 it was held that the Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights. The view was reiterated in *Deep Chand Vs. The State of Uttar Pradesh* 1959

After *Champakam Dorairajan* the Court went on to hold that disobedience to Directive Principles cannot affect the legislative power of the State. This view was taken in *In Re: The Kerala Education Bill, 1957*. With *L.C. Golak Nath and others v. State of Punjab*, (1967) the Supreme Court departed from the rigid rule of subordinating Directive Principles and entered the era of harmonious construction. The need for avoiding a conflict between Fundamental Rights and Directive Principles was emphasized, appealing to the legislature and the courts to strike a balance between the two as far as possible. Having noticed *Champakam* even the Constitution Bench in *Quareshi-I* chose to make headway and held that the Directive Principles nevertheless are fundamental in the governance of the country and it is the duty of the State to give effect to them. "A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that the State should certainly implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise the protecting provisions of Part III will be a 'mere rope of sand'. "Thus, *Quareshi-I* did take note of the status of Directive Principles having been elevated from 'sub-ordinate' or 'sub-servient' to 'partner' of Fundamental Rights in guiding the nation.

The Supreme Court, after the judgment in the *Kesavananda Bharati* case, has adopted the view of the Fundamental Rights and Directive Principles being complementary to each other, each supplementing the other's role in aiming at the same goal of establishing a welfare state by means of social revolution. *Kesavananda Bharati Vs State of Kerala* (1973) was a turning point in the history of Directive Principles jurisprudence. This decision clearly mandated the need for bearing in mind the Directive Principles of State Policy while judging the reasonableness of the restriction imposed on Fundamental Rights. In *Pathumma and Others v. State of Kerala and Ors.*, (1978) The supreme court neatly summed up the ratio of *Kesavananda Bharati* and other decisions which are relevant for the legality discourse of DPSP. *Pathumma* holds:-

"(1) Court interprets the constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people, which the legislature, in its wisdom, through beneficial legislation, seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. This Court while acting as a sentinel on the qui vive to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society so that when such a right clashes with a larger interest of the country it must yield to the latter.

(2) The Legislature is in the best position to understand and appreciate the needs of the people as enjoined in the Constitution. The Court will interfere in this process only when the statute is clearly violative of the right conferred on a citizen under Part III or when the Act is beyond the legislative competence of the legislature. The courts have recognised that there is always a presumption in favour of the constitutionality of the statutes and the onus to prove its invalidity lies on the party which assails it.

(3) The right conferred by Article 19(1) (f) is conditioned by the various factors mentioned in clause (5). (4) The following tests have been laid down as guidelines to indicate in what particular circumstances a restriction can be regarded as reasonable:

(a) In judging the reasonableness of the restriction the court has to bear in mind the Directive Principles of State Policy.

(b) The restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirements of the interests of the general public. The legislature must take intelligent care and deliberation in choosing the course which is dictated by reason and good conscience so as to strike a just balance between the freedom in the article and the social control permitted by the restrictions under the article.

(c) No abstract or general pattern or fixed principle can be laid down so as to be of universal application. It will have to vary from case to case and having regard to the changing conditions, the values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances all of which must enter into the judicial verdict.

(d) The Court is to examine the nature and extent, the purport and content of the right, the nature of the evil sought to be remedied by the statute, the ratio of harm caused to the citizen and the benefit conferred on the person or the community for whose benefit the legislation is passed.

(e) There must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved.

(f) The needs of the prevailing social values must be satisfied by the restrictions meant to protect social welfare.

Court has affirmed that since Directive Principles are fundamental in the governance of the country they must, therefore, be regarded as equally fundamental to the understanding and interpretation of the meaning and content of Fundamental Rights. In *Minerva Mills Vs Union of India* Chandrachud, C.J. said that "Fundamental Rights are not an end in themselves but are the means to an end." The end is specified in the Directive Principles.

In *State of Kerala. Vs. N.M. Thomas and Ors.*, (1976) the court opined: "In view of the principles adumbrated by this Court it is clear that the directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom and Articles 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the directive principles. So far as the courts are

concerned where there is no apparent inconsistency between the directive principles contained in Part IV and the fundamental rights mentioned in Part III, which in fact supplement each other, there is no difficulty in putting a harmonious construction which advances the object of the Constitution. Once this basic fact is kept in mind, the interpretation of Articles 14 and 16 and their scope and ambit become as clear as day."

The message of *Kesavananda Bharati* is clear. The interest of a citizen or section of a community, howsoever important, is secondary to the interest of the country or community as a whole. For judging the reasonability of restrictions imposed on Fundamental Rights the relevant considerations are not only those as stated in Article 19 itself or in Part-III of the Constitution; the Directive Principles stated in Part-IV are also relevant. Changing factual conditions and State policy, including the one reflected in the impugned enactment, have to be considered and given weightage to by the courts while deciding the constitutional validity of legislative enactments. A restriction placed on any Fundamental Right, aimed at securing Directive Principles will be held as reasonable and hence *intra vires* subject to two limitations : first, that it does not run in clear conflict with the fundamental right, and secondly, that it has been enacted within the legislative competence of the enacting legislature

In *Workmen of Meenakshi Mills Ltd. Vs Meenakshi Mills Ltd. and Anr.* , (1992) the Constitution Bench ruled that "Ordinarily any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest." In *Indian Handicrafts Emporium Vs Union of India* (2003) the Court while dealing with the case of a total prohibition reiterated that 'regulation' includes 'prohibition' and in order to determine whether total prohibition would be reasonable, the Court has to balance the direct impact on the fundamental right of the citizens as against the greater public or social interest sought to be ensured. Implementation of the Directive Principles contained in Part IV is within the expression of 'restriction in the interests of the general public'.

### **Fundamental Rights and Directive Principles**

The chapters on Fundamental Rights and Directive Principles together constitute the "conscience" of the Indian constitution. But, the differences between Fundamental Rights and Directive Principles of State policy are significant. Firstly, the fundamental rights constitute a set of negative injunctions. The state is restrained from doing something's. The directives on the other hand are a set of positive directions. The state is urged to do something to transform India into a social and economic democracy. Fundamental Rights are injunctions to prohibit the government from doing certain things; the Directive principles are affirmative instructions to the government to do certain things.

Secondly, the Directives are non-justiciable. Courts do not enforce them. A directive may be made enforceable by the courts only when there is a demand on it. Fundamental rights, on the other hand are justiciable. They impose legal obligations on the state as well as on individuals. Courts enforce them. If a law violates a fundamental right, the law in question will be declared void. But no law will be declared unconstitutional on the ground that it violates a directive principle against violation of a fundamental right, constitutional remedy under Art. 32 are available which

not the case is when a directive is violated either by the state or, by individual. For this reason Prof K. T. Shah deprecates the Directive Principles as “Pious wishes” or a mere window dressing for the social revolution of the country. In 1951, in *Champakam Dorairajan Vs the state of Madras*, the Supreme Court held that the chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive act. The Directive Principles of State Policy have to conform and are subsidiary to the chapter on Fundamental Rights. However this position was changed later, particularly in the context of socialist state in India.

The doctrine of harmonious construction as a new technique of interpretation in this field was introduced in *Hanif Quareshi Mohd. v. State of Bihar*, where the court invalidated a ban on the slaughter of all cattle, on the ground that it constituted an unreasonable restriction on the right to carry on a butcher’s business, as guaranteed by Article 19(1) (g), notwithstanding the Directive under Article 41. However it was stated that the Constitution has to be interpreted harmoniously, and the Directive principles must be implemented, but it must not be done in such a way that its laws takes away or abridge the fundamental rights.

It has now become a judicial strategy to read the Fundamental Rights along with the Directive Principles with a view to define the scope and ambit of the former. Mostly the Directive Principles have been used to broaden, and give depth to some Fundamental Rights, and to imply more rights there from for the people over and above what are expressly stated in the Fundamental Rights. The biggest beneficiary of this approach has been Article 21. By reading Article 21 with the Directive Principles, a bundle of rights has been read into Article 21. Accordingly it has been held that Article 21 includes the right to live with human dignity, the right to enjoy pollution free water, air and environment, the right to health and social justice, the right to education, the right to shelter, the right to privacy etc.

### **Articles on Directive Principles**

**Article 36- Definition of the term state**-The term state in this part has the same meaning given to state in Part-3.

**Article 37 –The provisions contained in this Part shall not be enforced by any court,** but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

**Article 38- The State is to secure a social order for the promotion of welfare of the people.**

1,The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

2,The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

**Article 39 -Certain principles of policy to be followed by the State**

The State shall, in particular, direct its policy towards securing –

a, that the citizen, men and women equally, have the **right to an adequate means of livelihood**; that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

b, that the operation of the **economic system does not result in the concentration of wealth** and means of production to the common detriment;

c, that there is **equal pay for equal work** for both men and women;

d, that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

e, that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

***Article 39A -Equal justice and free legal aid***

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

***Article 40 -Organization of village Panchayats***

The State shall take steps to organize village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

***Article 41 -Right to work, to education and to public assistance in certain cases***

The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

***Article 42 -Provision for just and humane conditions of work and maternity relief***

The State shall make provision for securing just and humane conditions of work and for maternity relief.

***Article 43 -Living wage, etc., for workers***

The State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

***Article 43A -Participation of workers in management of industries***

The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organization engaged in any industry.

**Article 44 -Uniform civil code for the citizen**

The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

**Article 45 -Provision for free and compulsory education for children**

The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

**Article 46 -Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections**

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

**Article 47 -Duty of the State to raise the level of nutrition and the standard of living and to improve public health**

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health.

**Article 48 -Organization of agriculture and animal husbandry**

The State shall endeavour to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

**Article 48A -Protection and improvement of environment and safeguarding of forests and wild life-**

The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

**Article 49 -Protection of monuments and places and objects of national importance**

It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

**Article 50 -Separation of judiciary from executive**

The State shall take steps to separate the judiciary from the executive in the public services of the State.

**Article 51 -Promotion of international peace and security**

The State shall endeavour to –

- a, promote international peace and security;
- b, maintain just and honourable relations between nations;
- c, foster respect for international law and treaty obligations in the dealings of organized people with one another; and
- d, encourage settlement of international disputes by arbitration.

Article 39 lays down certain principles of policy to be followed by the State, including providing an adequate means of livelihood for all citizens, equal pay for equal work for men and women, proper working conditions, reduction of the concentration of wealth and means of production from the hands of a few, and distribution of community resources to "subserve the common good". These clauses highlight the Constitutional objectives of building an egalitarian social order and establishing a welfare state, by bringing about a social revolution assisted by the State, and has been used to support the nationalization of mineral resources as well as public utilities. Article 39A requires the State to provide free legal aid to ensure that opportunities for securing justice are available to all citizens irrespective of economic or other disabilities.

Articles 41–43 mandate the State to endeavour to secure to all citizens the right to work, a living wage, social security, maternity relief, and a decent standard of living. These provisions aim at establishing a socialist state as envisaged in the Preamble. Article 43 also places upon the State the responsibility of promoting cottage industries. Article 43A mandates the State to work towards securing the participation of workers in the management of industries. The State, under Article 46, is also mandated to promote the interests of and work for the economic uplift of the scheduled castes and scheduled tribes and protect them from discrimination and exploitation.

Article 44 encourages the State to secure a uniform civil code for all citizens, by eliminating discrepancies between various personal laws currently in force in the country. Article 45 originally mandated the State to provide free and compulsory education to children between the ages of six and fourteen years, but after the 86th Amendment in 2002, this has been converted into a Fundamental Right and replaced by an obligation upon the State to secure childhood care to all children below the age of six. Article 47 commits the State to raise the standard of living and improve public health, and prohibit the consumption of intoxicating drinks and drugs injurious to health.

The State is mandated by Article 48 to organize agriculture and animal husbandry on modern and scientific lines by improving breeds and prohibiting slaughter of cattle. Article 48A mandates the State to protect the environment and safeguard the forests and wildlife of the country, while Article 49 places an obligation upon the State to ensure the preservation of monuments and

objects of national importance. Article 50 requires the State to ensure the separation of judiciary from executive in public services, in order to ensure judicial independence, and federal legislation has been enacted to achieve this objective. The State, according to Article 51, must also strive for the promotion of international peace and security, and Parliament has been empowered under Article 253 to make laws giving effect to international treaties.

### **Implementation of Directive Principles of State Policy**

Starting from the earlier days of Indian constitution itself, governments tried to frame a welfare state in accordance with the directive principles. The five year plans are a major initiative to implement the fourth chapter of the constitution. By the five year plans the governments provided for the promotion of a socialist order.

The directive in Article 39 has influenced legislation to fix land ceilings, remove intermediaries such as Zamindar, abolish hereditary proprietors, etc, and made the tiller of the soil real owners of the land. For this purpose the state enacted many land reform acts which incidentally abolished inequality and concentration of wealth to certain extent. The socialization agenda was further carried out with the nationalization of fourteen major banks in 1971. Later the provision of privy purses abolished by the government of India. The scope of article 39 was further widened with the amendments to right to property and later by the abolition of right to property as a fundamental right. The Taxation Inquiry Commission, 1953 –54 was asked to examine the tax structure and to suggest measures to reduce the inequalities of income and wealth and some other related subjects. The Industrial Development and Regulation Act 1954 and the establishment of the Monopolies Inquiry Commission in 1965 were aimed to achieve the objective outlined by the Taxation Inquiry Commission. The Monopolies Commission made probing inquiries into the causes and extent of concentration of economic power in private hands, the factors responsible for monopolies tendencies in the national economy and their social consequences.

Legal aid at the expense of the State has been made compulsory in all cases pertaining to criminal law, if the accused is too poor to engage a lawyer. (Art 39A).

A large number of laws have been enacted to implement organization of village Panchayat as a unit of self-govt all over the country (Art.40). The government has enacted the historic seventy-third and seventy-fourth constitution amendment act. 1992 to build Panchayat Raj Institutions as an administrative unit. Now Panchayats have been assigned 29 departments. With full power so that people of village can fulfill their long standing dreams by their sufficient support and participation. Most of the States has enacted their own State Panchayat act with same spirit of the main act and devolved funds, functions and functionaries to make Panchayat as an institution of self- government. Through 73rd and 74th Amendments to the constitution, Panchayat Raj has been given the constitutional status with more powers (Art 40). Panchayat Raj now covers almost all states and Union territories. One-third of the total number of seats has been reserved for women in Panchayats at every level.

The Equal Remuneration Act of 1976 provides for equal pay for equal work for both men and women. Maternity benefit act of 1961 address the issue of women workers (Art 42). The Minimum Wages Act of 1948 empowers government to fix minimum wages for employees

engaged in various employments. This is in tune with article 43. There is also the factories act 1948 which ensures better working conditions for the working class. The Consumer Protection Act of 1986 provides for the better protection of consumers. The act is intended to provide simple, speedy and inexpensive redressal to the consumers' grievances, award relief and compensation wherever appropriate to the consumer.

The enactment of the Hindu Marriage Act (1955) and the Hindu Succession Act (1950) have been important steps to implement the directives of Uniform Civil Code in art 44.

The Programme of Universalisation of Elementary Education has been accorded the highest priority in order to provide free education to all children up to the age of 14 years (Art-45). The constitutional amendment of 2002 inserted a new article, Article 21-A, into the Constitution, that seeks to provide free and compulsory education to all children aged 6 to 14 years.

Welfare schemes for the weaker sections are being implemented both by the Central and state governments in the context of article 46. These include programmes such as boys' and girls' hostels for scheduled castes' or scheduled tribes' students. In order to ensure that scheduled castes and scheduled tribes are protected from atrocities, the Government enacted the Prevention of Atrocities Act in 1995, which provided severe punishments for such atrocities. The Sampoorna Grameen Rozgar Yojana was launched in 2001 to attain the objective of gainful employment for the rural poor. The programme was implemented through the Panchayat Raj institutions. The National Rural Employment Guarantee Programme (NREGP) aims to provide employment for the poor rural people.

Small scale and village industries and Khadi Gram Udyog have been encouraged to bring prosperity to the rural areas. Khadi and village Industries board, Small scale industries board, handicrafts board, coir board and silk board were established for promoting cottage industries.

In order to improve the health of citizens (Art 47) primary health centers were established throughout India. Integrated Child Development Programme (ICDS) operates in a national scale to improve child health.

Efforts have been made to organize agriculture along modern and scientific lines. Cow slaughter is banned in many states (Art 48). Some states have legislated for public assistance in case of unemployment, old age and disability.

Judiciary has been separated from the executive in all the states and Union territories except Jammu and Kashmir and Nagaland (Art-49). The code of criminal procedure (1973) was enacted for the purpose.

India has also been actively co-operating with the U.N. to promote international peace and security. India's Foreign Policy has also to some degree been influenced by the DPSPs (Art 51). India has in the past condemned all acts of aggression and has also supported the United Nations' peace-keeping activities. Indian Army had participated in many UN peace-keeping operations. India played a key role in the passing of a UN resolution in 2003, which envisaged better cooperation between the Security Council and the troop-contributing countries. India has also been

in favor of nuclear disarmament. Further India is an active member of various international organizations.

### **Issues in Implementation**

The government achieved a glorious record in the implementation of directive principles of state policy. At the same time many provisions are still to be honoured with effective enactments. For example the implementation of a uniform civil code for all citizens has not been achieved owing to widespread opposition from various religious groups and political parties. The Shah Bano case (1985–86) provoked a political firestorm in India when the Supreme Court ruled that Shah Bano, a Muslim woman who had been divorced by her husband in was entitled to receive alimony from her former husband under Indian law applicable for all Indian women. This decision evoked outrage in the Muslim community, which sought the application of the Muslim personal law and in response the Parliament passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 overturning the Supreme Court's verdict.

Another example is Article 40. Despite of the constitutional provisions many states are still to accommodate the structural changes envisaged in the act.

### **Conclusion**

The Directive Principles of State Policy contained in Part IV; Articles 36-51 of the Indian constitution constitute the most interesting and enchanting part of the constitution. Even though there is no explicit judicial sanction behind the directives, there are certainly political sanctions. Art. 37 make the directives, “fundamental in the governance of the country and in... making laws.” Hence the government cannot totally ignore them, for fear of adverse popular reaction. The opposition inevitably takes the government to task whenever the directives are blatantly ignored, thus scoring a political point. The non-justiciability of part IV has exposed the directives to trenchant criticism. Jennings calls them “pious aspirations,” and “Fabian socialism without socialism.” Where characterizes them as “paragraphs of generalities.” However many scholars appreciate the value of the directives. Sir B. N. Rau regards them as “moral precepts” with an educative value. Ambedkar considered them as powerful instruments for the transformation of India from a political democracy into an economic democracy. The directive principles according to Granville Austin are “positive obligations”... to find a piddle way between individual liberty and Public good. “The directives constitute a sort of “instrument of instruction” to all governments in the great task of transforming a laissez-fire society into a welfare state, a socialistic pattern of society and eventually into a socialist society.

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## **MODULE-4**

## Federal process: Federalism and the State Autonomy

Theoretical exposition, Constitutional provisions: operational dynamics

A critique of centre state relations and movements for state autonomy

### **Introduction**

India is a big country characterized by cultural, regional, linguistic and geographical diversities. Such a diverse and vast country cannot be administered and ruled from a single centre. Historically, though India was not a federal state, its various regions enjoyed adequate autonomy from central rule. Keeping in view these factors in mind, the Constitution makers of India opted for the federal form of government. Though, the Government of India Act, 1935 envisaged a federal set-up for India; federal provisions of the Act were not enforced. Article one of the Indian Constitution says: - "India that is Bharat shall be a Union of States." Though the word 'Federation' is not used in Indian constitution, the government is federal. A state is federal when (a) there are two sets of governments and there is distribution of powers between the two, (b) there is a written constitution, which is the supreme law of the land and (c) there is an independent judiciary to interpret the constitution and settle disputes between the centre and the states. All these features are present in India. The Constitution of India is written and the supreme law of the land.

### **Federal Judiciary**

At the apex of single integrated judicial system, stands the Supreme Court which is independent from the control of the executive and the legislature. The Indian Constitution makes provision for an independent and Federal judiciary. The Supreme Court of India acts as a federal court. It has the power to decide the disputes arising either between the Union and the States or between the two or more States under its Original Jurisdiction as mentioned in Article 131 of the Constitution. The Constitution makes various provisions to ensure the independence of judiciary from the Executive and the Legislature

### **Division of Powers**

The Seventh Schedule of the Constitution makes provision for the division of powers between the Union and the States. It contains three lists:

1. The Union List which has 97 subjects of national importance and the Union Parliament has the power to enact laws with respect to these subjects;
2. The State List, which contains 66 subjects of local importance and the State Legislatures have the power to enact laws with respect to these subjects;
3. The Concurrent List, which contains 47 subjects and both the Parliament and State Legislatures can legislate on them.

### **Written and Rigid Constitution**

As per the requirement of federal system, the Indian Constitution is a written document. It is a rigid Constitution as far as the amendment of federal provisions is concerned. Thus, the many provisions, affecting the interests of states, can be amended only if not less than half of the state legislatures have approved the same: This includes, Article 54 and 55 related to the manner of election of the President; Articles 73 and 162 dealing with the extent of the executive power of the Union and States; distribution of legislative powers between the Union and States; representation of States in Parliament; and Amendment of the Constitution. In order to amend the above provisions the Constitution Amendment Bill has to be approved by not less than half of the state legislatures before it is presented to the President for his consent.

### **Unitary Nature**

But in spite of all these essential features of a federation, Indian Constitution has an unmistakable unitary tendency. The Indian federation is an example of 'Indestructible Union with Destructible states.' It means that the Union shall remain intact but the physical existence of states or units can be modified. Accordingly, Article 3 provides that the Parliament may by law form the new states by separating or uniting the territory of existing states, increase or diminish the area of any state, and alter the name and boundary of any state. On the other hand, the American federalism is characterized as 'Indestructible Union of Indestructible States'.

While other federations like U.S.A. provide for dual citizenship, the India Constitution provides for single citizenship. There is also a single integrated judiciary for the whole country. The provision of All India Services, like the Indian Administrative Service, the India Police Service, and Indian Forest Service prove another unitary feature. Members of these services are recruited by the Union Public Service Commission on an All-India basis.

A significant unitary feature is the Emergency provisions in the Indian constitution. During the time of emergency, the Union Government becomes most powerful and the Union Parliament acquires the power of making laws for the states. The Governor acts as the agent of the centre and is intended to safeguard the interests of the centre. These provisions reveal the centralising tendency of our federation.

Generally, in federalism, the states or units have equal representation in the second House of Parliament. But, in India, the states do not have equal representation in the Council of States. The representation of states depends on their population; the number of seats allocated to different states is mentioned in the Fourth Schedule of the Constitution.

### **Federalism: Theoretical exposition**

The concept of federal state has evolved over period, with the political experiments it was clear that the some issues should be handled best by the national government, while some could be handled by the regional governments who can handle the issues of local interest. Federalism is a mechanism for effective governance of a union to “reconcile unity with municipality, centralization with decentralization and nationalism with localism”. K.C. Wheare defined federal state as a state which has a “division of powers between general and regional authorities, each of which, in its own sphere, is co-ordinate with the others and independent of them”. The sphere of the general

government and the regional government is defined and limited; both the governments have supreme powers and no way the regional government is subordinate to the general government. There can be a concurrent list, in which one government can override the power of the other, but the main test of federalism lies in the control, actual or potential, of at least one subject in which only one of the governments is superior and the other is not.

### **Competitive and cooperative federalism**

In the early days of the Federal states like USA, Canada and Australia, the main prevailing concept was of “competitive federalism”, the rivalry and disputes between the general government and provincial government were significantly high. There was a “brotherhood of tempted rivalry”; inspired by the rivalry and conflict the states were aware of their mutual dependence. However, with the increase in inter-nation wars, rise in concept of social welfare state and emergence of modern communication technologies the concepts of competitive federalism gives way to “co-operative federalism”. In the twentieth century, the concept of federalism has risen to be a scenario of mutual co-operation between the two governments, with a centralist trend. However, a strong central government doesn’t necessarily mean that the regional governments are weak which works as administrative agents for carrying out the policies of the central government.

### **Indian federalism**

Moved by the horrors and dislocation of Partition, the Constituent Assembly of India focused on the need for ensuring the unity and integrity of the nation. The fear of excessive federalism was evident in the assembly and they rejected the American model of federalism in this background. However there were many practical issues in the adaptation of the British unitary model. This was obstructed by the local demands and diversity in the system. Further the issues of minorities also posed serious questions in adopting any existing federal models in India. The constitutional framework finally adopted departed significantly from all existing models of federalism. The Constituent Assembly devised a system which seemed most suited to the needs of the time and the requirements of a federal society.

The Indian constituent assembly adopted a new political structure which was neither fully federal nor completely unitary. It was therefore declared as ‘Quasi-Federal’. In the course of time, India’s political institutions are widely recognised as a hybrid variant of the federal species. Self rule and shared rule have been combined in an orthodox way which have enabled the Indian Union to not only survive but also flourish in all its diversity.

Prof: K.C. Wheare has remarked that Indian Constitution provides, "a system of government which is quasi-federal, a unitary state with the subsidiary unitary features". The framers of the constitution expressed clearly that there exists the harmony of federalism and the unitarism. Dr. Ambedkar said, "The political system adopted in the Constitution could be both unitary as well as federal according to the requirement of time and circumstances".

Morris-Jones described the centre-state relation in India as a form of co-operative federalism. He however characterized it as bargaining federalism. It referred to a pattern of centre-state relations in which neither centre nor states can impose decisions on the others in which hard

comp relative bargaining takes place in such institution as the Planning Commission, the Finance Commission and the Zonal Councils.

### **Judicial observation on federalism**

In the case of State of West Bengal Vs. Union of India, the Court held that the Indian “...Constitution which was not true to any traditional pattern of federation”. The legal sovereignty of the Indian nation is vested the people of India and the political sovereignty is distributed between, the Union of India and the States with greater weightage in favour of the Union.

In State of Rajasthan Vs. Union of India, the chief Justice considered the Indian Constitution as “more unitary than federal” and have the “appearance” of a federal structure. He also said that, “In a sense, therefore, the Indian union is federal. But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated and socially, intellectually and spiritually up-lifted.”

The case of S.R. Bommai Vs. Union of India indicates a turning point in the construction of federalism in India. In this case the court held that Democracy and federalism are essential features of our constitution and are part of its basic structure. The courts through their liberal interpretation of the Constitution have helped in extending the legislative fields which otherwise can be read rigidly to encroach upon the entry of the other government. The courts have played the significant role as the balance for harmonious construction of the entry to maintain the

### **Emergency Provisions and federalism**

The Chapter of the Constitution dealing with emergency provisions was subjected to vehement criticism. The Constituent Assembly witnessed one of its most agitated scenes during the discussion of these provisions. Many prominent members of the Assembly opposed the inclusion of these provisions in the Constitution as they thought that they were inconsistent with the democratic provisions. The majority of the members, however, favored the inclusion of these provisions, although reluctantly, as a precautionary measure, against possible disruptive forces destroying the newly established Union.

A major argument against the emergency provision was in the matter of federalism. During emergency period the state becomes more or less unitary. The central government acquires enormous power over legislation and administration. The seventh schedule may become a wish list. The Constitution provides for three different categories of Emergency and in each case there is a potential power concentration in central government. It is argued that the emergency powers form a major unitary provision in the federal state.

### **Article 352**

Under article 352 of the constitution War Emergency if the president is satisfied that a grave emergency exists whereby the security of India or any part of its territory is threatened by war, external aggression or armed rebellion, he may proclaim a state of emergency. As soon as the emergency is proclaimed, the federal provisions of the Constitution cease to function in the area affected by the proclamation. As a result, there is a two-fold expansion of the authority of the Union. First, the executive power of the Union will extend to the giving of any direction to any State executive in the emergency area. Article 353 states that the Proclamation of Emergency includes extending the executive power of the union to the states in the form of directions. The Parliament, as per this Article, can confer the power to make laws, upon the officers or authorities of the Union. Secondly, Parliament's law-making power will extend to the subjects enumerated in the State List. Further, the President is empowered to prohibit by order the distribution of revenues that are normally to be assigned to the States under the financial provisions of the Constitution. Article 354 says that provisions made under Articles 268 to 279 can be modified or exceptions can be made by the President of India by an Order while the Proclamation period of emergency is going on. However, all such orders have to be placed before each House of Parliament for its approval. The combined effect of the operation these provisions is the emergence of full-fledged unitary Government.

### **Article 356**

Article 356 of the constitution is one of the most disputed articles in the constitution in the context of central state relations. It is a potential threat to federalism and a real instrument in igniting a Unitarian state. According to the article if the President is satisfied on receipt of a report from the Governor or otherwise that a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions of the Constitution, he is empowered to proclaim an emergency under Articles 356. As a result, president may assume to himself all or any of the functions of the State or he may vest all or any of those functions in the Governor or any other executive authority. He may declare that the powers of the State legislature shall be exercisable by Parliament; and he may make any other incidental or consequential provisions necessary to give effect to the objects of the Proclamation. Article 357 provides that the powers of the Legislature shall be exercised by the Parliament during emergency. The Parliament has the right to delegate Legislative powers to the President of India or any such authority. The President of India, after the Proclamation of Article 356, can make laws and shall have access to the consolidated fund during the time period when the House of the People is not in operation.

The President, however, cannot assume to himself any of the powers vested in a High Court. The proclamation will have to be approved by both the Houses of Parliament in the same manner in which a war emergency proclamation has to be approved.

During the period of emergency, the State is empowered to suspend the Fundamental Rights guaranteed under Article 19 of the Constitution. The power to suspend the operation of these Fundamental Rights is vested not only in Parliament but also in the Union Executive and even in subordinate authority. Further, the Constitution empowers the President to suspend the right to move any court of law for the enforcement of any of the Fundamental Rights. It means that virtually the whole Chapter on Fundamental Rights can be suspended during the operation of the

emergency. However, such orders are to be placed before Parliament as soon as possible for its approval.

### **Article 360**

If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or any part of its threatened, he may declare a financial emergency under Article 360. The proclamation in this case also should be approved by Parliament. During the financial emergency, "the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the direction" or any other directions which the President may deem necessary for the purpose. Such directions may include those requiring the reduction of salaries and allowances of Government servants and even those of the Judges of the Supreme Court the High Courts.

During a period of emergency, it is natural that the Executive becomes unusually powerful. This is a tendency of governments all over the world. The experience of parliamentary democracies indicates that a Parliament is vigilant and through the members of the opposition it manages to compel the Executive to account for all its actions. Thus, Parliament has the power to check the Executive whenever the latter goes beyond reasonable limits. Emergency provisions. do not, in any way, cut Parliament out of the picture and Parliament has always the right to call the Executive to order.

The 44th Amendment adopted by Parliament in December 1978 ensures that the proclamation of emergency can be made only on the basis of written advice tendered to the President by the Cabinet. Internal disturbance not amounting to armed rebellion will no longer be ground for declaration of emergency. Emergency can be proclaimed only when the security of the country is threatened by war, external aggression or armed rebellion. As an additional safeguard, proclamation of emergency will require approval within a month by a resolution of Parliament by a majority of the total membership and not less than two-thirds of the members present and voting. The provisions for financial emergency, again, show how the framers of the Constitution have drawn upon the experience of the working of federalism elsewhere.

### **Amendment Provisions and federalism**

The federal nature of the state is evident with the amending provisions in the Indian constitution. There are two methods to amend the constitution- Rigid method and Flexible method. If the constitution of a state is flexible it may be amended in the ordinary legislative process by the ordinary legislature of the country. The best example of a flexible constitution is the British constitution, which can be passed, amended or repealed by a simple majority of the Parliament. This is a unique feature of unitary state where no concurrence of the units is not necessary for a constitutional amendment.

A rigid constitution cannot be amended in an ordinary law-making process. There is always special machinery for effecting amendment in the constitution. Generally speaking, there are four different methods of constitutional amendment in the case of a rigid constitution. Firstly, a rigid constitution may be amended through popular referendum. A proposal for constitutional

amendment in this case is first of all passed by the legislature and is then referred to the vote of the people. It is deemed to be passed only when majority of the voters have approved of it. This method of constitutional amendment is applicable in Switzerland, Australia and some states of the U.S.A. In Switzerland voters also have the right to propose an amendment. Secondly, federal constitutions may be amended by an agreement of suitable majority in the federal legislature and the legislatures of the federating units. The method prevails in the U.S.A. where the constitution can be amended with the approval of two-thirds majority of the Congress and three-fourth of the states.

Thirdly, constitutional amendment may be affected by a different organ created for this purpose. The U.S.A. is a typical example. The constitution of U. S. A. provides that an amendment may be proposed by the Congress by two thirds majority voting separately or by a convention called by the Congress at a request made by at least two-third of legislatures of States. The amendment proposed thus must be ratified either by three-fourths of the legislatures of the states or by conventions if three-fourths of the states, elected specially for this purpose.

Lastly, a rigid constitution may be amended by ordinary legislature under certain prescribed conditions. In France, a proposal for constitutional amendment is to be made and passed by the two Houses of the legislature. An amendment thus proposed and passed is to be ratified by an absolute majority of the members of the two Houses in a joint session sitting at the National Assembly.

### **Amending the Indian Constitution**

The procedure of amendment in the constitution is laid down in Part XX (Article 368) of the Constitution of India. The Indian constitution follows a midpath between extreme federalism and extreme Unitarianism. There are three methods for amending the constitution, by simple majority, by special majority and by special majority and with the consent of the states. A proposed amendment begins in Parliament where it is introduced as a bill. A bill must be presented in either house of the parliament and must be approved by a majority of each houses and not less than 2/3 majority of each house present and voting. After such approval the bill is presented to the president for his assent, upon whose assent the constitution shall stand amended as per the provisions of this article. However, if the amendment seeks to make a change in Articles 54, 55, 73, 162, or 241, Chapter 4, chapter 5, or chapter 1, any of the lists in the 7th schedule, representation of the states in the parliament and in article 368 itself the bill must also be ratified by not less than half of the states before it is presented to the president for his assent. For amending articles 5, 169, or 239-A, only a simple majority of both the houses of the parliament is required. It must then be approved by each House of Parliament.

### **Governor and Centre state relations**

The Constitution envisages that there shall be a Governor for each State (Article 153). The Governor is appointed by the President and holds office during his pleasure [Articles 155 & 156(1)]. The position of governor is an everlasting bone of contention between the state and centre. It is accused that the governor can become an agent of central government and can thus alter the federal equations. Article 154 vests the executive power of the State in the Governor. Under Article 163(1), he exercises almost all his executive and legislative functions with the aid and advice of his

Council of Ministers. Thus, executive power vests theoretically in the Governor but is really exercised by his Council of Ministers. But it should be noted that the governor is allocated a sphere of discretionary action.

### **Governor as head of executive**

The chief minister of a state is liable to report to the governor and the governor can demand reports from him. Article 167 of the Constitution imposes duties on the Chief Minister to communicate to the Governor all decisions of the Council of Ministers and proposals for legislation and such other information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for. If the Governor so requires, he can submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the

The Governor as Constitutional head of the State has “a right to be consulted, to warn and encourage”. Harmoniously with this role, the Governor also functions as a sentinel of the Constitution and a live link with the Union. The rationale of Article 167 is that by affording access to necessary information relating to the administration of the affairs of the State and the legislative proposals, it enables the Governor to discharge effectively this multi-faceted role.

The options available to the Governor under Article 167 give him persuasive and not dictatorial powers to override or veto the decisions or proposals of his Council of Ministers relating to the administration of the affairs of the State.

The Governor may exercise certain functions in his discretion, as provided in Article 163(1). The first part of Article 163(1) requires the Governor to act on the advice of his Council of Ministers. There is, however, an exception in the latter part of the clause in regard to matters where he is by or under the Constitution required to function in his discretion.

The Constitution contains certain provisions expressly providing for the Governor to act—

(A) In his discretion; or

(B) In his individual judgment; or

(C) Independently of the State Council of Ministers; viz.

(i) Article 200: Reservation for the Consideration of the President of any Bill which, in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by the Constitution designed to fill

(ii) Articles 371A, 371F and 371H: The Governors of Arunachal Pradesh, Assam, Meghalaya, Mizoram, Nagaland, Sikkim and Tripura have been entrusted with some specific functions to be exercised by them in their discretion

The Governors of Arunachal Pradesh and Nagaland have been entrusted with a special responsibility with respect of law and order in their respective States. In the discharge of this responsibility, they are required to exercise their “individual judgment” after consulting their

Council of Ministers. Articles 371(2) and 371C (1) provide that certain special responsibilities may be entrusted by Presidential Orders to the Governors of Maharashtra and Gujarat and the Governor of Manipur.

The governor is necessarily to act in his discretion where the advice of his Council of Ministers is not available, e.g. in the appointment of a Chief Minister soon after an election, or where the Council of Ministers has resigned or where it has been dismissed. At times a Governor may have to act against the advice of the Council of Ministers, e.g. dismissal of a Ministry following its refusal to resign on being defeated in the Legislative Assembly on a vote of no-confidence. Under article 356 Governor may have to make a report to the President under that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution. In such a situation he may have to act against the aid and advice of the Council of Ministers as the situation may be due to the various acts of omission or commission on the part of the Council of Ministers.

The Constitution thus assigns to the Governor the role of a Constitutional sentinel and that of a vital link between the Union and the State. The Governor, on occasions, could also play a useful role as a channel of communication between the Union and the State in regard to matters of mutual interest and responsibility. If any directions are issued by the Union in the exercise of its executive power to the State Government under any provision of the Constitution. It will be the duty of the Governor to keep the Union informed as to how such directions are being implemented by the State Government.

### **Governor's Role: Criticism**

The burden of the complaints against the behavior of Governors, in general, is that they are unable to shed their political inclinations, predilections and prejudices while dealing with different political parties within the State. As a result, sometimes the decisions they take in their discretion appear as partisan and intended to promote the interests of the ruling party in the Union Government. Such a behavior, tends to impair the system of federalism, detracts from the autonomy of the States, and generates strain in Union-State relations.

### **Article 370 and federalism**

The state of Jammu and Kashmir enjoys special autonomy under Article 370 of the Constitution of India. Jammu and Kashmir also has its own flag and constitution. The State was acceded to the Dominion of India by Maharaja Hari Singh, who was the ruler of the State in 1947. This was done on the basis of an Instrument of Accession executed by Maharajah Hari Singh, ruler of the princely state of Jammu and Kashmir, on 26 October 1947. The instrument of accession provided that the Indian parliament will have only limited powers over legislation regarding Jammu and Kashmir. That is why, the Framers of the Indian Constitution, made some special provisions with respect to the state of Jammu and Kashmir to meet the unique situation.

Article 370 specifies that except for Defense, Foreign Affairs, Finance and Communication. The Indian Parliament needs the State Government's concurrence for applying all other laws in

Jammu and Kashmir. Thus the state's residents lived under a separate set of laws, including those related to citizenship, ownership of property, and fundamental rights, as compared to other Indians.

The important features of the Special status are:

- a. The State has its own Constitution. This also implies that 'dual citizenship' principle is followed in this State.
- b. Contrary to the case with the other States, the residuary power lies with the Legislature of the Jammu & Kashmir (and not the Parliament).
- c. The national emergency proclaimed only on the ground of war or external aggression shall have automatic extension to the State of Jammu & Kashmir. This means that the national emergency proclaimed on the ground of armed rebellion shall not have automatic extension to J& K.
- d. The Governor of the State is to be appointed only after consultation with the Chief Minister of that State.
- e. The Parliament is not empowered to make laws on the subjects of State list (7th Schedule) for the State of Jammu and Kashmir under any circumstance.
- f. Financial Emergency (Art. 360) cannot be imposed on the State.
- g. Apart from the President's rule, Governor's rule can also be imposed on the State for a maximum period of six months.
- h. The preventive detention laws (Art. 22) of Parliament do not have automatic extension to the State.
- i. The name, boundary or territory of the State cannot be changed by the Parliament without the concurrence of the State Legislature.
- j. Arts. 19 (1) (f) and 31 (2) have not been abolished for this State and hence 'right to property' still stands guaranteed to the people of Jammu & Kashmir.

### **Finance Commission of India**

The Finance Commission is constituted by the President under article 280 of the Constitution. Its purpose is to give its recommendations on distribution of tax revenues between the Union and the States and amongst the States themselves. Two distinctive features of the Commission's work involve redressing the vertical imbalances between the taxation powers and expenditure responsibilities of the centre and the States respectively and equalization of all public services across the States. It is the duty of the Commission to make recommendations to the President as to—

- a) the distribution between the Union and the States of the net proceeds of taxes which are to be, divided between them and the allocation between the States of the respective shares of such proceeds;
- b) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India;
- c) the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Panchayats in the State on the basis of the recommendations made by the Finance Commission of the State;
- d) the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Municipalities in the State on the basis of the recommendations made by the Finance Commission of the State;
- e) any other matter referred to the Commission by the President in the interests of sound finance.

The First Finance Commission was constituted vide under the chairmanship of Shri K.C. Neogy on 6th April, 1952. Thirteen Finance Commissions have been appointed so far at intervals of every five years. The Thirteenth Finance Commission has been set up under the Chairmanship of Dr. Vijay L. Kelkar.

### **Inter State Council**

Article 263 of the Constitution of India provides for the establishment of an Inter-State Council. The Council charged with the duty of

- a) Inquiring into and advising upon disputes which may have arisen between States;
- b) Investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or
- c) making recommendations upon any such subject and in particular, recommendations for the better co-ordination of policy and action with respect to that subject, it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organization and procedure."

The provision of article 263 of the Constitution was invoked for the first time on 9 August 1952 when President by a notification established the Central Council of Health under the Chairmanship of the Union Minister of Health and Family Planning 'to consider and recommend broad lines of policy in regard to matters concerning health in all aspects'.

National Development Council was set up on 6 August 1952 on the recommendation of the Planning Commission. Similarly the National Integration Council was set up in 1962. The annual conferences of Chief Ministers, Finance Ministers, Labour Ministers, and Food Ministers etc have been taking place to discuss important issues of coordination between the Centre and the States. In

fact, the issues of inter-State and Centre-State coordination and cooperation were being discussed in a multitude of meetings on specific themes and sectors in an ad hoc and fragmented manner.

The Administrative Reforms Commission (1969) felt the 'need for a single' standing body to which all issues of national importance can be referred and which can advise on them authoritatively after taking all aspects of the problem into account'. The Commission recommended the setting up of Inter-State Council. This view was endorsed by the Commission on Centre-State Relations (Sarkaria Commission-1988). Government accepted the recommendation of the Sarkaria Commission and notified the establishment of the Inter-State Council On 28 May 1990. The Council is a recommendatory body with the following duties: -

- a) Investigating and discussing such subjects, in which some or all of the States or the Union and one or more of the States have a common interest, as may be brought up before it;
- b) Making recommendations upon any such subject and in particular recommendations for the better coordination of policy and action with respect to that subject; and
- c) Deliberating upon such other matters of general interest to the States as may be referred by the Chairman to the Council.

### **National Development Council**

The National Development Council (NDC) was set up on 6 August, 1952 by an executive order of the government with the following three objectives: a) to strengthen and mobilize the effort and resources of the nation in support of the national development plans;

- b) To promote common economic policies in all vital spheres, and
- c) to ensure the balanced and rapid development of all parts of the country.

The NDC comprise of the Prime Minister, all Union Cabinet Ministers, Chief Ministers of all States and Union Territories and the Members of the Planning Commission. Other Union Ministers and State Ministers may also be invited to participate in the deliberations of the council.

### **Planning Commission**

The Planning Commission was set up on 15 March 1950 in pursuance to commitment to social change through the social and economic goals of planned development. The Planning Commission was entrusted with the task of making assessment of all resources of the country, augmenting deficient resources, formulating plans for the most effective and balanced utilization of resources and determining priorities.

The Prime Minister is the Chairman of the Planning Commission, which works under the overall guidance of the National Development Council. The Deputy Chairman and the full time Members of the Commission, as a composite body, provide advice and guidance to the subject Divisions for the formulation of Five Year Plans, Annual Plans, State Plans, Monitoring Plan Programmes, Projects and Schemes. The First Five-year Plan was launched in 1951 and the Eleventh Five Year Plan (2007-12) was approved by National Development Council (NDC) on December 19, 2007.

## **Union Public Service Commission**

Union Public Service Commission is a constitutional mechanism to establish a unitary control over the federal structure. Through this institution the central government controls the appointment of top civil servants. Many of the UPSC recruits are placed in the state and that also in key positions. Articles 315 to 323 of the Indian Constitution of India provides for a Public Service Commission for the Union and for each state. The Union Public Service Commission (UPSC) is India's central agency authorized to conduct the Civil Services Examination, Engineering Services Examination, Combined Defense Services Examination, National Defense Academy Examination, Naval Academy Examination and Combined Medical Services Examination. The Commission consists of a Chairman and ten Members.

### **Sarkaria Commission Report**

Sarkaria Commission was set up in June 1983 by the government of India. The Sarkaria Commission's charter was to examine the relationship and balance of power between state and central governments in the country. The Commission was headed by Justice Rajinder Singh Sarkaria. The other two members of the committee were Shri B Sivaraman and Dr SR Sen. The Commission after conducting several studies, submitted its report in 1988. The final report contained 247 recommendations. The recommendations of the commission were a cornerstone of later discussions on Indian federalism. Commission suggested various methods by which the centre state relations can be improved.

### **Major Recommendations**

The commission recommended that the residuary powers of legislation in regard to taxation matters should remain exclusively in the competence of Parliament while the residuary field other than that of taxation should be placed on the concurrent list. Another recommendation was on the enforcement of Union laws, particularly those relating to the concurrent sphere, is secured through the machinery of the states. \_To ensure uniformity on the basic issues of national policy, with respect to the subject of a proposed legislation, consultations may be carried out with the state governments individually and collectively at the forum of the proposed Inter-Governmental Council. On Article 356, it was recommended that it may be used "very sparingly, in extreme cases, as a measure of last resort, when all other alternatives fail to prevent or rectify a breakdown of constitutional machinery in the state. The commission suggested that in the appointment of governor of a state, the chief minister of the state should be consulted. It is also advised that the Governor should be given five year tenure. The commission also recommended the establishment of an inter-state council.

### **State autonomy**

The idea of state autonomy may be understood with reference to demands of the units of a federation for autonomy within the parameters of a federal constitution and opposition to centripetal forces. The issue of state autonomy acquires significance in view of the fact that India has been constitutionally designated as a 'Union of States', reflecting the essentially centripetal bias of the Indian federation. Considering the historical circumstances under which the federation was

born, the framers of the Constitution were primarily driven by the concern to safeguard the federation from disintegrating forces and hence preferred the term 'Indian Union'. Thus, the Constituent Assembly, after prolonged debates, settled for "unitary federalism" in the backdrop of the challenges confronting the just emerged independent nation. Lawrence Saez observes that the passing of the India Independence Act and the eventual partition of India led the Constituent Assembly to adopt a more unitary version of federalism. It is in this context that the framers accorded a lot of emphasis on the fundamental unity of the Indian state and therefore envisaged a greater role for the federal government at the Centre. It was because of this compulsion that maximum number of subjects was incorporated in the Union list and the residuary powers were also vested in the Union Parliament, thereby allowing the centripetal forces to gain precedence over the centrifugal forces. However the demands for state autonomy was very live from the beginning of the constitution itself.

### **Demands for autonomy**

In the absence a democratic consensus, the legitimacy of the newly created Indian state was questioned in certain parts of the country. In order to check the autonomy demands the rulers of India introduced the slogan of 'national integration'. Critics are of the view that the Indian State, instead of responding to demands for state autonomy, with sensitivity to regional and cultural aspirations, has been trying to contain these demands through coercive measures. The champions of national homogeneity were of the view that even competitive political parties are dangerous threats to national unity and national integration. They favored a one party dominant system and look the regional political demands with much suspicion. However the autonomy demands were very strong and the centre was forced to reorganize the states in linguistic lines. This reorganization provided no final answer to the pertinent problem of autonomy.

The failure of the Congress party to understand the reality of a basically pluralistic Indian polity has led the party to adopt policies such as nationalization of political issues. This resulted in local dissents and autonomy movements in many states. There was deliberate interference from the Congress party with the state's legitimate jurisdiction and attempts to lower the prestige of the state leaders which ignited state autonomy movements and the growth of regional feelings throughout India. Another factor that prompted many autonomy movements was the general political refusal to recognize small communities as nationalities breeds. With regard to development many areas were neglected as they had little political representation in the national decision making mechanisms. The urban-based developmental projects raised rural upraising that resulted in the birth of many regional and communal political parties. Thus the demand for state autonomy is largely visible in the Indian polity of post 90's.

### **Autonomy demands and power sharing**

In India, an uneven distribution of powers between the Union and the units of the federation has evoked sharp reactions from states which have been clamoring for more autonomy. The specific grievances of states against the Centre has been on issues like law and order, regulation and control over trade and industries, encroachment on state autonomy even with regard to items in the state list, excessive financial control of the Centre over the states, misuse of Article 356 and the role

of the Governor. The states denounced the arbitrary deployment of paramilitary troops in the states without prior consultation with governments inspired by the fact that law and order is a state subject. However, the Union Government maintained that it had the unfettered right of stationing troops in states. The states also resented that the Centre had monopolized the control of industries, trade, commerce and production and distribution of goods. They argued that even though these were items in the state list, the Centre had brought them under its own control by taking advantage of the constitutional provision that Parliament could regulate them in national interest.

Regarding financial control of the Centre over the states, it was pointed out that the Planning Commission which is not a statutory body had become a “super government” and that through financial control; it had made the states subservient to the Centre. It was, therefore, argued that the Planning Commission should be made an independent autonomous body and should not merely be a wing of the Central government. Another major issue in Centre-State relations has been the promulgation of Presidential Rule in the states and the role played by the Governors in this regard. It was often alleged that the Governors were acting at the behest of the Centre. Many of these issues became grounds for confrontation between the Union and the States and as a result, the demand for setting up a Commission to go into the entire gamut of Union-State relations gained ground. This eventually led to the appointment of the Sarkaria Commission in 1983 to review Centre-State relations.

The issue of State autonomy came to the centre of the political stage in India in 2000 when the ‘Autonomy Resolution’ of the Jammu and Kashmir Assembly had triggered a national debate on the issue of greater autonomy for the other states of India. An immediate response has been the reiteration of the demand for greater autonomy by regional parties’ indifferent parts of the country, viz., the DMK, the Akali Dal, the AsomGana Parishad and so on.

A number of ethnic groups and communities in contemporary India have been asserting their rights as nationalities because they perceive a threat to their identity and seek to protect the same by trying to extract as many concessions as possible from the central political authorities. It is this process of bargaining with the Centre for a better deal which appears to be associated very often with the politics of assertion of nationalities in India. In order to achieve a genuine political integration of India, it is essential for the Indian state to appreciate the aspirations of these nationalities.

## MODULE-5

### **Judiciary and Social Change: Role of judiciary in social change, Judicial review, judicial activism, Public Interest Litigation and attempts at judicial reforms**

#### **Introduction**

India has one of the oldest legal systems in the world. Government of India Act, 1935 introduced a Federal Court of India and it began functioning from October 1, 1937. Federal Court had a very limited jurisdiction. After achieving independence in August, 1947, there was demand for enlarging the jurisdiction of Federal Court and granting more powers to it. With effect from 10th October, 1949 appeals to the Privy Council were abolished and the entire appellate jurisdiction was vested in the Federal Court. On 26th January, 1950, Federal Court gave way to the Supreme Court of India under the new constitution.

#### **Judiciary in India**

The judicial structure in India consists of Supreme Court high courts and subordinate courts. The Supreme Court is in the apex of the judicial system. The supreme court of India came into existence on 26th January, 1950. Articles 124 to 147 of the Constitution of India lay down the composition and jurisdiction of the Supreme Court of India. At present The Supreme Court of India comprises the Chief Justice and 30 other Judges appointed by the President of India. Supreme Court Judges retire upon attaining the age of 65 years.

Article 124 deals with the appointment of Supreme Court judges. It says the appointment should be made by the President after consultation with such judges of the High Courts and the Supreme Court as the President may deem necessary. The CJI is to be consulted in all appointments, except his or her own. In order to be appointed as a Judge of the Supreme Court, a person must be;

1, a citizen of India

2, must have been, for at least five years, a Judge of a High Court or of two or more such Courts in succession, or an Advocate of a High Court or of two or more such Courts in succession for at least 10 years or he must be,

3, in the opinion of the President, a distinguished jurist.

Normally the judges of Supreme Court are selected by a Collegium of the Supreme Court consists of senior most Judges including the Chief Justice of India. They will consider the elevation of Chief Justices/Judges of High Court to Supreme Court, elevation of Judges of High Courts as Chief Justices and elevation of Judges. In case of difference of opinion, the majority view will prevail. The Collegium proposes the name of judges and the President usually approves the proposal.

## **Independence of Judiciary**

The Constitution seeks to ensure the independence of Supreme Court in various ways. According to article 124(4) of the Indian constitution, A member of higher judiciary cannot be removed from office except by impeachment. An impeachment order is passed after an address in each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of members present and voting, and presented to the President in the same Session. Impeachment can be moved only on grounds of proved misbehavior or incapacity. The impeachment proceeding is done only in extreme cases. In India the Impeachment proceedings were done on two judges while in United States the house has initiated impeachment proceeding for 64 times since 1789. The first case of impeachment of a judge in India was of Justice V. Ramaswami of the Supreme Court in May 1993. The motion fell through in the Lok Sabha as the ruling Congress abstained from voting. Justice Soumitra Sen of the Calcutta high court also had undergone impeachment. He was impeached by Rajya Sabha. However he resigned from office before the resolution was taken by Lokhsabka.

A person who has been a Judge of the Supreme Court is debarred from practicing in any court of law or before any other authority in India. The salaries and allowances of the judges are not to be altered to their disadvantage during their term of office.

## **Jurisdiction of the Supreme Court**

The Supreme Court has original, appellate and advisory jurisdiction. Article 131 of the Constitution grants exclusive jurisdiction to the Supreme Court in any dispute between a) Government of India and one or more States or b) between Government of India and any State or States on one side and one or more other States on the other side c) between two or more States, insofar as such disputes involve any question on which the existence or extent of a legal right depends. Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce the fundamental rights. The Supreme Court has been conferred with power to direct transfer of any civil or criminal case from one State High Court to another State High Court or from a Court subordinate to another State High Court. The appellate jurisdiction of the Supreme Court can be invoked by a certificate granted by the High Court concerned under Article 132(1), 133(1) or 134 of the Constitution in respect of any judgment, decree or final order of a High Court in both civil and criminal cases, involving substantial questions of law as to the interpretation of the Constitution. Appeals also lie to the Supreme Court in civil matters if the High Court concerned certifies: (a) that the case involves a substantial question of law of general importance, and (b) that, in the opinion of the High Court, the said question needs to be decided by the Supreme Court. In criminal cases, an appeal lies to the Supreme Court if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (c) certified that the case is a fit one for appeal to the Supreme Court. Parliament is authorized to confer on the Supreme

Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court.

The Supreme Court has also a very wide appellate jurisdiction over all Courts and Tribunals in India in as much as it may, in its discretion, grant special leave to appeal under Article 136 of the Constitution from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India.

The Supreme Court has special advisory jurisdiction in matters which may specifically be referred to it by the President of India under Article 143 of the Constitution. There are provisions for reference or appeal to this Court under Article 317(1) of the Constitution, Section 257 of the Income Tax Act, 1961, Section 7(2) of the Monopolies and Restrictive Trade Practices Act, 1969, Section 130-A of the Customs Act, 1962, Section 35-H of the Central Excises and Salt Act, 1944 and Section 82C of the Gold (Control) Act, 1968. Appeals also lie to the Supreme Court under the Representation of the People Act, 1951, Monopolies and Restrictive Trade Practices Act, 1969, Advocates Act, 1961, Contempt of Courts Act, 1971, Customs Act, 1962, Central Excises and Salt Act, 1944, Enlargement of Criminal Appellate Jurisdiction Act, 1970, Trial of Offences Relating to Transactions in Securities Act, 1992, Terrorist and Disruptive Activities (Prevention) Act, 1987 and Consumer Protection Act, 1986. Election Petitions under Part III of the Presidential and Vice Presidential Elections Act, 1952 are also filed directly in the Supreme Court.

Under Articles 129 and 142 of the Constitution the Supreme Court has been vested with power to punish for contempt of Court including the power to punish for contempt of itself. In case of contempt other than the contempt referred to in Rule 2, Part-I of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975, the Court may take action (a) *Suo moto*, or (b) on a petition made by Attorney General, or Solicitor General, or (c) on a petition made by any person, and in the case of a criminal contempt with the consent in writing of the Attorney General or the Solicitor General.

Advisory Jurisdiction-Article 143 of the Constitution of India, provides that the president of India can seek the advice of Supreme court of India if it appears to the President that a question of law or fact has arisen, which is of public importance.

### **High Courts**

The High Court stands at the head of a State's judicial administration. Each High Court comprises of a Chief Justice and such other Judges as the President may, from time to time, appoint. The Chief Justice of a High Court is appointed by the President in consultation with the Chief Justice of India and the Governor of the State. They can be removed from office only by impeachment. To be eligible for appointment as a Judge one must be a citizen of India and have held a judicial office in India for ten years or must have practiced as an Advocate of a High Court or two or more such Courts in succession for a similar period.

Each High Court has power to issue to any person within its jurisdiction directions, orders, or writs including writs which are in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for enforcement of Fundamental Rights and for any other purpose. This is a special

function of high court since the Supreme Court issues writs only for the enforcement of fundamental rights. Each High Court has powers of superintendence over all Courts within its jurisdiction. It can call for returns from such Courts, make and issue general rules and prescribe forms to regulate their practice and proceedings

### **Judiciary and legal aid to poor**

The judiciary in India is committed to social justice. They extend free legal aid to the needy. If a person belongs to the poor section of the society or belongs to Scheduled Caste or Scheduled Tribe, a victim of natural calamity, is a woman or a child or a mentally ill or otherwise disabled person or an industrial workman, or is in custody including custody in protective home, he/she is entitled to get free legal aid from the Supreme Court Legal Aid Committee. The aid so granted by the Committee includes cost of preparation of the matter and all applications connected therewith, in addition to providing an Advocate for arguing the case.

The court wants to extend its help to all sections of society. The institution of Amicus Curie is an innovation in this direction. If a petition is received and if the accused is unrepresented then an Advocate is appointed as amicus curiae by the Court to defend and argue the case of the accused. In civil matters also the Court can appoint an Advocate as amicus curiae if it thinks it necessary in case of an unrepresented party. The Court can also appoint amicus curiae in any matter of general public importance or in which the interest of the public at large is involved.

### **Lok Adalats and Social Justice**

Lok Adalats are voluntary agencies which are monitored by the State Legal Aid and Advice Boards. They work as alternative forum for resolving of disputes through conciliatory method. The Legal Services Authorities Act, 1987 provides statutory status to the legal aid movement and it also provides for setting up of Legal Services Authorities at the Central, State and District levels. These authorities will have their own funds. Every award of Lok Adalats shall be deemed to be a decree of a civil court or order of a Tribunal and shall be final and binding on the parties to the dispute. It also provides that in respect of cases decided at a Lok Adalat, the court fee paid by the parties will be refunded.

### **Judiciary and Social Change**

In every society the judicial instruments work as effective tools for social justice. For example the Supreme Court of USA played a significant role in re-tuning the American constitution to suit to the needs of modern world. In India also this contribution of judiciary is worth mentioning. They changed the very nature and structure of Indian society through liberal interpretations of the constitution.

In post -Constitution period in India, Judiciary has adopted a cautiously slow process. Justice KT Thomas observes that, "They adopted slow process during the early period, perhaps because they would have thought that it was then a sort of probation period. The hang-over of British system persisted during the above period". During these periods the courts treated fundamental rights as a shield to prevent the upsurge of socially needed legislations. The courts upset much such legislation

during the initial period as violations of fundamental rights. For example the court stood against land reform acts in order to protect the right to property. The Champakam Dorirajan, AK Gopalan and Golaknath were important decisions representing this period. The court held that the parliament is lacking constitution amending powers. They interpreted the article 13(1) in a narrow way so as to obstruct much progressive legislation taken over by successive governments.

There were two ways of giving judicial impetus to social changes. First was by widening the areas of the Constitution through meaningful interpretative process for advancing social ameliorations. Second is by safeguarding the legislative measures which were enacted with the aim of giving social benefits. Some of such legislations were fiercely attacked by those who had adverse interest on the premise that such legislations are violations of fundamental rights. The courts in India have zealously protected social legislations by and large. The relentless stand adopted the judiciary during the first two decades after Constitution helped the working class in industrial and commercial establishments. During this period, the Supreme Court, through a number of decisions, set out a new labour jurisprudence in the country. Labour, till then, was the most exploited set in India.

### **Article 21 and Right to Life**

In the 1970s the Supreme Court started widening the constitutional spheres through judgment in famous cases called Royappa's case, RC Cooper's case and Maneka Gandhi's case. Constitution benches of the Supreme Court have expanded the contours of the equality clause, "Article 14 and the Article for protection of life and liberty of the individual (Art. 21). With the help of such expanded scope, the Supreme Court of India safeguards the interests of downtrodden. The fundamental right to Art. 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Supreme Court interpreted the word "life" in Art. 21 in a liberal way including "the right to livelihood". The right to life thus contains a set of rights connected with the dignity of individual. The court is of the opinion that this human life is not animal existence, but a life with all dignities worthy of human existence.

In Maneka Gandhi's case it was held that governmental restraints on 'personal liberty' should be collectively tested against the guarantees of fairness, non-arbitrariness and reasonableness that were prescribed under Articles 14, 19 and 21 of the Constitution. The Court developed a theory of 'inter-relationship of rights' to hold that governmental action which curtailed either of these rights should meet the designated threshold for restraints on all of them. In this manner, the Courts incorporated the guarantee of 'substantive due process' into the language of Article 21. This was followed by a series of decisions, where the conceptions of 'life' and 'personal liberty' were interpreted liberally to include rights which had not been expressly enumerated in Part III. In the words of Justice Bhagwati: "we think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms."

During the mid 70's Indian judiciary became more active and change oriented. It came with a new field of litigation popularly known as "Public Interest Litigation." These litigations were generally "Social Action Litigation." The PIL were successful initiatives to extend justice to the ordinary

citizen. It is during this period the judiciary supported parliamentary legislations to operationalise a welfare and socialistic state. Thus the case of KeshavandaBharathi accommodated the power of parliament to amend constitution within the frame work of basic structure. In Mandal case the court clearly acknowledged their role in social change.

### **Gender Justice**

In India the Parliament brought about sweeping legislative measures for checking the growing menace of cruelty to women. This includes the law against dowry, law against domestic violence, laws for protection of rape victims etc. Such legislative measures were the result of repeated reminders by the Supreme Court regarding the pathetic situation of women in this country. An important step in the area of gender justice was the decision in Vishaka Vs State of Rajasthan. The petition originated from the gang-rape of a grassroots social worker. In this case the Court invoked the text of the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) and framed guidelines for establishing redressal mechanisms to tackle sexual harassment of women at workplaces.

The Mary Roy case is an example of such an intervention. The Christian women in Kerala were denied their legitimate rights even after the proclamation of equality provisions in the Constitution. Though Parliament passed a law in 1952 for entitling women to have equal share under the law of inheritance, the fruits of parliamentary exercise failed to reach many. Women continued to suffer under the disability till 1985. Parliament passed the Dowry Prohibition Act and created special provision for punishing dowry death cases and also for cruelty to women. It was in this background that Mrs. Mary Roy provided an opportunity to the Supreme Court to look at this unjust law of inheritance as for women. Supreme Court declared that women are entitled to equal rights with men under the law of inheritance at least from 1952 onwards.

### **Environmental Justice**

Judiciary played an important role in environmental issues and in the area of human rights also. In the matter of pollution which reached almost a saturating point the court intervened effectively. The law for pollution control does not given the necessary deterrence. The pollution control authorities were lethargic and the loopholes in the law were successfully exploited by many industries. New Delhi became world's highest polluted city, closely followed by Calcutta and Mumbai. The Supreme Court and the High Courts made judgments against escalating pollution. This was mainly through public interest litigation. They demanded the closure of polluting industries and mandated the usage of CNG in public transport vehicles in Delhi in spite of diesel. Another contribution of judiciary to the sphere of social order is the criticism and denial the "Bandh calls" of political parties. They were termed as unlawful transgressions into the provinces of the fundamental rights of a citizen. To lessen the agony of the common man from the scourge of such bandhs the judiciary stepped in and made bandhs illegal. Supreme Court affirmed the judgment of the Full Bench of the Kerala High Court and the result is that a great relief to the society was afforded.

In *Parmanand Katara Vs Union of India*, the Court held that no medical authority could refuse to provide immediate medical attention to a patient in need in an emergency case. The public interest litigation had arisen because many hospitals were refusing to admit patients in medico-legal cases. Hence, the Supreme Court ruled that access to healthcare, is a justifiable right.

### **Judicial review**

The power of Judiciary to review and determine validity of a law or an order may be described as the power of "Judicial Review." It means that the constitution is the Supreme law of the land and any law inconsistent with it is void. The term refers to "the power of a court to inquire whether a law, executive order or other official action conflicts with the written constitution and if the court concludes that it does, to declare it unconstitutional and void." **Judicial Review has two prime functions:**

(1) Legitimizing government action; and (2) to protect the constitution against any undue encroachment by the government.

As guardian of the constitution, the Supreme Court has to review the laws and executive orders to ensure that they do not violate the constitution of the country and the valid laws passed by the congress. The power of judicial review was first acquired by the Supreme Court in *Marbury Vs. Madison* case. 1803. In this case Justice Marshall clearly established that American supreme court possess the right to judicial review

Under the constitution of India parliament is not supreme. Its powers are limited in the two ways. First, there is the division of powers between the union and the states. Parliament is competent to pass laws only with respect to those subjects which are guaranteed to the citizens against every form of legislative encroachment. Being the guardian of Fundamental Rights and the arbiter of constitutional conflicts between the union and the states with respect to the division of powers between them, the Supreme Court stands in a unique position where from it is competent to exercise the power of reviewing legislative enactments both of parliament and the state legislatures.

The power of judicial review of legislation is given to the judiciary both by the political theory and the constitution. There are several specific provisions in the Indian constitution, judicial review of legislation such as Articles 13, 32, 131-136, 143, 226, 145, 246, 251, 254 and 372. Article 13 specifically declares that any law which contravenes any of the provisions of the part of Fundamental Rights shall be void. The court would have the power to declare any enactment which transgresses a Fundamental Right as invalid. The Supreme and high courts are constituted the protector and guarantor of Fundamental Rights under Articles 32 and 226. Articles 251 and 254 say that in case of inconsistency between union and state laws, the state law shall be void.

In post-independence India, the inclusion of explicit provisions for 'judicial review' was necessary in order to give effect to the individual and group rights guaranteed in the Constitution. Dr. B.R. Ambedkar described the provision related to judicial review as the 'heart of the Constitution'. Article 13(2) of the Constitution of India prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention

of the afore mentioned mandate shall, to the extent of the contravention, be void. Thus judicial review ensured a check against the encroachment of the state on individual freedoms and liberty.

While judicial review over administrative action has evolved on the lines of common law doctrines such as 'proportionality', 'legitimate expectation', 'reasonableness' and principles of natural justice, the Supreme Court of India and the various High Courts were given the power to rule on the constitutionality of legislative as well as administrative actions. In most cases, the power of judicial review is exercised to protect and enforce the fundamental rights guaranteed in Part III of the Constitution. The higher courts are also approached to rule on questions of legislative competence, mostly in the context of Centre-State relations.

In *Shankari Prasad Vs. Union of India* (1951) the first Amendment Act of 1951 was challenged before the Supreme Court on the ground that the said Act abridged the right to property and that it could not be done as there was a restriction on the amendment of Fundamental Rights under Article 13 (2). The Supreme Court rejected the contention and unanimously held. "The terms of Article 368 are perfectly general and empower parliament to amend the constitution without any exception whatever. This was carried over to *Sajan Singh's* case (1964), where the competence of parliament to enact 17th amendment was challenged before the constitution. In *Golak Nath Vs The state of Punjab* (1967) the validity of three constitutional amendments (1st, 4th and 17th) was challenged. The Supreme declared that parliament under article 368 has no power to take away or abridge the Fundamental Rights contained in chapter II of the constitution. *Keshavanda Bharathi* was another major instance when the Supreme Court put forward certain basic structures to the constitution.

### Judicial Activism

Judicial activism is the use of judicial power to articulate and enforce what is beneficial for the society in general and people at large. It is defined as "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions". Judicial activism means active role played by the judiciary in promoting justiceists the right to strike down any legislation or rule against the precedent if it goes against the Constitution. Thus, ruling against majority opinion or judicial precedent is not necessarily judicial activism unless it is active. In the words of Justice J.S Verma , Judicial Activism must necessarily mean "the active process of implementation of the rule of law, essential for the preservation of a functional democracy". In a modern democratic set up, judicial activism should be looked upon as a mechanism to curb legislative adventurism and executive tyranny by enforcing Constitutional limits.

### Judicial Activism in India

The Emergency of 1975 and its aftermath constituted defining moments for judicial activism in India. In the decision in *ADM Jabalpur Vs Shukla* (1976) the Supreme Court permitted civil liberties to be suspended during the Emergency. The very Constitution of India permitted the suspension of civil liberties in Part III, such as the right to personal liberty. The Constitution was also amended extensively to permit the excesses of the Emergency. In 1975, therefore, permitting civil liberties to be suspended during the Emergency would arguably have constituted deference

both to the intent of the framers of the Constitution and to legislative wisdom. Judicial activism during the Emergency was clearly the need of the hour.

The landscape of recent Supreme Court rulings offers some interesting insights into the metamorphosis of judicial activism in India. The Supreme Court recently issued a notice to the Union government seeking an explanation of the steps taken by it to ameliorate the plight of Indian students in Australia, who have been facing racially motivated attacks. Foreign policy is widely considered to be non-justiciable. Yet, the interference by Indian courts has not wholly been condemned. In another instance Supreme Court issued notice questioning the proliferation of Mayawati statues, allegedly worth crores of rupees, in Uttar Pradesh. Like foreign policy, budgetary allocations are non-justiciable. But judicial interference in this matter too has not been deprecated, nor is it worthy of serious censure.

### **Public Interest Litigation**

Public-interest litigation (PIL) is litigation for the protection of the public interest. PIL may be introduced in a court of law by the court itself (*suo moto*), rather than the aggrieved party. Public Interest Litigation is not defined in any statute or act. It has been interpreted by judges to consider the intent of public at large. Although, the main and only focus of such litigation is only 'Public Interest' there are various areas where a Public Interest Litigation can be filed. For the exercise of the court's jurisdiction, it is unnecessary for the victim of the violation of his or her rights to personally approach the court.

Any public-spirited person can file a Public Interest Litigation case (PIL) on behalf of a group of persons, whose rights are affected. It is not necessary, that person filing a case should have a direct interest in this Public Interest Litigation. For example: A person in Mumbai can file a Public Interest Litigation for malnutrition deaths in Orissa. Someone can file a PIL in the Supreme Court for taking action against a cracker factory that's employing child labour. Any person can file a PIL on behalf of a group of affected people. However, the court will depend on the facts of the case to decide whether it should be allowed or not.

The Supreme Court through its successive judgments has relaxed the strict rule of '*locus standi*' applicable to private litigation. A PIL can be filed when the following conditions are fulfilled:

- There must be a public injury and public wrong caused by the wrongful act or omission of the state or public authority.
- It is for the enforcement of basic human rights of weaker sections of the community who are downtrodden, ignorant and whose fundamental and constitutional rights have been infringed. A Public Interest Litigation can be filed only against a State Central Government, Municipal Authorities, and not against any private party.

A PIL may be filed like a writ petition. However, in the past the SC has treated even letters addressed to the court as PIL. In *People's Democratic Union Vs. Union of India*, a letter addressed by the petitioner organization seeking a direction against the respondents for ensuring observance of the provisions of labour laws in relation to workmen employed in the construction work of

projects connected with the Asian games was entertained as a PIL. The SC has encouraged the filing of PIL for tackling issues related to environment, human rights etc. In early 90's have there been instances, where judges have treated a post card containing facts, as a Public Interest Litigation.

### **Evolution of PIL**

The emergency period (1975-1977) witnessed colonial nature of the Indian legal system. During emergency, state repression and governmental lawlessness was widespread. Thousands of innocent people including political opponents were sent to jails and there was complete deprivation of civil and political rights. The post emergency period provided an occasion for the judges of the Supreme Court to openly disregard the impediments of Anglo-Saxon procedure in providing access to justice to the poor.

In *Hussainara Khatoon Vs. State of Bihar*, (1979) the PIL was filed by an advocate on the basis of the news item published in the Indian Express, highlighting the plight of thousands of under trial prisoners languishing in various jails in Bihar. It was the first time that the Supreme Court acted suo moto and dealt the question of under trial prisoners who were languishing in jails for decades together. Under Cr.P.C. a person's under trial detention is to be set off from his total period of the sentence if found guilty. But due to enormous delay in judicial process, the under trial detention exceeds the period of sentence prescribed for the offence. The Court held that right to speedy trial was part of article 21 and that was deprived of. These proceeding led to the release of more than 40,000 under trial prisoners. Right to speedy justice emerged as a basic fundamental right which had been denied to these prisoners. The same set pattern was adopted in subsequent cases.

In *Kadra Pahadiya & Others Vs Bihar* a letter written by a social scientist was positively responded to by Supreme Court. The apex court ordered acquittal of under trial prisoners who were young boys. A prisoner wrote to Justice Krishna Iyer from prison cell that another prisoner in his neighbour prison cell was being tortured by police by inserting a baton into his anus. This letter led to a decision in *Sunil Batra Vs Delhi Administration*. The Supreme Court also took suo moto action based on a newspaper report about a tragedy in which 25 mentally challenged patients were killed at *Ervadi* of Tamilnadu state, by fire as they could not escape because they were chained to their beds. The Court criticized the governments for non-implementation of Mental Health Act 1987.

In 1981 the case of *Anil Yadav Vs. State of Bihar*, exposed the brutalities of the Police. News paper report revealed that about 33 suspected criminals were blinded by the police in Bihar by putting the acid into their eyes. Through interim orders Supreme Court directed the State government to bring the blinded men to Delhi for medical treatment. It also ordered speedy prosecution of the guilty policemen.

Two judges of the Supreme Court, Justice V. R. Krishna Iyer and P. N. Bhagwati recognised the possibility of providing access to justice to the poor and the exploited people by relaxing the rules of standing. In the post-emergency period when the political situations had changed, investigative journalism also began to expose gory scenes of governmental lawlessness, repression, custodial violence, drawing attention of lawyers, judges, and social activists. PIL emerged as a result of an informal nexus of pro-active judges, media persons and social activists.

## **PIL and Social Justice**

The concept of Public Interest Litigation (PIL) is in consonance with the objects enshrined in Article 39A of the Constitution of India to protect and deliver prompt social justice with the help of law.. In *Dr. Upendra Baxi Vs State of U.P.* (1987) the court entertained a letter from two professors at the University of Delhi seeking enforcement of the constitutional right of inmates at a protective home in Agra who were living in inhuman and degrading conditions. In *Miss Veena Sethi Vs State of Bihar*, 1982 the court treated a letter addressed to a judge of the court by the Free Legal Aid Committee in Hazaribagh, Bihar as a writ petition. In *Citizens for Democracy through its President Vs State of Assam and Others*, 1995 the court entertained a letter from Shri Kuldip Nayar, a journalist, in his capacity as President of Citizens for Democracy to a judge of the court alleging human-rights violations of Terrorist and Disruptive Activities (Prevention) Act (TADA) detainees; it was treated as a petition under Article 32 of the Constitution of India.

Before the 1980s, only the aggrieved party could approach the courts for justice. After the emergency era the high court reached out to the people, devising a means for a person, or an NGO, to approach the court seeking legal remedy in cases where the public interest is at stake. Filing a PIL is not as cumbersome as a usual legal case. PIL is working as an important instrument of social change. It is working for the welfare of every section of society. It's the sword of every one used only for taking the justice. The innovation of this legitimate instrument proved beneficial for the developing country like India. PIL has been used as a strategy to combat the atrocities prevailing in society. It's an institutional initiative towards the welfare of the needy class of the society.

## **PIL and court dynamics**

In Public Interest Litigation (PIL), the nature of proceedings does not exactly fit into the accepted common-law framework of adversarial litigation. The courtroom dynamics are substantially different from ordinary civil or criminal appeals. While an adversarial environment may prevail in cases where actions are brought to highlight administrative apathy or the government's condonation of abusive practices, in most public interest related litigation, the judges take on a far more active role. It can be done by posing questions to the parties as well as exploring solutions. Especially in actions seeking directions for ensuring governmental accountability or environmental protection, the orientation of the proceedings is usually more akin to collective problem-solving rather than an acrimonious contest between the counsels. Since these matters are filed straightaway at the level of the Supreme Court or the High Court, the parties do not have a meaningful opportunity to present evidence on record before the start of the court proceeding. To overcome this problem, Courts have developed the practice of appointing 'fact-finding commissions' on a case by-case basis which are deputed to inquire into the subject-matter of the case and report back to the Court. These commissions usually consist of experts in the concerned fields. In matters involving complex legal considerations, the Courts also seek the services of senior counsels by appointing them as *amicus curiae*.

## **Supreme Court guidelines for PIL**

During the late 80's many PILs were filed in the Supreme Court. Even personal issues were brought before the court. Thus in 1988 the Supreme Court was forced to provide certain guidelines

for entertaining public interest litigation. Accordingly no petition involving individual/ personal matter shall be entertained as a PIL matter. Letter-petitions falling under the following categories alone will ordinarily be entertained as Public Interest Litigation:

1. Bonded Labour matters
- .2. Neglected Children.
3. Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labour Laws (except in individual cases).
4. Petitions from jails complaining of harassment, for (pre-mature release) and seeking release after having completed 14 years in jail, death in jail, transfer, release on personal bond, speedy trial as a fundamental right
- .5. Petitions against police for refusing to register a case, harassment by police and death in police custody
- .6. Petitions against atrocities on women, in particular harassment of bride, bride-burning, rape, murder, kidnapping etc.
7. Petitions complaining of harassment or torture of villagers by co- villagers or by police from persons belonging to Scheduled Caste and Scheduled Tribes and economically backward classes.
8. Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life and other matters of public importance
9. Petitions from riot –victims
10. Family Pension.

### **Judicial Reforms**

Speedy trial is guaranteed under article 21 of the Constitution of India. Any delay in expeditious disposal of criminal trial infringes the right to life and personal liberty guaranteed under article 21 of the Constitution. The debate on judicial reforms has thrown up number of ideas on how the judiciary can set its own house in order. Alarmed by the backlog of inordinate delay in disposal of cases, Fast Track Courts or Special Courts were constituted. Some high courts also started evening benches. With regard to speedy redressal of grievances all the courts in India adapted modern technologies like internet.E-court system was introduced in Supreme Court and high courts. Court judgments and case positions were made available in the internet. The Supreme Court also sanctioned video conferencing for trials.

The 18<sup>th</sup> Law commission report suggests concrete measures for judicial reforms. The major proposals are;

- a) There must be full utilization of the court working hours. The judges must be punctual and lawyers must not be asking for adjournments, unless it is absolutely necessary.
- b) Many cases are filed on similar points and one judgment can decide a large number of cases. Such cases should be clubbed with the help of technology and used to dispose other such cases on a priority basis; this will substantially reduce the arrears. Similarly, old cases can be separated and listed for hearing and their disposal normally will not take much time.
- c) Judges must deliver judgments within a reasonable time
- d) Considering the staggering arrears, vacations in the higher judiciary must be curtailed and the court working hours should be extended
- e) Judgments must be clear and decisive and free from ambiguity, and should not generate further litigation.
- f) Lawyers must not resort to strike under any circumstances

The commission observed that in almost every High Court, there is huge pendency of cases and the present strength of the judges is sufficient to cope with the alarming situation. Thus it was recommended that the number of judges should be increased. Together with this there was a demand for more high court benches to ensure easy access and speedy justice delivery to citizen. This was also suggested for Supreme Court. The Supreme Court benches in southern and eastern parts of the country were also recommended.

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## **MODULE-6**

### **Grassroots democracy: Evolution of PRI in India 73 rd and 74 th constitutional amendments, Role of Panchayath raj in rural development**

#### **Introduction**

When India became Independent, Panchayat institutions were given little importance. Since the framers of constitution put their heads together to elaborate the central and state administration in its infinitesimal, the ambition of village panchayats was remained within the descriptive scope of Article 40 in the Directive Principles of State Policy- the wish list followed by the states in the making of laws. Etymologically the term ‘panchayat’ has an Indian origin. Historians have identified patterns of association and resistance among peasant communities in both north and south India. The terms used to describe such communities include the *bhaiband* or ‘brotherhoods’ in the villages of the Bombay Deccan, and the *nurwa* and *patidar* in Gujarat. Further back in time, the *gana*, *sabha*, *samiti* and *parisad* in the north, and the *nadu*, *brahmadeya* and *periyannadu* in southern India, refer to equivalent political or social communities, while anthropologists have observed the functioning of caste panchayats in the present day. To a large extent, however, the modern idea of the panchayat, its nature and its functions, derives from the image of the Indian village Community conjured up in the writings of Sir William Jones, Hector Munro, Mountstuart Elphinstone, John Malcolm and a variety of other colonial authors in the late eighteenth and early nineteenth centuries.

#### **Panchayathi raj and the British Raj**

References to *panchayats* and *janapadas* in ancient Vedic texts, translated into English for the first time by orientalist scholars, played a part in persuading British officials that here was to be found an elemental unit of Indian society and politics. It’s most brief and influential expression may be found in Charles Metcalfe’s defence of the *mahalwari* system of revenue settlement adopted in the newly ceded and conquered territories of the North-Western Province (later UP). Describing the fortified villages which sprung up around Delhi in the years after the collapse of Mughal power in 1761 Metcalfe wrote to the 1832 Select Parliamentary Committee on the East India Company’s charter in brilliantly evocative terms:

“The village communities are little republics, having nearly everything they can want within themselves and almost independent of any foreign relations. They seem to last where nothing else lasts. Dynasty after dynasty tumbles down; revolution succeeds to revolution; Hindu, Pathan, Mogul, Mahratta, Sikh, English, are all masters in turn; but the village community remains the same... This union of the village communities, each one forming a separate state in itself, has, I conceive, contributed more than any other cause to the preservation of the people of India through all the revolutions and changes which they have suffered, and is in a high degree conducive to their happiness, and to the enjoyment of a great portion of freedom and independence”

The idea of the Village Community, and of the panchayat or village council, subsequently assumed enormous importance in the writings of Henry Maine, who, in an effort to contradict the Roman school of law, represented by Austin, sets out to describe in his influential *Ancient Law*

(1861) the historical evolution of legal systems, linking these systems to what he saw as the various stages in the progress of Civilisation. This theory was later underlined in the writings of Baden-Powell and others (*The Indian Village Community*) and became one of the backbones of the theory of indirect rule developed in India in the second half of the nineteenth century, as well as extending elsewhere into other British colonial territories.

A measure of democratic local government was also introduced, beginning with Municipal Boards in 1882, which were set up to administer those towns large enough to have a magistrate. However, the village community and its panchayat, remained a first resort in case of dispute, practically at least if not juridically, over large parts of rural India. The problem with this was that lineage, locality and caste were the main determinants of traditional village tribunals, and the village panchayats were often no more than caste panchayats. This was a poor apparatus upon which to heap the burden of jurisdiction and the legal standards expected of a British-style system of justice.

Furthermore, despite the best efforts of Elphinstone in Maharashtra, Munro in Madras and the Lawrence brothers in the Punjab, no matter how hard they were pressed, British district collectors were always reluctant to devolve much of their power to a lower level. At the same time, the parallel development of the British court system meant that villagers were becoming increasingly reluctant to submit their disputes to the informal jurisdiction of a group of elderly high caste males, and when they did so, would often request the local British magistrate to overturn a judgement they had just received if it were not to their liking. The real authority of the village panchayat therefore, where it existed, was thus steadily eroded.

The rise of a substantial middle class in towns and villages in the UK, influenced development of local self government as a major theme in British society and politics in the late nineteenth century. Magnificent town halls were constructed, parish councils were vested with new powers, and Rotary societies flourished, while the village community and, the panchayat, as reflected in the orientalist imagining of India. It was no great surprise that, in the wake of Lord Ripon's enthusiasm for local self-government in the 1880s, attempts were made by William Wedderburn in Bombay, Elphinstone's former province, and by others, to revive the village panchayat. 'On the platform under the tree in the village', Wedderburn wrote, 'truth is spoken, but not often in the law courts...' Unfortunately, just as many were suspicious as were enthused by the idea of village committees, arguing that they were liable to corruption and were so irrevocably faction-ridden as to make them incapable of impartially administering any form of justice, no matter how trivial the limits of their authority may be.

### **Panchayathi raj and provincial administration**

In 1920, following the report of the Royal Commission on decentralisation and the Montagu-Chelmsford report of 1918, the village panchayats were formally vested with legal powers in no less than five provinces, including the Punjab, Central Provinces and UP. There were sound practical motives for this course of action: most official commentators accepted that by this date the 'ancient' village communities of which Metcalfe had written, if they had ever existed, were all but extinct. And should anyone doubt it, reference could be made to the 1911 census, in which

particular efforts had been made to track down and enumerate village committees. The census concluded that the 'myth' of their existence had 'probably arisen from the fact that a village is generally, if not invariably, formed by members of the same caste', and that castes often had their own panchayats, even though the village might not.

However, the various provincial administrations went ahead and formally invested village committees with a combination of administrative and judicial powers. Economy was a strong motivation: it was hoped that the panchayats might relieve pressures on the overstretched district and provincial courts. There was also the desire that by conferring powers upon villages, and cutting out the overeducated (and increasingly troublesome) class of collaborators upon whom the British depended for much else in their administration. The white rulers might further cement the bond between themselves and their loyal subjects.

The composition of these village committees and the powers they exercised varied enormously from province to province. Most were democratically elected, although in the UP all elections by the *gaon sabha* had to be approved by the local magistrate. Although hardly a 'traditional' method of selection, this procedure at least had the merit of locality combined with some sort of oversight. Nearly all of them were constituted primarily to carry out judicial business.

In Punjab, Bombay and the Central Provinces the panchayats covered about one-tenth or one-fifteenth of the countryside; in UP a quarter of the province was brought under their jurisdiction; and in Bengal and Madras presidencies panchayats were set up throughout the length of the country. While initially enjoying some measure of success (the Bengal panchayats disposed of some 122,760 cases in 1925), the picture thereafter was one of steady decline, partly because, their jurisdiction was all too easily subverted by resort to a British court. Ironically, it was during this same period, when the British were somewhat cynically encouraging the Panchayati system and putting its role into statute that the idea of the panchayat also entered into nationalist discourse.

### **Nationalist and Self Government**

To nationalists, the panchayat was not simply a cheap and easy means of indirect rule. Rather it was a symbol of the type of democratic government which Mahatma Gandhi and others wished to see supplanting that of the Europeans post-independence. Gandhi was well educated and deeply influenced by a variety of western writers, including Leo Tolstoy, whose vision of a self-sustaining community he absorbed. He was also strongly influenced by his reading of Sir Henry Maine, using Maine's *Indian Village Communities* as one of the principal items of evidence in a petition to the Natal Assembly in 1894, in which he argued that the franchise should be extended to members of the Indian community.

A key passage in the Petition reads as follows: The Indian nation has known, and has exercised, the power of election from times prior to the time when the Anglo-Saxon races first became acquainted with the principles of representation... In support of the above, your Petitioners beg to draw the attention of your Honourable Assembly to Sir Henry Summer Maine's *Village Communities*, where he has clearly pointed out that the Indian races have been familiar with representative institutions almost from time immemorial. That eminent lawyer and writer has

shown that the Teutonic Mark was hardly so well organised or so essentially representative as an Indian Village community until the precise technical Roman form was grafted upon it.

Gandhi went on to quote Chisolm Anstey in a speech delivered before the East Indian Association in London, in which 'the East' was described as 'the parent of municipalities', and it was said that 'local self-government in the widest acceptation of the term' was 'as old as the East itself'. Gandhi himself then insisted, somewhat imaginatively, that every caste in every village or town has its own rules and regulations, and elects representatives, and furnishes an exact prototype of the Saxon Witan, from which have sprung the present Parliamentary institutions. He warmed to this theme again in a letter addressed to 'Every Briton in South Africa', published as a pamphlet in 1895: To say that the Indian does not understand the franchise is to ignore the whole history of India.

Representation, in the truest sense of the term, the Indian has understood and appreciated from the earliest ages. That principle – the panchayat – guides all the actions of an Indian. He considers himself a member of the panchayat, which really is the whole body civic to which he belongs for the time being. This may be equivalent with the city state people. They identified themselves with the polis-the city state. His argument was threefold: firstly that the Indian people were as civilised as any other and therefore entitled to vote; second that they were long accustomed to the concept of representative democracy and indeed enjoyed the powers of voting – at least some of them – for members of municipal councils and provincial assemblies in India, and thirdly, that the Indian community was not at all political and that if given the vote they could be relied upon more often than not never to exercise it or, when doing so, to confine their support to modest and conventional candidates who would uphold the status quo. Gandhiji reassured his readers that Indians were rarely ever likely to stand for election, as few of them were sufficiently well educated in English to be able to keep up with the level of debate in the assembly chamber. In later years Gandhi's supporters perceived in village-based action not only the means to swaraj, in a personal sense, but also the means towards a national awakening and wholesale programme of social and economic reconstruction.

Gandhi himself was rarely so radical in his own writings on the subject; indeed, he does not even mention the idea of village self-government in *Hind Swaraj*, his erstwhile nationalist manifesto, published in 1910. He nonetheless insisted that it was a good Indian tradition to subordinate self-interest to the collective decision of a Panch, and often described the Indian National Congress central working committee as one such Panch: a sort of elected oligarchy to which unquestioning obedience was expected. At the same time, he freely admitted that the practising institution of the Village panchayat was rarely if ever likely to be found in effect. And although he expressed the hope that it might be revived, he clearly did not expect it to happen in a hurry. When asked in 1925 what should be done with those who borrowed capital from khadi boards and then failed to return it, he answered that in an ideal world they would submit themselves to the judgement of a panchayat, but that since the idea of the panchayat is 'as good as non-existent now', it would be best just to take them to court. And in 1931 he wrote in *Young India* as follows: ... we may not replace trained judges by untrained men brought together by chance. What we must aim at is confirmed, impartial and able judiciary right from the bottom. I regard village panchayats as an institution by itself. It must, however, be revived at any cost, if the villages are not to be

ruined. Gandhi was thus a believer, but hardly an unequivocal champion of village self-government, and he fully accepted the practical limits to such a scheme.

### **Swadeshi movement in Bengal**

The idea of village development through self-regulated councils was in fact first deployed politically in India, not by Gandhi, but by Rabindranath Tagore as early as the 1900s, and it became a major issue during the Swadeshi movement in Bengal between 1905 and 1910. CR Das, the Bengali swadeshi campaigner, was amongst those who supported it. Like Gandhi, CR Das spoke on the issue during his Presidential Address to the Bengal Congress in 1918, advocating the growth of village councils as a means of economic development. The policy was later written out of the manifesto of the Bengal provincial congress following pressure from the Zamindar lobby. In 1922 CR Das became President of the Indian National Congress, and in his Presidential address he again urged, as a requisite of Swaraj, the ‘organisation of village life and the practical autonomy of small local centres’. ‘Village communities must not exist as disconnected units’, he argued, but be ‘held together by a system of co-operation and integration’. He concluded: ‘I maintain that real Swaraj can only be attained by vesting the power of government in these small local centres’, and he advised the Congress to draw up a scheme of government based upon these proposals. As a result of this an *Outline Scheme of Swaraj* was drawn up by CR and Bhagavan Das, presented to Congress in 1923 and adopted as party policy.

This plan recommended a massive decentralisation of government after Independence, the higher centres of governmental power being reduced and the organ of administration becoming the panchayat, organised into village, town, district, provincial and all-India units of government. The purpose behind this idea was the upliftment of India’s villages and, as the memorandum put it, the ‘spiritualising of India’s politics by changing the Whole culture and civilisation of society from its present mercenary to a missionary basis’.

Gandhi and the Indian National Congress were not the only advocates of panchayats. The enthusiasm for the village, for co-operation and for local self government, was shared by a variety of liberal colonial officials – particularly members of the government’s revenue and agricultural departments, who saw the ‘intermediary classes’, whether moneylenders or lawyer-politicians, as a drain upon society and a barrier to progress, particularly in the progress of the revenue receipts. Neither Gandhi nor the British advocated anything so radical as land reform – this would be too revolutionary, but both expressed enthusiasm for the possibilities afforded by cooperation, the cooperative movement being increasingly encouraged by the British in the 1920s as the idea of the panchayat was taken over by the nationalists.

### **Village swaraj**

As the nationalist struggle progressed, Gandhi became more ambitious for the idea of village self-government. His clearest and most often quoted exposition of the idea dates from 1942, when he wrote of ‘village swaraj’, in words that closely echoed those of Metcalfe: “My idea of village swaraj is that it is a complete republic, independent of its neighbours for its own vital wants and yet interdependent for many others in which dependence is a necessity... As far as possible every activity will be conducted on the co-operative basis. There will be no castes such as we have

today, with their graded untouchability. Nonviolence with its technique of satyagraha and non co-operation will be the sanction of the village community... The government of the village will be conducted by a panchayat of five persons elected annually by the adult villagers, male and female, possessing minimum prescribed qualifications... Since there will be no system of punishments in the accepted sense, this panchayat will be the legislature, judiciary and executive combined to operate for its year of office... Here there is perfect democracy based upon individual freedom. The individual is the architect of his own government. The law of non-violence rules him and his government. He and his village are able to defy the might of a world. For the law governing every villager is that he will suffer death in the defence of his and his village's honour..."

Later on, Gandhi described his vision in an interview given just two years before his death. In this structure composed of innumerable villages, there will be ever widening, never-ascending circles. Life will not be a pyramid with the apex sustained by the bottom. But it will be an oceanic circle whose centre will be the individual always ready to perish for the village, the latter ready to perish for the circle of villages, till at last the whole becomes one life composed of individuals, never aggressive in their arrogance but ever humble, sharing the majesty of the oceanic rule of which they are integral units.

Jawaharlal Nehru also warmed to the idea, asserting in *The Discovery of India* that in ancient times 'the Village panchayat or elected council had large powers both executive and Judicial and its members treated with great respect by the Kings officers.' However, this was little more than a fit of historical imagination, with few practical implications as far as Nehru's Congress policy was concerned. Soon after writing it he was indeed engaged in discussions with P Thakurdas, GD Birla, JRD Tata and others, which led to the drawing up of the famous Bombay Plan of January 1944, setting the framework for India's social and economic development post-independence: a world of industry, urbanisation and of partnerships in development between government and the national bourgeoisie.

### **Revival of Panchayati Raj**

Following Gandhi's death, the possibility of a continuing judicial and administrative role for the village panchayat was considered, criticised and rejected by the Indian Constituent Assembly. They stick to the earlier British assumption that such local organisations were prone to corruption. Consequently, the only reference to panchayats at all in the Indian Constitution adopted in 1951 is in Part IV in the Directive Principles of state Policy, which is non justiciable, and which merely stated that 'the state should take steps to organise village panchayats and endow them with such power and authority as may be necessary to enable them to function as units of self-government'. The same fate befell the cooperative movement. After a brief outbreak of enthusiasm in the 1950s, cooperation was found more often than not to be sham in practice, and the cooperative ideal, together with the panchayati ideal, was shelved by most government departments.

This disdain seems real when BR Ambedkar wrote: 'what is the village but a sink of localism, a den of ignorance, narrow-mindedness and communalism'. These pressures began to make themselves felt soon after the launch of the first five-year plan. With the concentration of development resources on the industrial sector in the first, and particularly in the second five-year

plan, it rapidly became apparent that there were not the means available to carry into effect the rural arm of the government's development programme.

These shortcomings were manifested in the Community Development and National Extension Service programmes, both of which were the subject of an enquiry by a national planning committee study team led by Balwantrai Mehta, a Member of Parliament, in 1957. The study team concluded that if these programmes were to be effective, and affordable, and if repeated interventions by officials were to be avoided, there was a desperate need for an agency at the village level 'which could represent the entire community, assume responsibility and provide the necessary leadership for implementing development programmes.' The case for governmental decentralisation was later affirmed by the National Development Council, and once again panchayats came back onto the political agenda.

### **Belwant Rai Mehta Committee**

The Balwantrai Mehta Committee was set up by the National Development Council in 1957. It was assigned the task of study and recommendation for the reorganisation of Community Development Programme. The report of the committee formally launched the panchayati raj institutions in India. The Belwant Rai Mehta Committee report is widely hailed as the Bible of Panchayati Raj and a master blue print for the organisation of panchayats in India. The committee recommended for the three-tire Panchayati Raj system in India.

These three-tires are

- the Gram-Panchayats at the village level or at the bottom,
- the Panchayat Samiti at the block level or in the middle and
- the Zilla Parishad at the district level.

### **Other important recommendations**

- a. creation of Panchayati samiti to initiate development work at the local level.
- b. The proposed Panchayat samiti would be an exclusive body comprising of the President of the panchayat, members from SC and Women. MPs and MLAs would become its associate members.
- c. The District collector was to be a member of Zilla parishad/District level panchayat. Chairman of the panchayat samities of the district would be the members of Zilla Parishad. Zilla Parishad would have advisory, co-coordinative as well as the supervisory functions.
- d. Scrutiny of the budget of panchayat samiti by the zilla parishad.
- e. The panchayat samities would be given independent source of revenue.
- f. The Block Development Officer had to work as the Executive officer of the panchayat samiti.
- g. The State Government should have control over panchayat samities.

Rajasthan was the first state to pass legislation authorising the constitution of a new style of panchayat. The first, assuming largely administrative powers, was established at Naguar, in October 1959. Another was soon set up at Shadnagar in Andhra Pradesh, and by 1959 every state had passed a Panchayati Act and some sort of panchayat was thereafter established, in theory at least, in nearly every village.

It seems likely that the concept of Panchayati raj was both a response to financial exigencies and to the emergent conflicts between the Congress government's espousal of equality and welfare for all, and its heavily urban and industry-biased development planning. These conflicts heightened social and political tensions, and it is likely that Jawaharlal Nehru espoused the panchayat ideal for the same reason that in 1963 he espoused the so-called Kamraj Plan, which called upon Congress politicians to resign from office and devote themselves to grassroots work in the rural areas. Both could be seen as an attempt to undermine the influence of powerful and reactionary landed and bourgeois state level politicians and to reaffirm his party's links with the rural masses – just as the British had sought to do some forty years earlier. There was also strong support in favour of the Panchayati ideal among opposition groups. Jai Prakash Narayan was a great advocate of panchayats in the late 1960s and early 1970s, his vision being quite a radical one, championing the notion of party less democracy.

### **Problems of Early Panchayats**

The problem was that these panchayats were set up largely, for developmental reasons, and although constituted at village level (always including a certain number of women and Scheduled Castes/ Scheduled Tribes), the executive powers usually lay at block level, where a block Samiti was constituted by delegates from a number of villages. Executive powers here were effectively shared with the government block development officer, and above the block there were also Zilla Parishads playing a supervisory and coordinating role. There was thus very little continuity with the primarily judicial panchayats of the 1920s, let alone with Metcalfe's or even Gandhi's idea of little village republics. Where they functioned at all, they served as a channel for developmental and improvement works, and when in the later 1960s these programmes flourished, the village level panchayats played little part in administering them. This deficiency in community involvement was highlighted in RC Jain's 1985 study *Grass without Roots*.

With the shift of government expenditure away from industrial projects and into rural development after 1966, funds were made available to train and appoint officials to carry on the business of project implementation and management. The Block Development Officer therefore flourished, and was soon joined by a variety of other specialist teams sent by different ministries, each of which set up their own committees and other means of consulting with villagers, and none of whom were willing to entrust their pet projects to the control of villagers themselves.

Even as early as 1964 these problems were publicised in a seminar held by the All-India Panchayat Parishad, a voluntary association of panchayat organisations across India, presided over by Jayaprakash Narayan. The rapid deterioration of the panchayats constituted in the late 1950s and early 1960s was further underlined in the report of the Asoka Mehta Committee on Panchayati Raj

institutions which was set up in December 1977, and included such luminaries as EMS Namboodiripad and MG Ramchandran among its membership.

### **Asoka Mehta Committee**

Asoka Mehta Committee on Panchayati Raj institutions submitted its report in August 1978 and made 132 recommendations to revive and strengthen the declining Panchayati Raj System in the country. Its main recommendations are:

1. The three-tier system of Panchayati Raj should be replaced by the two-tier system, that is, Zila Parishad at the district level, and below it, the Mandal Panchayat consisting of a group of villages covering a population of the 15000 to 20000.

2. A district should be the first point for decentralization under popular supervision below the state level.

3. Zila Parishad should be the executive body and made responsible for planning at the district level.

4. There should be official participation of political parties at all levels of Panchayat elections.

5. The Panchayati Raj institutions should have compulsory powers of taxation to mobilize their own financial resources.

6. There should be a regular social audit by a district level agency and by a committee of legislators to check whether the funds allotted for the vulnerable social and economic groups are actually spent on them.

7. The state government should not supersede the Panchayati Raj institutions. In case of an imperative supersession, election should be held within six months from the date of supersession.

8. The Chief Electoral Officer of state in consultation with Chief Election Commissioner should organise and conduct the Panchayati Raj elections.

9. Development functions should be transferred to the Zila Parishad and all development staff should work under its control and supervision.

10. A minister for Panchayati Raj should be appointed in the state council of ministers to look after the affairs of the Panchayati Raj institutions.

11. Seats for SC and ST should be reserved on the basis of their population.

Due to the collapse of the Janta Government before the completion of its term, no action could be taken on the recommendations of the Ashok Mehta Committee at the central level.

## **Panchayati raj bill**

In 1985, Rajiv Gandhi became Prime Minister, and two committees were constituted. The first, under GVK Rao, was established to review the arrangements for rural development and poverty alleviation. It recommended the revitalisation of Zilla Parishads, with the appointment of a District Development Commissioner as Chief Executive of the Zilla Parishad. The second committee, chaired by HM Singhvi, proposed the reorganisation of Panchayati raj institutions and the setting up of effective village-level committees. Following this report the Sarkaria Commission on Centre–State relations and a Parliamentary Consultative Committee also recommended that there should be a significant strengthening of Panchayati raj institutions. After consultations with Collectors and District Magistrates, and representatives of existing panchayats, a special meeting of the All-India Congress Committee was convened to consider the matter. This obviously included the political implications of a program of administrative decentralisation, but with the popularity of Rajiv’s government by this stage sinking in the polls there was clearly nothing to lose by it.

A bill proposing an amendment to the Constitution, the 64th, was drawn up and presented to Parliament in May 1989. The introduction of 64<sup>th</sup> constitutional amendment bill in July 1989 represented the first attempt to confer constitutional status on rural local governments. This bill proposed to make it legally binding upon all states to establish a three-tier system of panchayats at village, intermediate and district level, each of them to be appointed by direct election and to enjoy a fixed tenure of no more than five years. At the first attempt, the bill was passed by the Lok Sabha, but rejected by the Rajya Sabha, following which the Congress called an election. The bill was eventually passed after it was reintroduced as the 74th amendment bill for the second time in 1991 by the government of Prime Minister Narasimha Rao. It was passed by the Lok Sabha on 22–23 December 1992 and, following its ratification by half the states, it achieved Presidential assent in April 1993 as the 73rd Amendment to the Constitution.

The amendments were then officially enacted through the issue of government notifications the Constitution (73rd Amendment) Act, 1992 (commonly referred to as the Panchayati Raj Act) went into effect on April 24, 1993, and the Constitution (74th Amendment) Act, 1992 (the Nagarpalika Act), on June 1, 1993. The amendments made a distinction between mandatory (compulsory for all states) and discretionary provisions (states can take appropriate decisions over these matters) And so, while many of the discretionary provisions laid out a vision and created a space for individual states to legislatively innovate in reforming local government, ultimately, the design and scope of particular reforms was left to the discretion of individual state legislatures. Of the mandatory provisions of the Panchayati Raj Act, the most critical are those that strengthen the structure of representative democracy and political representation at the local level.

## **The 73<sup>rd</sup> and 74<sup>th</sup> Constitutional Amendments**

The importance of the 73<sup>rd</sup> and 74<sup>th</sup> constitutional amendment Acts is that it provides constitutional status for panchayats and Municipalities in India. Hereinafter, they are enjoying powers which a constitutionally protected and listed in 11<sup>th</sup> and 12<sup>th</sup> schedules of Indian constitution. A new part, Part IX also incorporated in the constitution entitled “The Panchayats” in

the constitution of India. There are 29 subjects for panchayats and 18 areas of local importance are reserved for Nagarapalikas (municipal bodies)

The *Eleventh Schedule* added to the Constitution of India by the 73rd Amendment Act lists a comprehensive range of development activities to be entrusted to Panchayati Raj Institutions as a part of the decentralization process.

1. Programmes for productive activities – agriculture, irrigation, animal husbandry, fuel and fodder, poultry, fishery, small-scale industries including food processing and cottage industries;
2. Land development programmes – land reforms, soil conservation, minor irrigation, water management and watershed development, wasteland development, social forestry and grazing lands;
3. Education and cultural activities – primary schools, adult education, technical education and libraries;
4. Social welfare – women and child development, family welfare, care of people with physical and mental disabilities;
5. Provisions of civic amenities – drinking water, rural electrification, non-conventional sources of energy, rural roads, bridges, culverts, waterways, sanitation, rural housing and health;
6. Poverty alleviation and allied programmes for social and economic advancement of the weaker sections;
7. Maintenance of community assets and public distribution system;
8. Organization and control of rural markets and village fairs.

The key mandatory provisions are:

The establishment in every state (except those with populations below 20 lakhs) of rural local bodies (panchayats) a three tier system of panchayati raj system comprising of Village Panchayat, intermediate panchayat (Block Panchayat in Kerala) and District Panchayat. Thus Act provides uniformity in the structure of panchayati raj throughout the country. However states having a population below 20 lakh may not constitute panchayats at the intermediate level.

**Compulsory provisions in the Act.**

- a) Organisation Grama Sabha in a village or group of villages. Establishment of three tier panchayat system in all states.
- b) Direct elections to all seats in the panchayats at all levels.

- c) Compulsory elections to panchayats every five years. In the event that a panchayat is dissolved prematurely, elections must be held within six months and the newly elected members enjoy the rest of the period.
- d) Mandatory reservation of seats in all panchayats at all levels for Scheduled Casts and Scheduled Tribes in proportion to their share of the panchayat population.
- e) Compulsory reservation of fifty percent of all seats in all panchayats at all levels for women, with the reservation for women applying to the seats reserved for SCs and STs as well.
- f) Indirect elections to the position of panchayat chairperson at the intermediate and district levels.
- g) Mandatory reservation of the position of panchayat chairperson at all levels for SCs and STs in proportion to their share in the state population.

In addition, the act mandates the constitution of two state-level commissions:

1. An independent election commission to supervise and manage elections to local bodies and
2. A state finance commission, established every five years, to review the financial position of local bodies and recommend the principles that should govern the allocation of funds and taxation authority to local bodies.

### **Urban Local Governments and 74<sup>th</sup> Amendment 1992.**

The Act added a new part, Part IX A. entitled as “the Municipalities” in the constitution. The Act gives constitutional status to the municipalities. It has come under the justiciable part of the constitution of India. The Act provides for three types of Municipalities. They are

- a) Nagar panchayat; at transitional area i.e., area in transition from rural to urban area.
- b) Municipal council; for a smaller urban area.
- c) A municipal corporation for a larger area.

Representatives are elected as the manner in which elections are conducted to panchayats. But the Act allows certain persons having special knowledge, the members of Lok Sabha, Rajya Sabha, or MLAs, as special representatives without the right to vote in the municipal organs. The act recommended for the constitution of ward committees (similar to Grama Sabha) consisting of one or more wards. Reservation of seats and manner of election are on the same line with panchayati raj institutions.

### **Functional items of urban local bodies**

1. Urban planning

2. Regulation of land use and construction of buildings
3. Roads and bridges
4. Water supply, public health, sanitation etc.
5. Fire services
6. Urban forestry, protection of environment etc.
7. Slum improvement and up gradation.
8. Urban poverty alleviation.
9. Burials and burial grounds. Crematoriums etc.
10. Public amenities including street lighting, parking lots etc.
11. Regulation of slaughter houses and tanneries.
12. Care for disabled and downtrodden.

### **Devolution in local self governments**

Devolutionary aspects of local self governments make them more relevant in the context of developmental administration. Development of administration and Administration development are simultaneously carried out by these administrative units. Creation of Finance commission and District planning committee should be mentioned here. State level election commission is also established for superintendence, direction and control of elections to local self governments. It acts independently of the Election Commission of India. It is worthwhile to study the nature of Finance Commission and District Planning Committee as they show that how does the Amendment ensure proliferation of power to the grass root level of Indian democracy. The system revokes the traditional concepts of centralised planning and addresses the local needs. This is the only way we can change entire administrative scenario of the country. The aim of developmental administration can be materialised with this irrevocable initiative made by our parliament.

#### **State Finance Commission**

The state finance commission review the financial position of local bodies and make recommendations to the governor as to:

**1, the principals that should govern**

- a. The distribution between the state and the local bodies, the net proceeds of the taxes duties, tolls and fees levied by the states.
- b. The determination of the taxes, duties, tolls and fees that may be assigned to the local bodies.
- c. The grants-in-aid to the municipalities form the consolidated fund of the state.

2, The measures needed to improve the financial position of the municipalities.

3, Any other matter referred to it by the governor in the interest of sound finance of the municipalities.

### **District Planning Committee**

It is suggested that every state should constitute a District Planning Committee to consolidate the plans prepared by panchayats and municipalities in the district. The state legislature is empowered to make necessary laws for the constitution, composition, powers and functions of the District Planning committees. The Act lays down the four-fifth of the members of a district planning committee should be elected by a district panchayat and municipalities in the district from amongst themselves. There is a provision of Metropolitan Planning Committee in every metropolitan area.

### **Grama Sabha**

The grama sabha or village assembly lies at the base of PR superstructure. It consists of all the adult citizens who have been entitled to vote. The village panchayath owes responsibilities to the gramasabha. It presents a budget account and annual administrative reports before gramasabha. In Indian democratic decentralization, gramasabha has to play a key role and it had a great significance. The 73<sup>rd</sup> constitutional amendment and PR act ensures the importance of gramasabha in democratic decentralization. The 73<sup>rd</sup> constitutional act also envisages empowered gramasabha as the parliament of PR institutions.

The gramasabha meets in every 3 months. Besides, special meetings of grama sabha can be convened. The sarpanch can convene the grama sabha meeting. Government can authorize the collector or sarpanch to call a special meeting for the gramasabha. Gramasabha is to be held by rotation from time to time in each of village of the grama panchayath at convenient places as the sarpanch decides..

The quorum for gramasabha is 1/10<sup>th</sup> of the total electorate out of which 1/3<sup>rd</sup> should be women. In the case there is no quorum, the sarpanch or the president of the meeting shall adjourn the meeting to other date. Gramasabha had specific responsibilities to function. Such responsibilities are;

1. Propagate information about development and welfare measures.
2. Participate and propagate activities which related to development , health and literacy
3. Collect basic socio economic information etc.

### **Grass root level Democracy in Kerala- land marks**

Panchayathi raj system was well known to the people of Kerala. The most significant of Sri Mulam Thirunal's reform was the formation of the Legislative council consisting of members from the Taluk level onwards. The Government of Travancore initiated a village Panchayat Act on January 25, 1925. The object of this regulation was to initiate the institution of self-government

from the very bottom, viz., from the village itself, in other words, to make the village a vital part in the system of government. The next development of Panchayat Organisation took place in 1937 when the Travancore Village Union Act IX was passed by which 39 village unions were constituted.

The Panchayat Act enacted in 1950 created 548 panchayats in Kerala. Between 1950 and 1970 are specially marked by the appointment of three statutory committees for the purpose – the Administrative Reforms Committee (1958), The Commission for Delimitation of Panchayat Areas (1959) and the Administrative Reorganisation and Economy Committee (Vellodi Committee 1965).

Structure of panchayats was determined by their annual income. The number of members was determined by the state government and a ceiling of maximum number of members was made as seven. One seat was given to SC/ST population, provided their presence in the constituency is below 5%. A village council was proposed with judicial powers. Panchayats were constituted in every village on 1:1 basis. O. Chandumenon Committee, The commission for Delimitation of Panchayat Areas (1959) suggested Panchayati Raj system of administration in Kerala in which Panchayat, Taluq Council, Block and District Council. The government of Kerala enacted in 1960, a Kerala Panchayat Act unifying the existing laws in the Malabar and Travancore. With the enactment of the Kerala Panchayats Act, 1960, the State of Kerala had accepted a uniform law for the administration of Panchayats. The Kerala District Administration Bill was another landmark in the history of grass root level democracy in the state. The bill proposed in 1978 by the then chief minister AK Antony and passed the Bill in 1979 when the Chief Ministership was in the hands of the CPI leader P.K. Vasudevan Nair. Every District Council shall be a body known by the name of the district.

After the constitutional amendments the local self governments in Kerala act as a role model to every other state. Power devolution is complete and local self governments attained maximum power to control the destiny of people. The Grama Sabhas are effective grassroots legislative bodies in Kerala.

## **MODULE-7**

Nature of Party system

A, ideology and social base of Major political parties in India

B, All India parties-socialist tradition

C, Regional political parties an overview

### **Introduction**

The party system in India differs from its counterparts in the region. The state is having a vibrant party system and the success of Indian democracy can be rightly attributed to these political parties. They make democracy and its institutions workable. They effectively represent the various groups and subgroups in the country. The issues debated ranges from secularism to corruption. Thus India has a wide range of parties ranging from Congress to communists. Parties with no mass base also surfaced in state politics and won power. Thus the Aam Admi Party, which originated in the anti corruption movement of Anna Hazare also gained public acceptance.

Even though the constitution is silent with regard to political parties, political parties became a strong pillar of the state and constitutional mechanisms. The plural and federal character of our polity has been asserting itself in the party domain. The era of multi-party democracy had set in within two decades of Indian Independence. In some major States the national parties are marginalized or have become adjuncts to the regional parties. During the past two decades, most parties have performed the role of ruling as well as opposition parties at different levels. After the flux and uncertainty of the 80s, a two-coalitional party system has set in at the Union level, in which a large number of parties share power.

Throughout the years parties played an immense role as mediating agencies in bringing about democratic transformation of this country in a relatively peaceful manner, in a relatively short span of time, and under conditions that were considered not very conducive for democratic development. They were instrumental in taking governments closer to the people. Today, all parties contest elections in the name of securing the common good. They maintain that they are committed to protect and promote the interests of the poor, marginalized and the socially disadvantaged. Parties have exhibited a good deal of ideological flexibility. This has been the strength as well as weakness of parties. All parties profess adherence to some kind of egalitarian, secular, socialist and democratic principles. The representative character of parties also has increased over time. They drew more and more sections of society into the arena of politics.

### **Phases of Indian party system**

The evolution of parties and party system in India after Independence can be divided into four phases; 1, period of Congress consolidation and dominance (1952-67) 2, consolidation of opposition parties and emergence of multi-party system (1967-89) 3, period of flux (1989-98); 4, shaping of coalitional party system (1998 onwards). Most discussions on political parties in India start with the emergence of the Congress dominance during the 1950s and its breakdown during the

60s and 70s. During this period the congress party acted as dominant party and acquired legitimacy through its tradition of national movement. Congress party was also having strong leaders, many of whom were associated with the nationalist movement. With Indian partition, the main rival to the Congress, the Muslim League, was removed from the electoral scene.

Electoral politics that replaced the politics of freedom struggle had severely constricted the space available to non-Congress parties. The small parties were also suffering from structural deficiencies, which made them non entity. They were further rendered feeble under the first past the post electoral system followed in India. It enabled the Congress to gain two thirds majority in the legislatures. The multiplicity of parties and the presence of large number of independents enhanced the chances of victory for the Congress. Thus the presence of other parties in legislatures was much below their popular support. As the Congress eclipsed the non-Congress liberal parties, those who aspired to continue in politics had to seek space within the Congress fold. During this time Congress enjoyed exclusive control over governmental power at the Centre and in most of the States. Neither the pre-Independence non-Congress parties nor the newly emerged parties could present a viable alternative to the Congress. India thus produced a 'one-party dominance' model. This one party dominance system is however different from one-party system. Congress was not against other parties, but the numerous opponents failed to command public trust and legitimacy in Indian politics.

### **Second Phase**

The consolidation of the Congress and the weak opposition led to a belief that the Congress system was invincible. However, the beauty of democracy lies in its ability to provide ground for the working out of the opposition to the dominant idea or institution. Alongside the blossoming of the Congress dominance, a second phase appeared. New opposition parties began to emerge in the 1950s and 1960s. Several leaders within the Congress, who were either disgruntled with the policies of the party or denied access to power went out of it and formed separate parties – Socialist parties, Kisan Mazdoor Praja Party (KMPP), Krishikar Lok Party (KLP), Bangla Congress, Kerala Congress, Jana Congress in Orissa, Swatantra, Bharatiya Kranti Dal, etc. Other parties, rooted in long-standing anti-Congress orientations, also began to gain strength: SAD in Punjab, Muslim League in Kerala, DMK in Tamil Nadu, National Conference in Jammu & Kashmir, etc. The Communist party too split on the question on support to the Congress party and those who took a vehement anti-Congress position, saying that defeat of the Congress was necessary for the advancement of people's democracy in the country.

The emergence of new parties is well evidenced with the history of CPM. The party was born in 1964. Within three years it became the ruling party in Bengal and Kerala. Together with this the late 60s and 70s saw the consolidation of the non-Congress parties. Although the Congress retained power at the Union level in the 1967 elections, the party citadels began crumbling in several States. Opposition parties forged alliances and formed governments in eight major Indian States. Biju Patnaik, who formed the Utkal Congress in 1970, advocated the theory that future belongs to provincial parties which championed the hopes and aspirations of the people of their respective regions. Visions of a federal government comprising representatives from different States began to appear on the political horizon. For the first time since independence the Congress

suffered massive defections, as the Congress leaders who were dissatisfied have other parties to look to. It is in this background Rajni Kothari spoke of the dominant party model giving way to a more differentiated structure of party competition. Morris-Jones (1978) joined Kothari when he observed that the new situation brought a number of opposition parties fully into the market place, and competition that had previously occurred within the Congress was now brought into the realm of inter-party conflict.

### **Emergency and new protest**

The agitations led by Jayaprakash Narayan, the imposition of Emergency, and finally the formation of the Janata party in 1977 brought far-reaching changes in the structure of party competition. The Janata party came through the merger of different parties – Socialist Party, Bharatiya Lok Dal, Bharatiya Jan Sangh and the Congress (O). The Congress for democracy under the leadership of Jagjivan Ram joined the party after the election. The emergence of a viable non-Congress party and its capturing of power at the Centre raised the hope of a two-party system taking shape. But this experiment soon fizzled out with leadership quarrels in the Janata party. After a gap of nine years the non-Congress parties once again came to power in 1989, under the banner of National Front. But it too collapsed within two years. The leaders of these parties, although very experienced and talented, were unable to work out a broad programme to aggregate political groups and to overcome the deep-seated party identities. Thus, the non-Congress alliance was unable to consolidate the significant support it received from the electorate and continue in power. However, the Janata and National Front experiments proved that it was possible to displace the Congress if the non-Congress parties could come together.

### **Third Phase**

The 1980s was a period of great flux. It saw the emergence of more and more new parties. Several National and regional parties were born as the Janata party began to fall apart. Some old parties took new name, such as the BJP (formed in 1980), which began to gain strength as the major opposition to the Congress at the national level and in some States. The Bahujan Samaj Party began to take shape in the North as the representative of the dalits. New regional parties sprouted, developed and captured power in States: such as the TDP (1983) in AP and the AGP (1985) in Assam. As a result of reconfiguration of politics numerous small parties began to gain strength or emerge: All India Muslim League (1948), Shiva Sena (1966), Jharkhand Mukti Morcha (1972), Manipur People's Party, Mizo National Front (1965), J&K Panthers Party, Nagaland People's Party, Nagaland People's Council, Sikkim Sangrama Parishad, Indian People's Front, etc. are examples. The pluralistic nature of India's federal polity began to assert itself in the party domain. Here national parties were forced to bank on regional and small parties. It should be noted that earlier these regional parties were accused of parochialism and kept aside from the mainstream. Now the nationalist parties eagerly made election arrangements with small and regional parties. The regional parties gained a voice in national politics. They demanded for a more federal government and more autonomy to the States. Yogendra Yadav terms it as a "post-Congress polity". Congress was no longer the pole against which every polity formation was defined. The constraint on voter to vote for or against it was no more there. Even in those States where there was a direct race between the Congress and its rival, the Congress was no more the natural party of

governance. The political space was occupied by three forces: the Congress, BJP and others. The third space became the spring of political alternatives. As people at all levels of society became increasingly aware of the logic of electoral politics, a new awakening occurred among the great mass of India's voters. They became more assertive and their difficult to govern.

This period of flux also saw a decline in the capacity of institutions to respond to pressures from society. This decay affected most political parties. The awakening of the electorate and the decay of parties combined to generate two major tendencies: (i) the way the elections were won or lost. and (ii) growing divergence between the logic of politics at the national level and the logic of politics in various State-level arenas. Thus this period was marked by greater competition among parties and also by greater instability within many parties. It was a time characterized by abundant alternation between parties in power at the State and national levels.

This shift was necessitated by certain contingencies in Indian politics during this period. Firstly, the nature of development and the policies pursued by the government during three decades of independence saw the emergence of new political forces. The rise of the aspiring political elites from among the intermediate peasant communities is one major factor that added to the dynamism of state politics. With Mrs. Gandhi's attempts to reduce her dependence on the prominent leaders in States due to her experience during 1967-69, to undercut the leaders in States by resorting to populist politics and attempts to directly communicate with the masses, disenchantment set in among those who began to exercise power in their regions. As a result of the popularization of democracy and superimposition of leaders on State units by Mrs. Gandhi, people who belonged to the intermediate castes began to look for non-Congress parties where they offered a viable alternative to the Congress or formed new parties. Secondly, people of certain castes are coterminous with the geographical boundaries of States. This also contributed to the rise of regional parties. The growth of non-Congress opposition and regional parties in Punjab, Jammu and Kashmir, Orissa, Maharashtra, Karnataka, Andhra Pradesh, Assam, Kerala, etc. can be explained on this thesis. Wherever the non-Congress regional parties already existed (such as the SAD or the DMK) they got consolidated and quickly rose to power. The leaders who founded regional parties claimed that the national parties in India did not give due importance to regional aspirations. In terms of parliamentary presence in the Lok Sabha, the Congress for the first time in 1996 became the second party, behind the BJP.

### **Era of Coalitions**

The growth of the BJP after 1989 and its coming to power in 1998 marked a turning point in the history of party politics in the country. The rapid expansion in the electoral support for the BJP and sudden increase in the number of its MPs in the Parliament, and its ability to forge alliances with several parties to come to power marked the party politics of the 1990s. It inaugurated the emergence of bipolarities in the States and at the Centre. While in the States it is in the form of a competition between two parties or between two competing alliances, at the national level it was mainly a competition between competing alliances. As the BJP gained strength, the effort by the Janata Dal and other regional parties of the United Front to work with the third alternative proved to be in vain. The tri-nodal party system that raised hopes in the 1990s got slowly melted away. The formation of alliances and coalition governments at the National and State levels ushered in a new

phase in party competition and cooperation. The NDA government at the Centre during 1999-2004 had about 25 partners in it. Wallowing in its former glory, the Congress party wanted to come to power on its own. But on the eve of 2004 Lok Sabha elections it finally realized that it could not do so and forged alliances with 16 parties. The ability to rope in the support of the regional and small parties and their electoral performance decided the fate of the National parties. In 2004 elections, a loss of few allies and the poor performance of two or three of its partner State parties caused an electoral disaster for the NDA.

### **Nature of Indian Party system**

Party system in India is of special significance since it offers a unique model. It is a result of long term evolution.

**Multiparty system:** As of now India follows a multiparty system. The number of relevant parties at the national and State levels has enormously increased. The number of parties represented in the Lok Sabha had increased three-fold between 1957, the year in which parties got stabilized, and 2004. In 1989 there was a big jump in the number of parties participating in the Lok Sabha elections

**Dominance of state parties:** Most of the parties designated as National parties and State parties at the time of first general elections did not exist after 20 years. In the first general elections there were 14 national parties. But only four of them retained the National party status by the time of second general elections. The birth and death rate for the State parties is high. They have seen not only serious ups and downs in their electoral fortunes, but several of them lost out in the race to be recognized as State party and some parties slowly died out. Some State parties are more stable, such as the SAD, DMK, National Conference, JMM, MGP, Sikkim Democratic Front, ADMK, RSP, FB, Muslim League, Kerala Congress, and later the TDP, AGP, Shiva Sena, SP, RJD, Trinamool Congress, splinter groups of the Janata Dal and the BJD.

**Electoral strength of regional parties:** The vote share of the National parties had declined considerably. Most of this was due to the decline of the Congress vote. The year 1996 could be the water shed as far as the relative share of votes and seats for the National and State parties are concerned. In that election, the National parties lost 11 per cent vote and 75 seats, whereas the State parties gained 9 per cent vote and 78 seats. Their vote and seat share had increased since 1996. The vote share of the State parties had gone up by more than 20 percent between 1952 and 2004. They grew in strength at the expense of the National parties. State parties today not only play a crucial role in the victory and defeat of the National parties, they control power or function as the opposition, and in some cases as main opposition parties, in all most all the major States.

**Power sharing by major parties:** Most of the major parties in India had captured power at one or the other level. There are no more permanent ruling or opposition parties. Some parties play the role of ruling party at the Union level and that of opposition at the State level or the vice versa. Of the 50 odd regional parties, 43 had so far ruled or shared power either at the Union or State level or both. Indian polity has reached a situation where no single party is in a position to form governments at the national level. This resulted in the emergence of a two-coalitional party system,

in which the two leading national parties, with more or less equal electoral strength, act as central pillars to the rival coalitions.

**Peaceful transformations:** Party system in India has seen peaceful transfer of power among parties. There are only very few exceptions when parties refused to participate in elections or refused to recognize the election result as legitimate. When the Janata party won elections in 1977 the transfer of power was smooth. The parties could put behind the Emergency experience and bring democratic politics back onto the rails. Indeed, there was intolerance towards opposition and it became evident within a decade after Independence. When the communist party won the mandate in Kerala in 1957, it was allowed to form the government, but a “liberation struggle” was launched to destabilize and later to dismiss the government. In many occasions the Congress, misused the Art. 356 to dismiss duly elected governments at the State level. However, in most cases the aggrieved parties chose to launch democratic struggles.

**Movement against corruption:** A recent phenomenon in India is the movement against corruption. Normally this can operate as a social movement. But in India they consolidated as a political party under Aam Admi. The victory of Aam Admi Party in Delhi evidences a new shift to the Indian party system. It demands more accountability in public fields and use innovative method for operation. The new social media was effectively used by the party in its propaganda work and administration. This compelled major political parties to shift their modalities of operations.

### **Ideology of Indian Political Parties**

The ideological basis of Indian political parties can be traced back to the nationalist movement and the different perceptions for the attainment of independence. With regard to Indian national Congress, this ideological linkage is very clear. From 1920s onwards, Nationalism, socialism, secularism and democracy were the main planks of the Congress. The party sticks to the same policies till now. During the nationalist movement there was a tendency to emphasize the need to forge a new nationalist identity based on the rejuvenated Hindu values and thought. The communists wanted to unite the freedom struggle with social revolution leading to the establishment of the rule of the proletariat and peasantry guided by Marxism-Leninism. These were the three broad ideological tendencies during the formative years of political parties in India.

The congress party claims themselves as the true inheritors of the nationalist movement. They stood for national values. The party policy gives a big role to the state in regulating, directing and changing the national economy and raising the public sector to the commanding heights. The license-quota-permit raj of congress governments testifies this argument. The party affirmed its commitment to democratic values and socialism way back in 1950's. In the 90's the party appeared as ardent champions of Liberalization, privatization and globalization. In foreign policy side the party holds the Nehruvian Panchsheel with a clear tone of non-alignment. In the International scenario the party suggests a policy of cooperation and co-habitation.

The split in the Congress in 1969 was a break between those who stood for socialism, known as radicals led by Mrs. Gandhi, and the conservative elements, led by the old guard of the party, called the Syndicate. The socialist parties are against the theory and practice of communism. The formal adoption of the objective of building a socialistic pattern of society by the Congress

made their positions more near to the congress. The most vigorous opposition to the Congress on the basis of ideology came from the communists. Soon after Independence, they waged an armed struggle in some parts of the country to overthrow the Indian state. They soon gave up that course and participated in the first general election. The ideological debates on the character of the Indian state, path to revolution in India, and strategy and tactics led to several splits in the communist party. However, their participation in elections and success in forming and running governments at the State level firmly placed them in the arena of parliamentary politics. India is the only country in the world where a communist party could come to power through parliamentary means and control governments within capitalist state. At present the communist parties are strongly against the liberalization policies of Congress. They oppose the globalization initiatives and neo-liberal economic reforms initiated by successive congress governments. The party stands for consolidation of the marginalized and better avenues for the working class.

The rise of the BJP and the strategies it adopted to augment its electoral base became an important theme in the study of political ideologies in India. The main ideology of BJP is Hindutva. The attempt of the BJP to forge unity among the Hindus based on the fears that the Indian State and political leaders, especially that of the Congress, were indulging in policies and programmes to appease the Muslims and that the Hindu culture and religion are in the danger of getting marginalized. During the 1980s the BJP returned to militant strategies and could efficiently implement them. . During the 1990s it played down its Brahmanical image in favour of militant nationalism. It kept the momentum by combining ethno-religious mobilization with appeals to sectional interests.

In the working of parties, caste, religion, language and region also have acquired ideological overtones. Religion has been an active element in party domain before and after Independence. Today we have parties that claim to represent the interests and culture of specific religions. Origins of some of these parties can be traced to the pre-Independence period. The Muslim League during the freedom struggle instilled in the minds of Indian Muslims that they constitute a separate political community. Their position as minority and the rise of Hindu communalism in the North made some Muslim elites to capitalize on their sentiments. But after the partition, a large number of Muslims remained in India, constituting a large chunk of world's Muslim population. The Muslim League was revived in 1948, although there were splits in it later. In Punjab, the rise of the Shiromani SAD had its roots in religion and its membership is restricted to Sikhs only. In Sikhism religion and politics seem to be inextricably united. The leaders of the SAD believe that the Sikhs constitute a separate political community. There are Christian parties too in the country, as in Kerala. However, one positive feature of parties in India is that despite of the existence of the parties claiming to represent people of specific religious beliefs, the followers of those religions did not support such parties en masse. There are substantial sections of the Sikhs who support the Congress, Communist parties and the BSP.

Sometimes, language and region also acquired the nature of ideology. India has some of the highly developed and rich languages of the world. Most of the regions of India are coterminous with linguistic nationalities. It is sometimes difficult to distinguish between the terms "region" and "nation" in some of the Indian languages. Some regard India as a nation of nationalities or a multi-national country.

All parties in India are secular, socialist and democratic. Legally it is mandatory for the parties to declare true faith in these principles while they register with the election commission. Even parties that appeal to people on the basis of caste and religious identities and are founded to promote the interests of particular communities regard themselves secular. Similarly almost all parties in India claim to be socialist or egalitarian. But every party has their own version of these principles. BSP understands it as the emancipation and empowerment of bahujans. Congress has its own enigmatic brand of socialism. Several State parties too stand for socialism. The multi-cultural nature of the Indian society and internalized Indian psyche makes parties secular. The widespread poverty, backwardness, illiteracy, etc. make parties socialist.

### **The Myth of ideology**

Except in the initial years after Independence, ideology did not become a bar to forge alliances among parties. The Communists and the Muslim League fought elections in Kerala together. Both the Congress and the CPI forge alliances and together they could arrive at electoral understanding with caste based parties in Kerala. The coming together of the socialists, former Congressmen, and the JanaSangh to form the Janata party showed that ideology is not a hindrance in party politics. Parties are always ready to make compromises due to electoral compulsions and political vicissitudes. The coalitional arrangements change as per the requirements of the situation. Some of the socialists joined hands with the BJP in 1998 and they were happily together since then. DMK or the ADMK switch sides between the NDA and the UPA. In UP, the BSP formed government with the support of the BJP. SAD and National Conference became partners in the NDA.

### **Socialist tradition**

Socialist parties played a major role in Indian Politics. During the freedom struggle, socialists had put up a spirited advocacy of socialist policies and could influence the Congress position to some extent. Socialist groups sprang up in various parts of the country during the 30s and they continued till 1948 as part of the Congress with an objective to bring change in the policies of the party that would emancipate people from foreign rule as well as native exploitation. Thereafter the socialist party underwent several splits and reunions. In 1951 Kripalani formed the KMPP, but after the 1952 elections, the KMPP and the SP merged to form the PSP, so that an anti-Congress non-communist leftist opposition could be forged. In 1955 Lohia left the PSP and revived the old Socialist party. Again in 1964 SSP was formed as a result of the merger of the Socialist party with the PSP. The relation between the Congress and the socialists was always ambiguous. There were differences on cooperating with the Congress, which were in a way responsible for the splits in the Socialist party. Their ideological stands made them closer to the Congress. Narendra Deva and Lohia opposed any tie up with the Congress. In 1953 talks were held between Nehru and Jaya Prakash Narayanan on cooperation between the Congress and the PSP. In 1962 Ashok Mehta was expelled from the PSP and he joined the Congress Government as a Cabinet Minister at the Centre. However in later politics the socialist groups were marginalized.

### **Support Base of Parties**

Parties draw their support largely from specific social classes. In circumstances where the support from one section is not sufficient to cross the threshold to win an election, they strive to keep the primary base of the party intact, and win elections with the support of others. In India, the multi-structured society with different regions at different stages of development, the continuous redefining of social relations, the presence of religious minorities in, identities based on caste and the large number of dalits make the political structure complex. Over the past years the social bases of parties had undergone some changes – both at the all India and State levels. More than class or gender, caste seems to be an important factor to understand the social bases of parties. Although most societies are known to have social inequalities of some kind, in India such inequalities have come to be settled in the form of caste within a hierarchical order. Industrial development, urbanization, occupational mobility, spread of education and egalitarian values, equality of opportunity through a system of reservations in education and employment, etc. have virtually broken down the caste system. The democratization process and the elections reinforced the caste identities in the political arena.

The Congress received support from all the castes, communities and classes for almost three decades after Independence. The communists traditionally got considerable support from workers, peasants and agricultural labourers. The socialists and the Swatantra received support primarily from the middle castes and classes. During mid 70's the middle castes provided the central core of opposition to the Congress in most States. In response the Congress under Mrs. Gandhi adopted the strategy of uniting the opposite extremes of the social spectrum – the upper and lower (dalit) castes – against the middle castes. The victory of the Janata party after emergency could be seen as the reassertion of the middle segment. When the Janata experiment failed, these sections extended support to the regional formations. In the 80's electoral decline of the Congress party was not a result of the mobilization of new social groups but rather was due largely to the elements of its coalition that had once supported it now opted for different parties. The replacement of one-party dominant system by state-specific parties was explained as resulting from pre-existing social cleavages that are state specific. Since the cleavages were state specific, only state-based parties could emerge.

After the 1980s, attempts were made in some States, especially in Bihar and UP, to forge parties mainly on the basis of overwhelming support from certain castes. With the emergence of an urban middle class among the lower castes, largely due to the state policies of land reforms, reservations in education and employment, consolidation of horizontal identities among them and given their numerical strength, the elites from these castes broke away from the mainstream parties and formed caste-specific parties to stake their claim for power. The Mandal and the anti-Mandal agitations brought this issue to the fore in the late 1980s and early 1990s. The rise of the BSP, with a solid support from the dalits and that of the SP in UP, the Samata and the RJD in Bihar, the PMK and Puthiya Tamilagam in Tamil Nadu can be understood in this context. They could come to power on their own or in alliance with others. The decline of the Congress in UP and Bihar was mainly attributed to the walking out of various caste groups from the Congress fold in favour of caste-based parties.

The BJP has developed a political support base of the upper strata comprising the upper castes and upper classes. While the BJP succeeded in drawing heavily from its smaller core

constituency and supplementing it with selective support from other sections in different parts of the country, the Congress support in its wider constituency had thinned down. Moreover, the Congress was restricted to picking up the remainder vote of those communities that were not courted and captured by other parties.

### **Regional Parties**

India is a land of regional parties. Regional parties are parties, whose main holds are in one particular region or state. They generally limit their operations within the territorial limits. Some prominent regional parties include Dravida Munnetta Kazhagam (DMK) in Tamil Nadu, Telugu Desham Party (TDP) in Andhra Pradesh, Shiromani Akali Dal (SAD) in Punjab, Shivasena in Maharashtra, Kerala Congress in Kerala, National Conference in Kashmir, Hariyana Vikas Party in Haryana, Manipur Peoples party in Manipur, Sikkim Democratic Front in Sikkim, Misso National Front in Mizoram. These regional parties have considerable influence over national as well state politics. With the coming of coalition politics most of the regional parties acquired national significance. This can be explained in connection with the weakening of the Indian National Congress and emergence of new political demands, priorities and polarities in the Indian polity.

Some authors argue that regional identity is constitutive of Indian national identity as a whole. Rajni Kothari says that the India's nation-building process is driven by two simultaneous trends: administrative-political re-structuring and the inter-penetration and growth of multiple power centers as well as new elites through a re-configuration of social and economic structures.

The regional party ascendance is a part of an ongoing process of party system change in India since 1967. In the early phase of post-Independence politics India's party landscape was dominated by the Indian National Congress. This phase was characterized by the Congress Party's winning the largest vote shares and seat shares in both the national and State level elections. During this period, voters had no strong incentives to vote for opposition parties since in most districts the opposition candidates received significantly lower vote shares than most Congress candidates, making it unlikely that they would ever be elected. This division ensured that the Congress remained the winning party across the States throughout India. Talented politicians also had no incentives to run as opposition candidates since the status of the INC as the party of the freedom struggle and its effective political machines throughout the regions made running against Congress candidates a risky strategy. In consequence, opposition politicians frequently joined the Congress party between elections or even during election campaigns to avail themselves of this Congress advantage. The fluidity of the party system increased significantly after the 1967 national and State elections. In the Lok Sabha elections of that year the Congress Party suffered losses in both seat and vote shares. In the State assembly elections of the same year, it lost power in seven of the eight States holding elections that year. Most of the parties winning the State elections in 1967 were splinter factions of the Congress.

One of the consequences of the ascent of regional parties over the last three decades has been the slow erosion of national party preeminence in the national party system. This erosion has led regional parties to become viable if volatile coalition partners in national coalition governments between 1977 and 1979 and again after 1989 in a number of minority coalition cabinets. With the

shift from the old "Congress system" to a competitive multi-party democracy at the regional, as well as at the national levels, the once dominant Indian National Congress (INC), has mostly become relegated from the dominant to a mere formateur status in the process of government formation after regional or national elections.

Reasons for the emergence of several strong and viable regional parties during 1980s and later received good attention of political scientists. The new party equations might have evolved out of several incidents. Firstly the nature of development and the policies pursued by the government during three decades of independence saw the emergence of new political forces. The rise of the aspiring political elites from among the intermediate peasant communities as one major factor that added to the dynamism of state. Secondly, people of certain castes are coterminous with the geographical boundaries of States. This also contributed to the rise of regional parties

The regional parties are vital for the health of democracy. They offer alternative policies and programme. They ensure effective representation of all regions and interests in representative institutions. The regional parties can have better access to the concerns of the local people and minorities. In the context of the diverse structure of Indian polity the regional parties also relieve the national parties from their burdens. Better inner party democracy is also possible in regional parties. It facilitates better constituency representative communications. However critics are in legion and they argue on grounds of national unity and disintegrating tendencies. To many regional parties destabilizes Indian polity and results in political stalemates and crises. But this argument is not validated through the Indian experience. In India the ever increasing number of political parties and regional groupings might have resulted in hanging parliaments and minority governments, but they positively promoted the cause of Indian democracy. The test of a political party is their public acceptance and in India the regional parties effectively mobilized public support and became legitimate champions of public will.

## MODULE-8

Electoral Politics, Political participation and electoral behavior, electoral reforms

### Introduction

India has the distinction of being the largest democracy of the world. Elections are the most important and integral part of the politics in a democratic system of governance. Democracy sustains on the consent of the governed. This consent is rightly expressed through elections. Part XV of the Indian constitution deals with elections. The very fact that elections have been discussed in the constitution and itself made an integral part of it indicates that the constitutional makers fully well appreciated the need and the necessity of free election.

For successful working of democracy it is essential that elections should be free and impartial. While politics is the art and practice of dealing with political power, election is a process of legitimization of such power, democracy can indeed function only upon this faith that elections are free and fair and not rigid and manipulated, that they are effective instruments of ascertaining popular will with in reality and in form and are not mere rituals to generate illusion of difference to mass opinion.

### Electoral system in Constitution

Article 324 to 329 in part XV of the Indian constitution make the following provisions with regard to the electoral system in India. By article 324 the constitution provides for an independent election commission in order to ensure free and fair elections in the country. At present the commission consists of a chief election commissioner and two election commissioners. The article provides that there is to be only one general roll for every territorial constituency for election to the parliament and the state legislature. No person is to be ineligible for inclusion in the electoral roll on grounds only of religion, race, caste sex or any of them. Further, no person can claim to be included in any special electoral roll for any constituency on grounds only of religion, race, caste or sex or any of them. The elections to the Lok Sabha and the State assemblies are to be on the basis of adult franchise. Parliament may make provision with respect to all matters relating to elections to the parliament and the state legislatures including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing their due constitution. In exercise of this power, the parliament has enacted the following laws.

- a) Representation of the people Act of 1950 which provides for the qualifications of voters, preparation of electoral rolls, delimitation of constituencies, allocations of seats in the parliament and state legislatures and so on.
- b) Representation of the people Act of 1951 which provides for the actual conduct of elections and deals with administrative machinery for conducting elections, the poll, election offences, election disputes, by elections, registration of political parties and so on.

- c) Delimitation commission Act of 1952 which provides for the readjustment of seats, delimitation and reservation of territorial constituencies and other related matters.

Besides the three laws the other laws and rules in respect of elections are:

1. Presidential and vice – presidential elections Act, 1952.
2. Government of union territories Act, 1963
3. Government of the national capital territory of Delhi Act 1991
4. Chief election commissioner and other election commissioners (conclusions of service) Act, 1991
5. Prohibition of simultaneous membership roles, 1950
6. Registration of electors rules, 1960
7. Conduct of elections rules, 1961

Further, the election commission has issued the election symbols (Reservation and Allotment) order, 1968. It is concerned with the registration and recognition of political parties, allotment of symbols and settlement of disputes among them.

The state legislatures can make provision with respect to all matters relating to elections to the state legislatures including the preparation of electoral rolls and all other matters necessary for securing their due constitution. The constitution declares that the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies cannot be questioned in any court. The constitution lays down that no election to the parliament or the state legislature is to be questioned except by an election petition presented to such authority and in such manner as provided by the appropriate legislature.

Article 323 B empowers the appropriate legislature to establish a tribunal for the adjudication of election disputes. It also provides for the exclusion of the jurisdiction of all courts (except the special leave appeal jurisdiction of the supreme court) in such disputes. So far, no such tribunal has been established. It must be noted that in Chandra Kumar case (1997), the Supreme Court declared this provision as unconstitutional. Consequently, if at any time an election tribunal is established, an appeal from its decision lies to the high court.

### **Political Participation**

Participation is the principal means by which consent is granted or withdrawn in a democracy and rulers are made accountable to the ruled. Thus political participation involves criticism of the government. Therefore, the rulers always take care to rule according to the public opinion. Political participation does not depend upon the democratic political system alone but is also influenced by so many other factors.

### **Activities of political participation**

According to J.L, Woodward and F.R.Robert political participation involves the following activities;

1. **Voting at the polls** – In a democracy the adult males and females have a right to participate in elections. This is mainly carried out through voting. The age of participation varies in different states from 18 to 21 years.

2. **Membership of pressure groups**- An important activity of political participation is the active membership of political pressure group.

3. **Communication by legislators**- Modern democracies are generally indirect, since the number of people is so large they cannot directly participate in the political activities. Hence, in most of the countries the people elect members of legislatures. Before elections, the candidates contact the voters, educate them and ask for their votes. Thus the political participation of the people does not end with the elections but the political activities constantly go on between the voters and the legislators on the one hand and the legislators and local leaders on the other. The legislators who fail to do so or who do not maintain public contact should not hope for victory in future elections.

4. **Participation in political party**-Every democracy has two or more political parties. Each political party has a specific ideology and it constantly propagates it. This propagation is done by political workers who are active members of a political party and some of them are whole time political workers . Most of the political parties have their net work of workers in every nook and corner of the country. This is particularly true about a political party at the national level. Democracy allows people to from political party and activity participate in any political group.

5. **Propaganda of political opinion.** Before election and almost all the time after it every political party tries to propagate it's ideology. Each party has a right to propagate it's ideas everywhere through newspapers magazines and other means of communication. Before election the speed of political participation increases. From time to time the local and national political issues are taken up to maintain activity. Not only the political issues but many non-political problem becomes the basis of political movements. Meetings are organized, processions taken out, memoranda submitted and demonstrations held. According to L.Milbrath, the activities included in political participation may be divided into-gladiatorial activities, transitional activities and spectator activities.

1. **Gladiatorial activities.** This category includes the activities which are part of routine of the political parties such as elections to political post, participation in the elections to legislature, gathering fund for the party, movements to increase membership and organization of meeting to form public opinion etc.

2. **Transitional activities.** These include activities of the helpers and well wishers of the political parties such as hearing the lectures of the leaders, donating to the fund of the party and maintaining contact with the leaders of the party.
3. **Spectator activity:** This category includes voting, influencing other's vote, participating in political debates, being influenced by political stimuli, wearing badges of the political party and distributing leaflets etc.

### **Classification of Political Participation.**

The classification of political participation is of two types: active and passive. This classification is based upon time, energy and means utilization. **Passive** – all the people do not want to devote time, energy or money in political activities. They are only spectators. **Active** Those who create the spectacle are the active political participants

Another classification of political participation is based upon purpose. From the point of view of purpose political participation is of two type; **Instrumental:** In instrumental political participation the persons aim at achieving definite purposes such as victory in the elections by the political party, enactment of a bill in the legislature or increasing the field of influence of a particular leader, **Expressive:** Expressive political participation does not have definite objects. It only aims at the satisfaction or the release of a feeling. Some persons vote to achieve the victory of a particular candidate whereas most of the voters vote for the satisfaction or the use of their voting right.

### **Political Apathy.**

Some people do not participate in political activities. This in activity generally termed as political apathy. It is a serious issue in the participation debates. This make heavy burden on the democratic processes. Political apathy is not sign of democracy alone. It is found in some forms or the other even is non-democratic systems. It is a type of political passivity, which may provides support for the regime. But it enables the individual to avoid the politicization of his whole being. Some people do not participate in political activities due to absence of information and lack of interest in the political field. This apathy is not optional. It is generally found in illiterate, lonely and poor member of society. There are various causes of political apathy.

### **Reasons of political apathy.**

Political apathy may be due to the following reasons.

**1, Absence of reward:** The chief cause of political apathy is that, as compared to other human activities, political activity is less rewarded. For example helping the relatives and friends or gathering means of material enjoyments provide satisfaction. It is more than the reward of the political participation. In other words, such a person finds political participation of very low value. This devaluation may be psychological or social. In Indian situation there are many taboos associayed wit political participation. Thus women and marginalized often shut off from politics.

**2, Consciousness of political helplessness:** A significant cause of political apathy is the consciousness of political helplessness among some people. Wherever citizens feel that their political activity does not give significant results, they reduce political participation.

**3, Satisfaction with the political system:** If a person is satisfied from the present political system and finds it absolutely efficient and effective, he may be apathetic to political participation. It is due to the belief that the political system will continue even he if does not participate in political activity.

**4, Dissatisfaction with the political system:** On the other hand, if some person are absolutely disillusioned of a political system, they also leave political participation. In their absolute dissatisfaction, they think that the political system is so corrupt that his participation will bring no significant changes. He believes that it cannot be reformed or they have no power to reform it. Therefore they think it better to save themselves from corruption, keeping themselves away from politics. Sometimes this kind of political apathy becomes an ideology

### **Determinants of political participation**

The important determinants of participation change are as follows.

**A, Psychological factors:** political participation very much depends upon psychological factors. Common political beliefs lay the ground work for shaping equivalent emotions of anger sympathy and distress. Common interests improve the opportunities for small talk, common activities create bonds of friendship, politics may offer to lonely more new opportunities for association with others. Politics participation is also determined by unconscious conflicts and tension. Man always seeks power because he feels happiness in being powerful. Generally the urge to power is active on the unconscious level. Consciously or unconsciously the ego of the political leader seeks satisfaction from political activities.

**(B) Social Factors:** Besides the psychological factors, social factors are important determinants of social participation. Social factors are part of the social environment of a person influencing his social status. The most important such factors are education, occupation, income, age, residence, mobility, sex, religion, race and class, etc. It has been found that political participation has a high rate among individuals belonging to dominant caste, high class, dominant religion, minority having high education, high occupation, high income, male sex and stable residence. Education is the most important social factor influencing political participation. This influence is due to the fact that education widens man's field of interests. The educated person is more self confident. Therefore, he can easily propagate his ideas. Thus he has more ability of political participation.

Occupation plays a key role in participation. The traders and the professional persons have to attend political development since their occupations are influenced by parties. In some occupations most of the persons have to face identical problem which brings them near each other. These people take more part in politics. Besides education and occupation, income has an important influence upon political participation. Higher income provides more leisure, diminishes anxieties and gives more occasions for political contacts. Therefore, in many countries in the west,

the political leaders belong to higher income groups. However, in poor countries, the political leaders come from middle and lower classes.

Social status also influences political participation. Ordinarily, persons belonging to a lower social status show lower rate of political participation as compared to occupants of higher social status. Females are generally more conservative, detached and less interested in politics. This is also due to the reason that the females have higher ethics, more stability and higher cultural values which makes them misfit to certain range of politics. Religion also occupies a key role in deciding participation levels. Certain religions are apathetic to politics whereas some religions advise their followers to involve in politics. Race also influenced political participation. In countries distinguishing between white and black races, the white people show more political participation in comparison to black persons.

(C): **Political factors:** Besides the social factors the following political factors are important determinants of political participation.

1, Attitudes of government :The rate of political participation is lower in a country where the field of politics is so vast that transport and communication between all the corners is impossible – on the other hand in a country where competition for power is open, the rate of political participation is high. National and international crises increase political participation.

2, Political parties

Political parties also play an important role in political participation. The political parties take the opinion of the people to the government. They are the media of the expression of the demands of the people

### **Electoral reforms**

Electoral reforms means the change in electoral systems to improve electoral process. Since 1988, a number of reforms have been introduced in Indian electoral system.

#### **Electoral reforms before 1996**

The 61<sup>st</sup> constitutional Amendment Act of 1988 reduced the voting age from 21 years to 18 years for the Lok Sabha as well as the assembly elections. In 1988, a provision was made to provide that the officers and the staff engaged in preparation, revision and correction of electoral rolls for elections are deemed to be on deputation to the election commission for the period of such employment. Another reform in 1988 is that the number of electors who are required to sign as proposers in nomination papers for elections to the Rajya Sabha and state legislative council has been increased.

In 1989, a provision was made to facilitate the use of electronic voting machines (EVMS) in elections. The EVMS were used for the first time in the general elections (entire state) to the Assembly elections of Goa in 1999. This was a significant reform as it replaced the existing paper ballot system. The use of EVM make election process more smooth and electoral result vey early. The possibility of tampering is also low. Another issue attended by election commission during this

period was the conduct of fair polls. During this time electoral violence was taking place in many parts of the country. Booth capturing was also frequent. In 1989, a provision was made for adjournment of poll of programme if booth capturing is reported. Booth capturing includes seizure of a polling station and making polling authorities surrender ballot papers or voting machines taking possession of polling station and allowing only one's own supporters to exercise their franchise.

### **Electoral reforms of 1996**

In 1990, the national front government headed by VP sing appointed a committee on electoral reforms under the chairmanship of Dinesh Goswami, the then law minister. The committee was asked to study the electoral system in detail and suggest measures for remedying the drawbacks in the system. The committee, in it's report submitted in 1990, made a number of proposals on electoral reforms. Some of these recommendations were implemented in 1996.

#### **a. Increase in security deposit**

The amount of security deposit to be paid by the candidates contesting elections to the Lok Sabha was increased from Rs 500 to Rs 10,000 for the general candidates and from Rs 250 to Rs.5000 for SC and ST Candidates. Similarly, the security deposit in the case of elections to the state legislative assembly was increased from Rs.250 to Rs.5000 for the state legislative assembly was increased from Rs.250 to Rs.5000 for the general candidates and from Rs.125 to Rs.2,500 for the SC/ST candidates.

#### **b. Listing of names of candidates.**

The candidates contesting elections are to be classified into 3 categories for the purpose of listing or their names. They are.1,Candidates of recognized political parties.2,Candidates of registered – unrecongised political parties.3,Other candidates. Their names in the list of contesting candidates and in the ballet papers has to appear separately in the above order and in each category they have to be arranged in the alphabetical order.

A person who is convicted for the following offences under the prevention of insult to national honor Act of 1971 is disqualified to contest in the elections to the parliament and state legislature for 6 years.

1. Offence of insulting the national flag
2. Offence of insulting the constitution of India
3. Offence of preventing the singing of national Anthem

No liquor or other intoxicants are to be sold or given or distributed at any shop ,eating place ,hotel or any other place whether public or private with in a polling area during the period of 48 hours ending with the hour fixed for the conclusion of poll. Any person who violates this rule is to be punished with imprisonment upto 6 months or with fine up to Rs.2000/- or with both.

Earlier, in case of death of a candidate before the actual polling, the election used to be countermanded. Consequently, the election process had to start all over again in the concerned constituency. But now, the election would not be countermanded on the death of a constituency candidate before the actual polling. According to the new reforms by-elections are to be held within six months of occurrence of the vacancy in any house of parliament or a state legislature. But this condition is not applicable in two cases.

1. Where the remainder of the term of the member whose vacancy is to be filled is less than one year, or

2. When the election commission, in consultation with the central government, certifies that it is difficult to hold the by-election within the said period.

The registered voters employed in any trade, business, industry or any other established are entitled to a paid holiday on the polling day. This rule applies even to the daily wages. Any employer who violates this rule is to be punished with a fine up to Rs.500. However, this rule is not applicable in the case of a voter whose absence may cause danger or substantial loss in respect of the employment in which he is engaged. Entering into the neighborhood of a polling station with any kind of arms is to be a cognizable offence. Such an act is punishable with imprisonment up to two years or with fine or with both. The minimum gap between the last date for withdrawal and the polling date has been reduced from 20 to 14 days.

### **Electoral reforms after 1996**

In 1997, the number of proposers and seconders for contesting election to the office of the president was increased from 10 to 50 and to the office of the vice-president from 5 to 20. Further, the amount of security deposit was increased from Rs.2,500 to 15,000 for contesting election to both offices of president and vice president so as to discourage frivolous candidates.

In 1998, a provision has been made whereby the employers of local authorities, nationalized banks, universities, LIC, government undertakings and other government aided institutions can be requisitioned for deployment on election duty. In 2003, the facility to opt to vote through proxy was provided to the service voters belonging to the armed forces and members belonging to a force to which provisions of the army act apply.

### **Declaration of criminal antecedents, assets,**

In 2003 the election commission issued an order directing every candidate seeking election to the parliament or a state legislature to furnish on his nomination paper the information on the following matters.

1, Whether the candidate is convicted or acquitted or discharged in any criminal offence in the past

2, Prior to 6 months of filing nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for 2 years or more, and in which charges were framed or cognizance was taken by a court

3, The assets of a candidate and his/her spouse and that of dependents

4, Liabilities, if any, particularly whether there are any dues of any public financial institution or government dues.

5, The educational qualification of the candidate

In 2003 two changes were introduced with respect to elections to the rajya sabha. Domicile or residency requirement of a candidate contesting an election to the rajya sabha was removed. Prior to this, a candidate had to be an elector in the state from where he was to be elected. For elections to the rajya sabha open ballot system was introduced. This replaced the old secret ballot system. This was done to curb cross-voting and wipeout the role of money power during rajya sabha elections.

In 2003 the central government raised the maximum ceiling on election expenditure by candidates for lok sabha. It was also provided that the travelling expenditure incurred by the campaigning leaders of a political party shall be exempted from being included in the election expenses of the candidate. According to another 2003 provision, the government should supply, free of cost, the copies of the electoral rolls and other prescribed materials to the candidates of recognized political parties for the lok sabha and assembly elections. With another provision the political parties were entitled to accept any amount of contribution from any person or company other than a government company. They have to report any contribution in excess of Rs.20000 to the election commission for making any claim to any income tax relief. Under a 2003 provision, the election commission should allocate equitable sharing of time on the cable television network and other electronic media during election to display or propagate any matter or to address public. In 1998, the BJP led govt. appointed an 8 member committee on state funding of elections under the chairmanship of Indrajith Gupta. The committee submitted its report in 1999. It upheld the cause for introduction state funding of elections. It stated that state funding of elections is constitutionally and legally justified and is in public interest

### **None of the Above (NOTA)**

According to Conduct of Elections Rules there was a provision for rejection vote. Conduct of Elections Rules 1961 rule 49-O states that "If an elector, after his electoral roll number has been duly entered in the register of voters in Form-17A and has put his signature or thumb impression thereon as required under sub-rule (1) of rule 49L, decided not to record his vote, a remark to this effect shall be made against the said entry in Form 17A by the presiding officer and the signature or thumb impression of the elector shall be obtained against such remark." According to this provision secrecy of the ballot is violated as the voter has to inform the presiding officer and an entry is made against his name in the voters list. Such voters are in danger of being victimized by some candidates or political parties. The numbers of such entries have to be mandatorily recorded in Form 17-A. Election Commission has directed that the entries should be compiled and recorded constituency wise and sent to the Commission. This information may also be obtained through Right to Information Act.

Before the introduction of EVMs, there were easy methods to by pass this regulation as the individual can mark no name in the list or can consciously make his vote invalid. It provides an option to the voter to reject all candidates. It also helps to keep a check on bogus voting as someone else will not be able to impersonate and vote in place of him in favor of any candidate. But the introduction of Electronic voting machine made such a short cut impossible.

In this background the Election Commission of India has received proposals from a very large number of individuals and organizations that there should be a provision enabling a voter to reject all the candidates in the constituency if he does not find them suitable. In many countries people were given right to register their dissent and reject the candidates placed by the political parties. The election commission of India was positive to these proposals. The Commission recommended that the law should be amended to specifically provide for negative / neutral voting. For this purpose, Rules 22 and 49B of the Conduct of Election Rules, 1961 may be suitably amended adding a provision that in the ballot paper and the particulars on the ballot unit, in the column relating to names of candidates, after the entry relating to the last candidate, there shall be a column None of the above, to enable a voter to reject all the candidates, if he chooses so. The ECI received no response to the proposal for amending the said rule, although the Minister in charge needed neither the Union Cabinet's nod nor Parliament's assent. In 2004, the then Chief Election Commissioner, T.S. Krishnamurthy, reiterated the proposal after naming the button as 'none of the above' but, for the first time, clearly articulating that it was to "to enable a voter to reject all the candidates, if he chooses so." By then, the peoples union for civil liberties had already moved the Supreme Court in the matter. The case came up for hearing in 2009. But heated arguments continued and the case was decided in positive.

On 27 Sept 2013, in an important decision Supreme Court mandates the use of NOTA button on EVMs and Ballot Papers. On 13 Oct 2013, The ECI ordered the Chief Electoral Officers of all States and UTs to provide for NOTA option in electronic voting machines and ballot papers. NOTA votes will also be counted and shown in final results. Moreover, ECI introduced NOTA in 2013 Legislative Assembly elections in Delhi, Madhya Pradesh, Rajasthan, Chhatisgarh and Mizoram. During these elections around 1.3 million people voted for NOTA. In these elections in some seats, the number of votes from people who rejected all parties was also higher than the number of votes received by the candidate who came in third. However it was provided that if NOTA votes outnumbered all the candidates contesting elections then in that case, candidate with most number of votes will be declared as winner. So, in other words, it is not a right to reject.

### **Voter Verified Paper Audit Trail (VVPAT)**

Voter Verified Paper Audit Trail is a verification system which enables voters to ascertain whether their votes were cast correctly or not. As of now with the electronic voting machines the voters are not in a position to identify the status of their vote. In this connection a Public Interest Litigation was filed seeking implementation of VVPAT to arrest election frauds and to ensure verification of choice of candidates by the voter. In 2013, the Supreme Court of India has directed the Election Commission to implement the VVPAT in a phased manner on an all India basis in the above case (Dr. Subramanian Swamy Vs. Election Commission of India, 2012). VVPAT was experimentally introduced in some booths during the 2013 state assembly elections. The project

will soon be rolled in throughout in India. VVPAT systems usually consist of a thermal printer attached to an EVM with a spool of ballots enclosed within the machine. Each voter is to inspect his or her paper ballot to verify it matches the electronic record before casting the ballot. These paper records can also be used for a recount. When a voter casts his or her vote using the EVM, a ballot slip containing the serial number, name of the candidate and poll symbol will be printed thereby allowing the voter to verify whether his vote was recorded correctly or not. This ballot slip will be visible to the voter for about 5 seconds behind a ballot slip viewing window. After this, the slip will get cut and will fall into a compartment.

### **Issues in electoral politics**

The election at present are not being conducted in ideal conditions because of the enormous amount of money required to be spent and the muscle power needed for winning the elections. The major hindrances which come in the path of electoral system in India are:

#### **1. Money power**

Money power plays in an electoral system distinctive role affecting seriously the working of periodic elections. It leads to all round corruption and contributes mainly to the generation of black money economy which rolls at present our country. The elections in India are becoming increasing expensive and the gap between the expenses incurred and legally permitted expense is increasing over the years.

#### **2. Muscle power**

Violence, pre election intimation, post election victimization ,booth capturing both silent and violent are mainly the products of muscle power. There are prevalent in many parts of the country like Bihar, western Uttarpradesh , Maharashtra etc.

#### **3. Misuse of govt. machinery**

It is generally complained that the government in power at the time of election misuse official machinery to further the election prospects of its party candidates. The misuse of official machinery takes different forms, such as issue of advertisement at the cost of government and public exchequer highlighting their achievements ,disbarments out of the discretionary funds at the disposal of the ministers, use of government vehicles for canvassing etc.

#### **(4) Criminalisation of Politics**

Many criminal elements enter into electoral politics. At one time politics hired criminals to help them win elections by booth capturing. But later these criminals themselves came to the political arena as contestants.

#### **(5) Non-Serious Candidates**

In recent years there has been a study increase in the number of candidates in elections. Many of these candidates are not serious about elections and they have no ideologies and proposals.

### **(6) Political Instability, Hang Parliaments**

There has been a great deal of political instability during last decades. The result has been unstable administration and unstable politics, the hall mark of minority governments..

### **(7) Casteism**

Although there is hardly any instance in India of a political party being totally identified with any particular caste group, yet there are cases of certain castes lending strong support to particular political parties. If the caste group is dominant and the political party is an important one, this interaction is all the more prominent.

### **(8) Communalism**

The emergence of India of the politics of communalism and religious fundamentalism in the post independence period has led to a number of separate movements in various states and regions of the country. Caste and religion have in recent years enlarged as rallying points of gain electoral support. There is also a tendency to play upon caste and religious sentiments and field candidates in elections with an eye on the equations and communal configurations.

### **(9) Lack of Moral Values**

There has been very sharp erosion in the ideological orientation of political parties. Party dynamics in India has led to the emergence of value less politics much against the ideals of the father of the nation, Mahatma Gandhi. The Gandhian values of the spirit of service to the nation has become extinct from the present day politics.

### **Suggestions for reform**

The following suggestions are to be taken into consideration for making electoral systems free and fair .

- a) At present, the Election Commission is at the mercy of the government for its requirements. The CEO should not be at the mercy of executive and parliament for its requirements. He should have separate and independent election department to enhance its objectivity and impartiality.
- b) Political corruption should be stopped by providing funds to genuine candidates through political parties whose account should be auditable.
- c) For having a true democracy the registration and recognition of the political parties should be fair and without any kinds of influence.
- d) Mass media should play a non-partisan role in election and as safeguard of democracy
- e) The secrecy of voters preference to any candidate should be maintained.
- f) The election machinery must function honestly and impartially at every stage.
- g) The names of the voters may be included in the electoral rolls even at the time of casting of voters by the polling officer, when he finds a genuine case.
- h) Unearth and confiscate black money, which is widely used for buying voters

Election system has allowed the voters not only to freely choose representatives, but also to change governments peacefully both at the state and national level. Elections have become a part and parcel of our democratic life. The election at present are not being held in ideal conditions, because of the enormous amount of money required to be spent and large muscle power need for winning the elections. Through many of its positive interventions the election commission gained public confidence. Now a days the country is able to conduct more peaceful elections. The voter in India has gained confidence. The election observers are appointed by election commission to check any misbehavior from the part of candidates and parties. The legitimacy of the election commission has increased in the eyes of the people. If the election process becomes more flawless, voters and citizens would be able to share more effectively in this carnival of democracy and make it more meaningful.

### **Women Participation In India**

The right to equality in voting is a basic human right in liberal democracy. Women enjoy this right to equality in voting, and by casting a vote they make a formal expression of their individual choice of political parties, representatives or of broad policies. The fact that more women are voluntarily exercising their constitutional right of adult suffrage across all states in India is testimony to the rise of self-empowerment of women to secure their fundamental right to freedom of expression. This is an extraordinary achievement in the world's largest democracy with 717 million voters of which 342 million voters are women. However there is an evident gender gap in various sector of democracy including participation and voting. Women suffer low representation in parliaments, representative bodies political leadership and in policy making mechanisms. This leaves the majority in the system as powerless spectators in the game of politics. There were many measures adopted by governments and political parties to overcome this issue. The constitutional amendments with regard to Panchayathi raj provided for 33% women reservation in local self government. The women reservation bill is a concrete move in this direction. The bill also mandates reservation of seats to women in state and central legislatures.

Despite a steady improvement in the sex ratio of India's electorate, there are still more male voters being registered than female voters, Women formed 41 per cent of first-time voters aged 18-19, though they make up 47 per cent of the population in that age group. Summary election data released by the Election Commission in 2014 show 96 lakh women aged 18-19 have been registered to vote, compared with 1.4 crore male voters. Nagaland is the only State where the newly registered female voters aged 18-19 out number male voters. Haryana has the most adverse sex ratio in this segment (just 28.3 per cent of the registered 18-19 year olds are female), followed by Maharashtra (35.5 per cent) and Punjab, Chandigarh and Gujarat (36.2 per cent)

Some of the Indian states are suffering from low women voter turnout. This may be because of social and political taboos associated with gender and voting. However the election commission of India is making concrete steps to educate the voters. They also provide special ques to women voters. With these measures it is hoped that there will be more women voters and their presence may enrich the electoral process in India.

## **MODULE-9**

### **Challenges to Secular policy**

#### **Secularism-theory and practice-**

#### **Communalism**

### **Introduction**

Secularism is a major premise of democracy and modernity. It is defined as the principle of separation of government institutions and persons mandated to represent the state from religious institutions and religious officials. Accordingly public activities and decisions, especially political ones, should remain uninfluenced by religious beliefs and practices. Secularism draws its intellectual roots from Greek and Roman philosophers. The purposes and arguments in support of secularism vary widely. In Western states, it has been argued that secularism is a movement toward modernization, and away from traditional religious values . The term "secularism" was first used by the British writer George Jacob Holyoake in the year 1851. This notion was associated with free thought. However this idea of free thought had existed throughout history. Secularism is often associated with the Age of Enlightenment in Europe and played a major role in Western society. The principles of separation of church and state in the United States and in France draw heavily on secularism. Secular states also existed in the Islamic world during the Middle Ages .

In political terms, secularism is a movement towards the separation of religion and government. This may refer to reducing ties between a government and a state religion, replacing laws based on scripture with civil laws, and eliminating discrimination on the basis of religion. This is said to add to democracy by protecting the rights of religious minorities. Modern Democracies are generally recognized as secular. This is due to the near-complete freedom of religion and the lack of authority of religious leaders over political decisions. Nevertheless, religious beliefs are widely considered a relevant part of the political discourse in many of these countries.

### **Secularism and Secularization**

The mere institutional separation of state and religion cannot be the distinguishing mark of secular states. Institutional disconnection is a necessary condition for secular states and, especially in states with long tradition of strong establishments or theocracy. But separation by itself does not install a secular state and is not the distinguishing feature of political secularism. Bhargava identifies three levels of disconnection. A state may be disconnected from religion at the level of ends at the level of institutions and the level of law and public policy.

A secular state is distinguished from theocracies and states with established states by a primary, first-level disconnection. A secular state has free standing ends. It is clearly disconnected from the ends of religion or conceivable without a connection with them. States with established religions have something in common with secular states- at least a partial institutional disconnection. But secular states go further in the direction of disconnection; they break away completely. They withdraw favours or privileges that established religions had earlier taken for

granted. Finally, a state may be disconnected from religion even at the level of law and public policy. Such a state maintains a policy of strict separation. The dominant self-understanding of western secularism is that this third level disconnection is crucial. When a state is disconnected from religion at all three levels, a 'wall of separation' has been erected between the two. On the wall of separation conception of secularism, the state must have nothing to do with religion. Religion must be outside the purview of the state, and in this sense, it must be privatized. But there are two other modes of relating to religion at this third level. The state may either be strictly neutral, with religion or it may even go beyond neutrality: A secular state is to be distinguished not only from theocracy but also from a state where religion is established.

A non-theocratic state is not automatically secular because it is entirely consistent for a state not to be run by priests inspired by 'divine laws', but to have a formal alliance with one or more religions. Nor is a state separated from church necessarily secular, because church-state separation is compatible with the establishment of religion. A secular state goes beyond church state separation. To go beyond it is to refuse to establish religion. Therefore, a secular state follows principle of non-establishment. Thus, in a secular state, a formal or legal union or alliance between state and religion is impermissible. Official status is not given to religion. No religious community in such a state can say that the state belongs exclusively to it. Nor can all of together say that it belongs collectively to them and them alone. This does not mean that a secular state is anti-religious but it does imply that it exists and survives only when religion is no longer hegemonic. No one is compelled to pay tax for religious purposes or to receive religious instruction. No automatic grants to religious institutions are available.

Secular states aim to end religious hegemony, oppression and domination and to do so by separating them from their structure. There are two reasons for separating state from religion. First, states may do so simply for self-aggrandizement, for example when states wish to maximize their own power and wealth. These states are not motivated by values such as peace, liberty or equality. Usually, such states are imperial and autocratic. Another category of secular state is value-based secular states. It is a non-self aggrandizing secular state with several important and substantive values. The first of these is peace or rather the prevention of a society from its regression into barbarism. The second is toleration, i.e. the state does not persecute anyone on grounds of religion. Thirdly, a secular state is constitutively tied to the value of religious liberty.

### **Gandhian Secularism**

In India, secularism was a way of life to the ancient Indians. The Indian religious tolerance is well known all over the world and India is hailed a host to any number of religions. In this way foreign religions came to India and established themselves in the land. To many early kings religion was a matter outside state. However since the early decades of the twentieth century, the politicization of religious identities has inexorably propelled religion into the public sphere. By the 1920s, at the very time when Mahatma Gandhi set out to forge a major mass movement that could take on colonialism, the politicization of religious identities, whether in the form of the Muslim League or that of the Hindu Mahasabha, could have hampered the project of building a pan-Indian freedom struggle. Mahatma Gandhi looked for a principle that could bind people who subscribed to different faiths together, and which could weld them into a mass movement. This principle he

found in the doctrine of sarva dharma sambhava, which can be read as 'equality of all religions' or 'all religions should be treated equally'. Given Mahatma Gandhi's religiosity, the notion of sarva dharma sambhava was not only a pragmatic principle designed to bring people together, it was also a normative principle that recognized the value of religion in people together.

### **Nehru and Secularism**

Nehru's preferred notion of secularism was that of dharma nirapekshata. The public debate on the issue has been polarized between those who subscribe to the Nehruvian meaning of secularism, and those who subscribe to the meaning that Gandhi gave to the concept. Pandit Nehru continued to believe that the state could abstract the domain of policymaking from that of religion is debatable. For, the recurrent communal riots which culminated in the frenzy of the partition proved that religious prejudices, more than religious sensibilities, had become a constituent feature of Indian politics. To ignore this would have been bad historical understanding as well as bad politics. In the process of coming to terms with this reality of Indian politics, Nehruvian understanding of secularism came much closer to the notion of sarva dharma sambhava. Nehru, who by that time had become India's first Prime Minister, made this clear on various occasions. To him Firstly, secularism did not mean a state where religion as such is discouraged. It means freedom of religion and conscience, including freedom for those who may have no religion' secondly, for Nehru, the word secular was not opposed to religion.

To many secularism means something opposed to religion. To others it is a state which honors all faiths equally and gives them equal opportunities; that, as a state, it does not allow itself to be attached to one faith or religion, which then becomes the state religion. For Nehru, the concept of the secular state thus carried three meanings: (a) freedom of religion or irreligion for all, (b) the state will honor all faiths equally, and (c) that the state shall not be attached to one faith or religion, which by that act becomes the state religion. The creed of secularism therefore discouraged fears that one group had the right to stamp the body politic with its ethos, even if it is in a majority. Conversely, religious group would not be disprivileged in any way even though it happened to be in a minority. In effect, the meaning that secularism acquired in the Indian context is qualified with equal treatment of all faiths.

### **Secularism in Indian Constitution**

The constitutional discourse in constitutional assembly does not insist on a wall of separation between religion and politics. The former Chief Justice of India P.B Gajendragadkar, interpreted secularism as (a) the state does not owe loyalty to one religion; (b) it is not irreligious or anti-religious; (c) it gives equal freedom to all religions; and (d) that the religion of the citizen has nothing to do in the matter of socio-economic problems. Secularism is more than passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions'. Accordingly, the judges ruled that the destruction of the Babri mosque by mob, was a clear violation of the equal treatment principle. Secularism, ruled Justice Sawant, was a part of the basic structure and the soul of the Constitution, and could not be infringed in any way. For these reasons the court upheld the dismissal of four state governments ruled by the Bharthiya Janatha Party (BJP), and the imposition of President's rule in these states.

### **Right to Religion and secularism**

The Constitution of India recognizes the freedom to profess, practice and propagate the religion under Article 25. Part (1) of Article 25 secures to every freedom of conscience: and the right to (i) profess religion; (ii) practice religion; and (iii) propagate religion. The term 'religion' has not defined in the constitution but Supreme Court of India defined religion in *Commissioner, H.R.E. Vs L.T. Swammiar*. Accordingly religion is a matter of faith with individuals or communities and it is not necessarily theistic. A religion has its basis in a system of beliefs or doctrines, which are regarded by those who profess that religion as conducive to their spiritual well being. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship, which are regarded as integral parts of religion and these forms and observance might extend even to matters of food and dress. The freedom of religion guaranteed under Indian constitution is not confined to its citizens but extends to 'all persons including aliens.' This point, was underlined by the Supreme Court in *RatiLal Panchand Vs. State of Bombay* .

The Constitution thus declares that every person has a fundamental right not only to hold whatever religious belief commend themselves to his judgement, but also to express his beliefs in such overt acts, as are prescribed by his religion and propagate its tenets among others. The exercise of this right is, however subject to 'public order, morality and public health.' Here the constitution succinctly expresses the limitations on religious liberty that has been evolved by judicial pronouncements in the United States and Australia. In fact, the framers of the Indian constitution attempted to establish a delicate balance between 'essential interference and impartial interference' on the part of the state. They kept in consideration the possibilities of arising out of circumstances in which the government may have to impose restraints on the freedoms of individuals in collective interests.

Accordingly Article 25 (2) provides broad sweeping power of interference to the state in religious matters. This Article imposes drastic limitations on the rights guaranteed under Article 25(1) and reflects the peculiar needs of Indian society. It is important to mention that law providing for the very extensive supervision by the state about temple administration has been enacted by virtue of this provision. Extensive modification Hindu personal law (marriage, divorce, adoption, succession etc.) has been effected by legislation based on the provision permitting measures of social welfare and social reform. In a case on the validity of the Bombay Prevention of Hindu Bigamous Marriages Act of 1946, where the validity was upheld by the Bombay High Court the court observed that the enforcement of monogamy among Hindu is a measure of social reform which the state is empowered to legislate by Article 25 (2) (b) 'notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practice and propagate religion'.

The same constitutional provision permits legislation opening Hindu religious institutions of a public character to all classes and sections of India. Harijan temple entry laws have been enacted by many of the state legislatures. The Central Untouchability (Offences) Act of 1955 provides that any attempt to prevent Harijans from exercising their right to enter the temple is punishable with imprisonment or fine or with both.

Religious denominations as well as individuals have certain important rights spelt out under Article 26. The term 'religious denomination' has not been defined under the Constitution. The Supreme Court has accepted the definition given in Oxford Dictionary, that defines religious denomination' as 'a collection of individuals classed together under the same name a religious sect of body having a common faith and organization and designated by a distinctive name.' The Supreme Court in number of cases held that Arya Smaj, Anandmarga, Vaishanave, The followers of Madhawacharya and other religious teachers, though not separate religions, yet these are separate religious denomination and enjoys the protection under Article 26 of the Constitution.

The right under Article 26(a) is a group right and is available to every religious denomination. Clause (b) of Article 26 guarantees to every religious denomination the right to manage its own affairs in matters of religion. The expression 'matters of religion' includes 'religious practices, rites and ceremonies essential for the practicing of religion.' An important case that involved the right of a religious denomination to manage its own affairs in matters of religion was Venkataramana Devaru Vs. Stae of Mysore. In this matter, Venkatramana temple was belonging to the Gowda Saraswath Brahman Community. The Madras Temple Entry Authorization Act, supported by Article 25(2)(b) of the Constitution, threw open all Hindu public temples in the state to Harijans. The trustees of this denominational temple refused admission to Harijans on the ground that the caste of the prospective worshipper was a relevant matter of religion according to scriptural authority, and that under Article 26(b) of the Constitution they had the right to manage their own affairs in matters of religion. The Supreme Court admitted that this was a matter of religion, but when it faces conflict with Article 25(2) (b), it approved a compromise arrangement heavily weighted in favour of rights of Harijans and a token concession to the right of a religious denomination to exercise internal autonomy. Further Article 26(c) and (d) recognize the right of a religious denomination to own, acquire and administer movable and immovable property in accordance with law. However it was held in Surya Pal Singh Vs. State of U.P. that this guarantee did not imply that such property was not liable to compulsory acquisition under the U.P. Abolition of Zamindari Act. Article 30 deals with another aspect of collective freedom of religion:

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

The object behind Article 29 & 30 is the recognition and preservation of the different types of people, with diverse languages and different beliefs, which constitute the essence of secularism in India. Equality of citizenship is guaranteed by Articles 14, 15(1) and 29(2) of the Indian constitution. Article 15(1) states that the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 16(1) & (2) of Indian constitution affirm an equal opportunity for all citizens in matters relating to employment or appointment of any office under the state. It further affirms that no citizen, on grounds of religion or race be eligible for or discriminate against in respect of any employment or office under the

state. Article 29(2) declares that no citizen shall be denied admission into any educational institution maintained by the state on grounds only of religion, race etc. The clause on universal franchise as well as Article 325 that declares a general electoral roll for all constituencies and states that no one shall be ineligible for inclusion in this roll or claim to be included in it on grounds only of religion, etc. embody the value of equal active citizenship.

### **Issues in Secularism**

In India the communalization of society has been paralleled by the communalization of the polity. Though the role of individual administrators and police officials in the communal riots that have scarred the body politics since the late 1960s has been well documented, in 1984 the state came to be seen as complicit in the genocidal attacks on the Sikh minority. In 1992, not only was the Central government inactive when mobs demolished the Babri mosque, both the Central and state governments failed to prevent massive riots, which, following the demolition, targeted members of both the communities.

In 2002 in Gujarat, many Muslims were killed in a massive pogrom against the minority. The event was followed by the death of number of Hindus when a train compartment in which they were travelling was set on fire by a crowd at Godhra station. The Amnesty International Report 2008 states that five years after the violence in Gujarat, in which thousands were attacked and killed, justice continues to elude the victims. The inability of the state in prevents communal riots, and the role of state officials in fomenting communalism, has necessarily caused a great deal of consternation and apprehension.

In 1980s, Ashis Nandy argued that since the modern state seeks to dominate individual and collective lives, it not only banishes rival ideologies such as religion to the periphery, it hierarchies the two domains by typing religious affiliations as inferior ways of being. This impoverishes understanding within the modern public spheres which might otherwise have proved enriching for both. Second, because religious identities have been exiled to the metaphorical closet. They come to be frozen in time. This in turn inhibits a dialogue within and between religions. But since religious identities constitute an endearing feature of humanity, they must perforce make their appearance in the public sphere. This is made possible through the democratization of the polity.

The problem is that religious identities, which are regarded as untouchables by formal politics, make their appearance either in form of religious instrumentalism, or religious fundamentalism. In sum, where as secularism provides with an impoverished public sphere devoid of any substantive system of meaning, the entry of religious identities into the public sphere impoverishes religion, because religion is subordinated to political pursuits. Societies are consequently left with few substantive resources which can negotiate relationships between religious communities, and which can control pure politics. For, over time, whereas the ills of religion have found political expression, the strengths of religion are not available for checking corruption and violence in public life. In the end the state is left with a denuded and impecunious version of religion that serves narrow and partisan ends.

T.N Madan observes- 'I believe that in the prevailing circumstances secularism in South Asia as a generally shared credo of life is impossible, as a basis for the state action impracticable,

and as a blueprint for the foreseeable future impotent'. Madan cites three reasons for this belief: one that the majority of people living in the region are active adherents of some religious faith; second, Buddhism and Islam have been declared state religions; and third, secularism is incapable of countering religious fundamentalism. Madan insists that he had not dismissed secularism. What he had done was caution against the 'easy confidence of secularist regarding unproblematic adaption of secularism'.

The four core arguments in this regard are as follows; It was possible to privatize religion in the West because developments internal to Christianity- such as the Reformation- facilitated the process. In India, however, major religious traditions do not assume any radical antinomy between the sacred and the secular. Second, for the inhabitants of the region, religion establishes the place of individuals in society, and because it gives meaning to their lives. It is both moral arrogance and political folly to impose the ideology of secularization on believers. On the contrary, these beliefs must be taken seriously, and the religious should be given the same place in society as the non-religious. Third, the denial of the legitimacy of religion in social and political life serves to provoke fanaticism or fundamentalism on the part zealots. Fourth, traditions of religious pluralism can help us carry forward inter-religious harmony.

Other arguments that hinge on the mismatch between secularism and non-secularization of the Indian polity recognize the salience of religious identities. Vanaik proposes that traditional beliefs and practices are responsible for undermining the secular state, because they have blocked the project of the rationalization and democratization of society. Far from endorsing religious beliefs, Vanaik argues that the root cause of religious communalism is religion itself. The struggle against religion should not be limited to setting up a state equally tolerant at all religions, but extended to the secularization and diminution of religion in civil society. Secularism in India must mean three things: the right to freedom of worship, the primacy of citizenship, and then non-affiliation of the state to any religion and impartiality.

On the other hand, Bilgrami says that these communities had a large role to play in designing the secular principle. Secularism, suggests Bilgrami, has run into trouble because it stands in a conceptual and political space that lies outside the sphere of substantive political commitments. In other words, Nehruvian secularism did not emerge as the product of a dialogue between religious communities. Instead, it was adopted from an Archimedean point. And it is precisely this feature that makes it unsustainable. Had secularism been grounded in debate and the understanding of different communities, it would have proved more compelling, for then all groups would have reason to subscribe to the notion of secularism.

### **The Equality debate**

India's civil society is constituted in major part by the presence of religious communities. The Indian version of secularism is grounded in the principle of equality of all religions, and not in that of the separation of the state and religion. In the United States it is least possible to envision a clear separation of Church and state, in which religion and politics are maintained as distinct areas of human striving, and where the neutrality of equal treatment is broadened to require a hands-off policy for governing the relations between secular and religious institutions. But such an

arrangement is inconceivable in India, where, upon initial analysis, religious and secular life are so pervasively entangled that a posture of official indifference cannot be justified either politically or constitutionally.

In this context the Indian stand on secularism can be well understood within the broader framework of the nation's commitment to social reform. Meaningful social reform required attention to the critical role of religion in Indian life. Article 25 of the Fundamental rights chapter of the Constitution makes this quite explicit: subject to public order, morality, and health...all persons are equally entitled to freedom of conscience and the right to freely profess, practice, and propagate religion. The second section of Article 25 states that nothing in this Article shall affect the operation of any existing law or prevent the state from making law regulating or restricting any economic, financial, political, or other secular activity that may be associated with religious practice, or in providing for social welfare and reform, or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. This is only case where the right to religion has been prefaced by numerous restrictions.

### **Minorities and Secularism**

In the 1920s, the political project of incorporating secularism was accompanied by an overlapping project, that of commitment to the rights of minorities to their own culture and religion. This commitment formed part of the Nehru Constitutional Draft of 1928, the Karachi Resolution of 1931, and later documents issued by the Indian National Congress. Admittedly the commitment to minority rights, like the commitment to secularism, initially stemmed from pragmatic considerations- to stay off the demand for separate electorates based on religion in post-Independent India. But in time minority rights, like secularism, became a credo of faith for Congress leaders who sought to conceptualize a society in which all religious communities would be able to live without the constant danger of being swamped by the majority.

In one way the Partition of India signified the failure of the secular minority right project. The Congress leaders failed to convince the leadership of the Muslim League that the members of the Muslim community would be armed with equal citizenship rights as well as constitutional protection to their own religion in post-Independence India. However the secularist policies of Indian leaders got steady ground in the polity. The Constituent assembly met amidst wide-scale rioting, atrocities heaped by one religious community on another, massacres, and looting of property, country had been partitioned in the name of religion. But on the face of these adversaries the makers of the Constitution stood firm in their commitment to secularism as the explicit principle underlying the Constitution. It was not even considered necessary to mention secularism in the Constitution. It was only in 1976 that the Emergency regime of Prime Minister Indira Gandhi inserted the word secular along with the word socialist into the Preamble of the Constitution.

The framers of the Constitution held fast to their commitment to the rights of minorities to their own culture and religion. In the Constituent Assembly, the suggestion that religious minorities should be represented through separate electorates was dropped after Partition, because Partition was seen as a consequence of the introduction of separate electorates by the colonial power. But the

right of minorities to their own culture and the right to run their own religious institutions was granted vide Article 29, and more importantly by Article 30, of the Fundamental Rights chapter. These Articles have to be read along with Article 25, which provides for freedom of conscience and the right to freely profess, practice, and propagate religion. In sum, whereas Article 25 grants individual rights, Article 29 and 30 recognize groups as bearers of rights.

The grant of minority rights was accompanied by a special concession made to the minorities. They could retain their own personal laws. It is interesting to note that whereas the colonial government codified criminal and procedural law in India, it held back from codifying personal laws of Hindus and Muslims. Personal laws relate to marriage, dowry, and dissolution of marriage, Parentage and legitimacy, guardianship, adoption, gifts, wills, inheritance, and succession. They are, therefore, crucial for gender justice. The acceptance that the Muslim and Christian minority could be governed by their personal laws in matters of adoption, marriage, divorce, and inheritance had to do with the political need to secure minority identities. Whether this was a wise move or not has been a matter for some debate, because it brought into question both the role of the Indian state in providing a secular public sphere, and its self-arrogated role as social reformer. The problem is that immediately after Independence, the government set out to reform the personal laws of the Hindu community through a series of legislation known collectively as the Hindu Code Bill. Through the Constitution and a series of parallel legislations, the government set out in a determined fashion to reform the Hindu caste system. In other words, government intervention in affairs of religious groups proved to be selective. Whereas the Hindu community was socially reformed through legislation from above, the personal laws of the minorities are left alone.

The first substantive debate on secularism emerged in the aftermath of precisely this development. D.E. Smith (1963) suggested that the liberal democratic theory of secularism carries three connotations: (a) liberty and freedom of religion, (b) citizenship and the right to equality, non-discrimination, and neutrality, and (c) the separation of state and religion. In India, argued Smith, the first two principles have been for secularism, and as important constitutional values in their own right. However, the right of the state to intervene in the affairs of religion has deeply compromised these two principles. The core of the problem of Indian secularism, lies in the non-separation of state and religion. On the other hand, V.P Luthera (1964) argued that since the wall of separation between religion and the state does not exist in India, the country is not and cannot be secular. In time, this academic debate was paralleled by an overlapping debate in political circles. The Hindu right, capitalizing upon the selectiveness with which Congress government have intervened in religious affairs, accused the government of practicing pseudo-secularism. It is not that the Hindu dismisses secularism. The argument goes deeper; if secularism means equality of all religions, the minority rights and retention of personal laws violate the basic precepts of secularism. Arun Shourie(1997)., argued that first, the individual and not religion or caste or region should be considered the unit for state policy, and second, that nothing should be conceded to other groups. This, according to Shourie and other proponents of Hindutva, constitutes genuine secularism.

## **Uniform Civil Code**

A uniform civil law is in many ways at the heart of the secular political system. How is a uniform law to be introduced in a society that has been regulated for ages by parallel systems of 'personal' law is one of the greatest challenges met by the Indian society. This difficulty was seen as early as during Macaulay's time when he argued the need for a uniform *lex loci* in India. While the Law Commissions, initiated by Macaulay, were able to unify criminal law, hopes of the regulation of Civil Law were not realised. It is argued that in order to establish a secular state in the future, the state is forced to abandon secularist principles of noninterference with religion at least temporarily.

The Shah Bano case was a major turning point in the minority debate. The case was not the first of its kind in independent India. But in the 1980s the decision of the court and the subsequent passage of Muslim women's Bill by Parliament, aroused a storm of protest from the Muslim community, particularly from the patriarchal sections. The scale of the protest can only be understood as a response to the massive mobilization of Hindu rights in the Mid-1980s. but whatever the reason, the unprecedented protest of the Muslim community had important political implications.

Shah Bano who had been divorced by her husband, appealed to the high court of Madhya Pradesh that her former husband should pay her maintenance under section 125 of the Criminal Procedure Code. According to this section, the former husband is liable to pay maintenance to divorced woman if she is destitute, and if she possesses no means for her own survival for as long as she lives or until she remarries. The high court ruled in favor of Shah Bano. However, Shah Baanos's husband, moved the Supreme Court on the ground that he was not obliged to pay his former wife maintenance beyond the traditional three-month period of iddat under personal law. The Supreme Court confirmed the Judgment of the MP high court, and stated that Article 125 of the CrPC overrides all personal laws, and that it is uniformly applicable to all women. The bench also called upon the Government of India to enact a Uniform Civil Code under Article 44 of the constitution.

The leaders of the Muslim community opposed the judgment on the ground that it constituted a disregard for the personal laws of the Muslim community, which are based on the shariat. They argued that since the Shariat is divinely sanctioned, it can neither be tampered with nor interpreted by the Court. The controversy snowballed into a major political problem. Ultimately the government introduced a Bill in Parliament that sought to exempt Muslim women from the protection provided by Article 125 of the CrPC. 1986. This legislation raised many questions on the authority and sustainability of minority rights in the background of article 14 and 44.

## **Prospects of Secularism**

The practice of secularism cannot be detached from the historical context in which it is embedded, and evaluated in against an ideal that has been formulated in other societies. If secularism is the conceptual and the practical opposite of the theocratic state, then it carries certain connotations: (a) freedom of religion or all (Article 25), and (b) non-discrimination and equality of treatment (article 14). Given these core features, secularism in India appears fairly close to the ideal, at least in the way it has been embodied in the constitution. In fact, we do not even have to

use the term secular to practice secular politics; all that we need to do is to faithfully follow the provisions of the Constitution. For, if the principle of equality is followed rigorously, the state cannot possibly align with one religion to the detriment of others. Secularism cannot be understood in abstraction from democracy and its attendant principles because it derives its essential meaning from these antecedent moral concepts.

Locating secularism in the principle of democracy and equality has one further advantage: it will ensure that both inter-group as well as intra group relations are regulated by the norms of equality. We can defend minority rights in order to protect minorities from assimilationist quest for unity.

### **Communalism**

Communalism arises among the society when a particular religious or sub-religious group tries to promote its own interests at the expense of others. In simple terms, it can be defined as to distinguish people on the basis of religion. At present communalism is a grave threat to Indian political system.

The stagnant economy of India during the British rule was an important factor for the growth of communalism in India. It was deeply rooted in and was an expression of the interests and aspirations of the middle classes in a social set up in which opportunities for them were inadequate. The communal question was, therefore a middle class question par excellence. The main appeal of communalism and its main social base also lay among the middle classes. It is, however, important to note that a large number of middle class individuals remained, on the whole, free of communalism even in the 1930s and 1940s. According to Bipan Chandra communal politics till 1937 was organised around government jobs, educational concessions and the like as also political positions - seats in legislative councils, municipal bodies, etc - which enabled control over these and other economic opportunities.

Communalism developed as a weapon of economically and politically reactionary social classes and political forces. Communal leaders and parties were in general allied with these classes and forces. The vested interests deliberately encouraged communalism because of its capacity to distort and divert popular struggle, to prevent the masses from understanding the real issues. The British government used communalism to counter and weaken the growing national movement and the welding of the Indian people into a nation. It was presented by the colonial rulers as the problem of the defence of the minorities. Hindu-Muslim disunity was sighted as the reason for the continuation of the British rule. They favoured one community against the other in services and promotions. The British policy of acting late to crush the communal violence also contributed to the growth of this phenomenon. The British policy of separate electorate was another factor.

During the national movement, a strong religious element was introduced in nationalist thought and propaganda. Hindu idiom was introduced to its day-today political agitation. Thus Tilak used Ganesh puja and Shivaji festival to propagate nationalism; and the anti-partition Bengal agitation was started with dips in the Ganges. A communal and distorted view of Indian history, particularly of the ancient and medieval period, was also responsible for its growth. A beginning in this regard was made by the British historian, James Mill in the early 19th century, who described

the ancient period of Indian history as the Hindu period and the medieval period as the Muslim period. The basic character of the polity in India was identified with religion. Hindu communal view of history relied on the myth that Indian society and culture had reached ideal heights in the ancient period and fell into permanent and continuous decay during the medieval period because of the Muslim rule and domination. In turn the Muslim communalism harked back to the 'golden age of Islamic achievement' in West Asia and appealed to its heroes, myths and cultural achievements. They tended to defend and glorify all Muslim rulers.

According to Asghar Ali Engineer the partition deeply wounded the Hindu psyche. The resurgence of Hindu-Muslim economic competition fuelled a communal ideology. This was joined by the formation of the Rashtriya Swayamsevak Sangh (RSS), by Hedgewar in 1925 . Since then, a systematic process of historical distortion has sought to perpetuate a demonised Hindu-Muslim history through school textbooks and academic treatises.

Political parties, prompted by political considerations, take decisions, which promote communal violence. Communal disturbance necessitates a communalised context and intervention by a political party. A communally surcharged ambience is often the result of a political tug-of-war between secular and communal parties for the votes of majority and minority communities. A partisan police aggravates the breakdown of law and order, through incitement, active participation, and letting rumours fester and fly. The slightest indication of minority communalism fans a multi-fold release of majority communalism.

Efforts should be made by the citizens to discourage the communal and caste based forces from the social, political and electoral process in order to make these forces irrelevant. They are to be opposed not to be appeased. Communal carnage and caste wars should be dealt strictly with new strategies. To usher an era of social equity the people of India should not mix religion and caste with politics to attain the goal of common brotherhood for the unity and integrity of the nation.

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